Neutral Citation: [2014] IEHC 665

THE HIGH COURT

FAMILY LAW

[2012 No. 22 M]

IN THE MATTER OF FAMILY LAW ACT 1995, AND IN THE MATTER OF THE FAMILY HOME PROTECTION ACT 1976,

BETWEEN

G.R.

APPLICANT

AND

J.J.D.

RESPONDENT

JUDGMENT of Mr. Justice Abbott delivered on the 5th day of December, 2014

1. This judgment relates to the respondent's motion for discovery of certain bank accounts and documents relating to farm and other transactions. It further seeks discovery of any files relating to the transfer of Folio No. , of the County of , (on which the family home is situated), documentation relating to a loan facility with the Bank of Ireland extended to the applicant to include loan proposals, the loan application and any vouching documentation in relation to same, and also the loan facility letter from the bank and any amendments to same.

2. The background of the application is as follows. In these proceedings the applicant, who is the registered owner of the said Folio, seeks to sell same and to obtain an order of the court dispensing with the consent of the respondent to sell the family home pursuant to the Family Home Protection Act1976. The applicant was married to the respondent in 1997 and they have two children. On 18th June, 2003, the respondent executed a transfer of the said folio to the applicant in consideration of his natural love and affection. A "particulars delivered" (PD) stamp on this transfer was dated 23rd June, 2003. The applicant became the registered owner of the said lands comprised in the said folio on 9th June, 2005, and the ownership of the respondent was cancelled on the same date.

3. On 7th July, 2003, the respondent made a statutory declaration averring that he was solvent at the date of the said transfer and that the purpose of the transfer was to benefit his wife, the applicant, and not for the purpose of defeating his creditors.

4. The applicant obtained a loan from the Bank of Ireland (which apparently is now secured on the said folio) and judgment was obtained by the bank against her on 23rd February, 2011, for the sum of €1,698,001.51 with measured costs of €2,650.00 plus VAT. There was a stay on the order for nine months and the court was informed that interest is running on this judgment debt at a sum in excess of €2,500.00 per week. In order to reduce the applicant's indebtedness to the Bank of Ireland, she must sell the lands comprised in the said folio and, for that purpose, has applied in the above entitled proceedings for an order of this Court to dispense with the consent of the respondent to the sale by the applicant of the family home under the Family Home Protection Act 1976. She further seeks a declaration that she is the beneficial owner of the family home, the respondent having failed to be there to provide the said consent or agree that she is the beneficial owner.

5. After some attempts at effecting service of the proceedings on the respondent, which necessitated an order for substituted service upon the respondent, the respondent eventually appeared as a litigant in person. He answered the claim initially submitting that he required an adjournment so that he could inquire if he could negotiate a reduction of the debt with the bank. He acknowledged to this Court that the debt was due to the bank. He stated that he needed a further adjournment at a later date to obtain legal advice and eventually he was represented at a further adjourned date by his first senior counsel who sought a further adjournment and asserted that the application "might not have been as straightforward as it seemed." Counsel for the respondent stated that it would take "a significant amount of time to obtain full instructions in relation to the complex background of the matter." A further adjournment was obtained.

Progress of Case

6. The respondent transferred the property into this wife's name "in case anything happened to him or in case his business collapsed". The court was told by his first senior counsel that the respondent had a large vehicle which had a spectacular crash into another large vehicle in England; the like of which could give rise to multiple personal injuries claims. On the basis that he was afraid that he would be sued, he transferred the family home into the name of the applicant wife to protect his assets. In para. 8 of his affidavit sworn on 13th December, 2012, the respondent says:-

> "I say that the land was transferred to the applicant to hold for us as a family in case anything went wrong in this deponent's business life."

Throughout a number of affidavits the respondent stated that he continued to farm the lands comprised in the folio and that he paid numerous bills, or had third parties pay for them, that he liaised with the accountant dealing with the farm business and that he paid several sums to the bank in respect of the bank debt.

