

THE HIGH COURT

[2012 No.90 CAF]

IN THE MATTER OF THE JUDICIAL SEPARATION

AND FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

AND IN THE MATTER OF THE DOMESTIC VIOLENCE ACT 1996

BETWEEN

C.M.

APPLICANT

AND

A.M.

RESPONDENT

JUDGMENT of Mr Justice Michael White delivered the 22nd day of February 2013

1. This Court on the 9th October 2012 granted an order in favour of the applicant directing that the payment by the respondent to Dunboyne and District Credit Union of €51,386.55 be reversed subject to any submission the Credit Union wished to make. The Court granted liberty to the Credit Union to make submissions and directed the *in camera* rule be dispensed with for the purposes of Dunboyne and District Credit Union making submissions. The Court had previously made an *ex parte* order on the 5th October, 2012.

2. The Dunboyne and District Credit Union (hereinafter "the third party") have availed of their right, pursuant to the Court order, to make submissions to the Court. Submissions were made on the 19th December, 2012, and the court gave liberty to the third party to file an affidavit and adjourned the making of further submissions to the 25th January 2013, when further submissions were made, and judgment was reserved.

3. The history of the matter is that the applicant issued family law proceedings in the Circuit Court on the 4th July, 2012, wherein it was set out in the indorsement of claim that the family home held in the joint names of the parties was subject to five mortgages in favour of the Educational Building Society in the sum of approximately €431,708 and that one of the mortgages on the property was invested in property in Spain. The indorsement of claim further recited that this asset was at present being sold for the purposes of reducing the mortgages on the family home and further that the applicant was anxious to retain the family home pending one of the children completing his secondary education.

4. The family civil bill sought relief pursuant to section 9 (1) of the Family Law Act 1995 (hereinafter "the Act of 1995") seeking a transfer of the family home into her sole name.

5. The Spanish property was sold to the applicant's sister and brother-in-law, the net proceeds being the sum of €147,948.

6. D.M. O'Brien & Co., the Solicitors for the respondent wrote to Gore & Grimes, Solicitors for the applicant on the 18th June, 2012 stating:-

"...as you are aware we recently advised that the interest on the Spanish property is currently in the process of being sold to your client's sister and brother-in-law for what we are instructed is the sum of €150,000. Our client has advised that he has not received the sale proceeds to date although he does expect to receive same shortly. Our client has confirmed that he is prepared to furnish an undertaking that he will not dissipate any of the sale proceeds from the Spanish property without due consultation between our respective offices."

7. The letter further stated:-

"...we confirm our client has no intention to use any monies received from the sale of Spanish and Polish properties for his sole benefit."

8. By further letter of the 16th July, 2012 D.M. O'Brien & Co., Solicitors wrote to Gore & Grimes, Solicitors stating:-

"In the meantime once again we confirm that our client agrees to place the sale proceeds of the Spanish property on joint deposit. He will sign the necessary documentation to set up the account and lodge the bank draft to the relevant account following his recovery from surgery. In the meantime we confirm that we continue to hold the bank draft, a copy of which was previously furnished on file, we trust this is in order."

9. The respondent changed solicitors in or around the end of August 2012 and his new Solicitors, Carney & McCarthy, Solicitors wrote to Gore & Grimes, Solicitors on the 7th September, 2012, stating:-

"We understand that there are certain debts that urgently require settlement, including school fees etc., that there is a bank draft representing funding available to discharge such debts and further that you have issued a motion returnable for the beginning of October next concerning maintenance (and other issues)."

10. By letter of the 27th September, 2012 from Gore & Grimes, Solicitors to Carney & McCarthy, Solicitors it was stated:-

"We have already advised that our client is willing that the fees would be discharged out of the proceeds of the Spanish property, which proceeds are held on joint deposit in accordance with our previous instructions to Dr. M.'s previous solicitors."

11. The respondent in his affidavit sworn on the 3rd October, 2012 deposed that this letter was not received until the 1st October, 2012. The respondent further averred that the parties were not *ad idem* on the issue of the proceeds of the sale of the Spanish property.

12. Carney McCarthy, Solicitors replied by letter of the 1 October, 2012 which was also sent by fax and stated:-

"It appears that there was no clear agreement regarding what is to be done with the bank draft payable to A.M. in the sum of €147,948. There are a number of suggestions apparent from the correspondence but there does not appear to be a single clear agreement, merely different proposals by each of their respective clients and positions then being reserved while instructions were awaited, in the circumstances as arrears and various accounts are mounting and certain payments must be made from the funds available, the following as instructed by our client to conclude matters. A.M. has arranged to lodge the bank draft to a separate bank account with clear written instructions to that bank, such that immediately the funds are cleared funds."

13. The following bank draft of €51,386.55 was to be issued among others to Dunboyne and District Credit Union.

14. By reply on the same date on the 1st October, 2012, Gore & Grimes, Solicitors wrote to Carney McCarthy, Solicitors stating:-

"Please note that the contents of the correspondence in your unilateral decision to dispose of the joint funds of €147,948 is completely in contravention and contradiction as to what was agreed between solicitors in relation to these funds."

15. The letter went on to state:-

"Please note that notwithstanding the Notice of Change of Solicitor the position remains exactly the same as agreed between Solicitors and in accordance with your client's instructions. Please further note that any attempt by you to dispose of these funds will be dealt with as a reviewable disposition and indeed in total contravention of what was agreed between the parties' Solicitors."