7. The matter came on for hearing in relation to the application for discovery and disclosure before this Court on day of , 2014. Written submissions were furnished to the court which had been prepared by counsel for each party. The submissions on behalf of the applicant dealt with the law of advancement between husband and wife as illustrated in Hilary Delaney, *Equity and the Law of Trusts in Ireland*, 5th Ed., (Dublin, 2011), p. 168 onwards where it is stated that the resulting trust may arise when a donor conveys or transfers property to a donee, but that this presumption may be rebutted by the presumption of advancement in certain cases and, most relevantly in this case, as between the husband and wife, and that this presumption of advancement may be rebutted in

evidence. The submissions continued to highlight the manner in which Delaney states that if the transfer intended to benefit the transferee at the date of the transfer, he cannot subsequently change his mind. In *O'Brien v. Sheil*, (1873) I.R. 7 Eq. 255, O'Sullivan M.R. said:-

> "Declarations of the (transferor) subsequent to the advancement, if they are not so connected with it as to be reasonably be regarded as contemporaneous, cannot be evidence to rebut the presumption of advancement."

In that case the memorandum found among the father's papers after his death was not admissible in evidence to rebut the presumption of evidence in favour of his daughter in relation to a transfer of securities into their joint names during the father's lifetime. Delaney also dealt with the question of rebutting the presumption of resulting trusts, referring to the case *Standing v. Bowring,* (1885) 31 Ch. D. 282, p. 164 of her work. She states that the judgment of the Court of Appeal also makes it clear that the relevant time for establishing evidence of intention to make a gift is the time of transfer and once this is shown, a donor cannot subsequently change his mind and withdraw this intention. A good illustration of this principle is provided by the decision of the British Columbia Court of Appeal in *Romaine Estate v. Romaine* (2001), 205 D.L.R. (4th) 320, in which an uncle transferred property to his nephew before his death in order to save taxes, however; he subsequently regretted his decision. Levine J.A. confirmed that:-

> "All the evidence of the donor's intention written or oral at the time of a transfer that is claimed to be a gift was made is admissible to determine whether the transfer was a gift."

The Court of Appeal ruled that the trial judge had erred in admitting statements made after the parties fell out to support the presumption of a resulting trust. All the evidence of the uncle's intention up to that time suggested that he intended to transfer the property to his nephew and it was held that when all the admissible evidence was considered, it rebutted the presumption of a resulting trust.

8. It was submitted that the respondent cannot make the case which he is now attempting to make by pleading his own intention to defraud creditors. It was submitted that the case of *Tinker v. Tinker* [1970] 2 W.L.R. 331 was a case in which all the legal issues were identical with the present case. It was submitted in conclusion that the respondent had himself committed the fraud and that he cannot himself rely upon a claim through his own fraud on the authority of *Tinker v. Tinker*. Moreover, that the respondent did not fall within the category of s. 74(3) of the Land and Conveyancing Law Reform Act, 2009, which provides that any conveyance of property may with the intention of defrauding a creditor is voidable by any person thereby prejudiced. S. 31 of the Registration of Title Act, 1964, provides that the register shall be conclusive evidence of the title of the owner of the land appearing on the register and such title shall not, in the absence of actual fraud, be in any way affected in consequence. The judgment in *In Re. Mulhern*, [1931] I.R. 700 is relevant, particularly insofar as it was then claimed that the Bank of Ireland had a charge on the property.