16. Subsequent to that correspondence the applicant applied *ex parte* to the President of the Circuit Court on the 2nd October, 2012, and was granted an *ex parte* order restraining the respondent pursuant to s. 35 of the Act of 1995 from dissipating the proceeds of the sale of the property in Spain. The matter was returnable for the 4th October, 2012, when Mahon J. declined to renew the order.

17. A notice of appeal against the refusal to renew the order on the 4 October, 2012 dated the 5th October, 2012 was lodged.

18. In addition the applicant applied *ex parte* to the High Court, relying on the inherent jurisdiction of that court, seeking relief.

19. This Court by order of the 5th October, 2012, directed the respondent or solicitor for the respondent to disclose and vouch to the Court full details of the distribution of the said proceeds of sale of the Spanish property in the total sum of €147,148 and made an order pursuant to section 35 of the Act of 1995 that all disbursements made by the respondent in breach of the aforesaid undertaking be set aside and that the respondent be further restrained from dissipating any proceeds of the sale until further order. The order of the 5th October, 2012 was granted *ex parte*.

20. A notice of motion was duly issued returnable to this Court on the 9 October, 2012, and after full submissions were made by the applicant and the respondent when relevant affidavits and pleadings were opened, the Court made the order already referred to of the 9th October, 2012.

21. From a further booklet of correspondence lodged with the Court and from the affidavit of Mary Tierney, Manager of the Dunboyne and District Credit Union Limited sworn on the 10th January, 2013 the following undisputed facts have emerged.

22. Carney McCarthy, Solicitors by express tracked post on the 1st October, 2012 wrote to Dunboyne and District Credit Union Limited sending a bank draft in the sum of €51,386.55 payable to Dunboyne and District Credit Union Limited. This payment was in discharge of a loan granted to the respondent in the sum of €55,000 repayable over a period of ten years. Application for the loan was made on the 17th November, 2010, and approved on the 25th November, 2010, and was for a car and education purposes. The applicant was not a party to this loan and did not sign any documents in respect of same.

23. The third party received the letter from Carney McCarthy, Solicitors on the morning of the 2nd October, 2012, duly posted it to its ledger and in the course of the morning of the 2nd October, the draft was collected by G4 Securicor for lodgement in the Ulster Bank Limited.

24. On the afternoon of the 2nd October, 2012 the Credit Union received a faxed transmission from Carney McCarthy asking that the draft would be returned to them. The letter stated:-

"Pursuant to a court order made this morning we request that you do not present this bank draft and that you return same to us by return of post."

25. Ms. Tierney has acknowledged that she did not contact the Ulster Bank to try and have the bank draft returned but instead telephoned the offices of Carney McCarthy, Solicitors and was informed that Mr. Carney was not available. She received a telephone call from Mr. Carney on the 3rd October, 2012 and it was accepted that she was informed that the proceedings involved were complex but she was not informed that they were matrimonial proceedings.

26. Ms. Tierney stated in her affidavit that it was not until the morning of the 8th October, 2012 that she got the first indication that the proceedings were family law proceedings.

27. It is accepted by the third party that no effort was made by the Credit Union to contact the Ulster Bank Limited to try and arrest

the processing of the bank draft.

28. Counsel for the third party submitted to the Court that the payment to the third party was not covered by section 35 of the Family law Act 1995 because it was a disposition made for valuable consideration (other than marriage) to a person who at the time of the disposition acted in good faith and without notice of an intention on the part of the respondent to defeat the claim for relief.

29. Ms. Jackson, Counsel for the third party has opened a number of English authorities on the matter.

(1) *Ansari v Ansari (Bank of Scotland and others intervening)* [2009] 3 WLR 1092.

(2) *B v B (P intervening) Reviewable Disposition* [1995] 2 Fam. CR 670.

(3) *Kemmis v Kemmis (Weiland and Others, Interveners) Lazard Brothers & Co. (Jersey) Ltd. v. Norah Holdings Ltd and Others* [1988] 1 WLR 1307.

30. Ms. McDonnell, Counsel for the applicant, has submitted that because the Court has deliberated on the matter as between the applicant and the respondent and made a decision on the 9th October, 2012 that the third party is bound by that order and has also referred the Court to the fact that the third party did not attempt to cancel the processing of the bank draft.

31. This Court is satisfied that pursuant to the provisions of the order of the 9th October, 2012, the third party is entitled to make submissions to the Court and to request the Court to grant a declaration that the payment to the third party is not a reviewable disposition.

32. This Court accepts that the third party acted in good faith but as a matter of fact it is not correct to say that it acted without notice of an intention on the part of the respondent to defeat the claim for relief.

33. The Court accepts that the information it received on the 2nd October, 2012 was minimal, however the third party did receive a letter from Carney McCarthy & Co., Solicitors on the afternoon of the 2nd October, 2012 the exact same day of the making of the order by the President of the Circuit court.

34. The notice from Carney McCarthy, Solicitors of the 2nd October, 2012, by fax to the third party stated:-

"Pursuant to a court order made this morning we request that you do not present this bank draft and that you return same to us by return of post."

35. The Court is satisfied that was sufficient notice of the payment to the third party within the provisions of s. 35 of the Family Law Act 1995.

36. The Court in directing that other disbursements could proceed did so, on the basis of either consent by the parties, or clear identification that the disbursements were for the benefit of both parties. This payment was not in any of those categories.

37. The Court having given the opportunity to the third party in accordance with its order of the 9th October 2012, to make submissions to the Court directs the third party to place the said sum on joint deposit in the names of Gore & Grimes, Solicitors for the applicant and Carney McCarthy & Co., Solicitors for the respondent.