Submission on Discovery

9. Chapter 4 of William Abrahamson, James B. Dwyer and Andrew Fitzpatrick, *Discovery and Disclosure*, 2nd Ed., (Dublin 2013) summarises the relevance of documents and necessity for discovery. Until 1999, when O. 31, r. 12 of the Rules of the Superior Courts was first amended, the majority of discovery applications were decided solely on the basis of the requirement of relevance which was usually applied quite broadly. Very little express consideration was given to the necessity requirement until the amendment of the Rules in 1999 which prompted the Irish courts to consider the necessity requirement in more detail. This greater focus on whether discovery is necessary in any particular case has also led to greater judicial consideration of the relevance requirement and its application to discovery. The *dictum* of Morris J. in *McKenna v. Best Travel Limited* [1995] 1 I.R. 577, at p. 580 was relied on wherein it is stated:-

> "It is in my view well settled that it is only documents which would support or defeat an issue that arises in the existing action which are required to be discovered or should be made the subject matter of an order for discovery. Unless the documents in question enable the plaintiff to advance her own case or damage the defendant's case these documents are not discoverable."

On the basis of this test it was submitted that evidence of the nature in respect of which an application for discovery and disclosure is being sought in this case after the relationship of the parties broke down is not admissible since it was after the time of the execution of the transfer, moreover; it was submitted that it was not relevant as per *Romaine Estate v. Romaine* (2001), 205 D.L.R. (4th) 320.

10. In oral submissions counsel for the applicant referred to the judgment of Costello J. (as he then was) in the case of *Parkes v. Parkes*, [1980] ILRM 137, in which it was held that the court should not assist a purchaser who has placed property in his wife's name dishonestly and by means of an illegal act performed for the purpose of evading the law. Counsel for the applicant further opened the judgments in *Gascoigne v. Gascoigne* [1918] 1 K.B. 223 and *Tinker v. Tinker* [1970] 2 W.L.R. 331 referred to in the judgment of Costello J.

The Submissions on behalf of the Respondent

11. The respondent's legal submissions set out a number of preliminary points, including:-

> (a) That the respondent entered into the Deed of Transfer on 18th June, 2003, transferring the farm to the applicant for the purpose of protecting the family home, and this deed was not part of any agreement to permanently transfer ownership.
>
> (b) Further reference is made to Deed of Separation in or around 2006 "solely for the purpose of assisting the applicant in obtaining a loan".
>
> (c) A divorce settlement which is alleged not to have been seen by respondent until recently shown same by his counsel and long descriptions of the manner in which the applicant received income from the farm "through the offices of the respondent" but that the respondent runs the farm and takes responsibility for it and has always done so.

12. The respondent's submissions then proceeded at length to outline the law of discovery as explained by the Supreme Court in *Ryanair Plc. v. Aer Rianta C.P.T*. [2003] 4 I.R. 264, and the higher standard of proof of some objective necessity as a pre-condition to the grant of an order for discovery in *Swords v. Western Proteins Limited* [2001] 1 I.R. 324. It was submitted that the definition laid down in *Compagnie Financière et Commerciale du Pacifique v. Peruvian Guano Co. (*1882) 11 Q.B.D. 55 remains the universally accepted test of what is the primary requirement for discovery, namely the relevance of the documents sought. It was conceded in para. (g) of the submissions that a court may have regard to alternative means of proof which are open to the applicant for discovery. These may include the possible service of notices to admit facts, such as the respondent in the present case, which

contests all the relevant on the pleadings and has formally objected to its opponent resorting to affidavit evidence can plausibly ask the court to deprive its opponent of access to documents which will enable it to improve matters which it disputes. It was submitted that the respondent (who is also the applicant for discovery) had sufficiently specified the categories of documents in respect of which he sought discovery. The respondent's submissions at Part C proceed to deal with the presumption of advancement and refers to the principles set out in *In re Eykyn's Trusts* (1877) 6 Ch. D. 115 and the judgment of Finlay P. (as he then was) *in W. v. W.* [1981] I.L.R.M. 202. It was submitted that the courts of this jurisdiction have identified a principle of equality of spouses within marriage under Articles 41 and 42 of the Constitution, and that in 1981 the common law defence of martial coercion available to a wife was abolished in *State (Director of Public Prosecutions) v. Walsh*, [1981] I.R. 412, and similarly in 1993 the rule of dependent domicile was abolished by *W. v. W.* [1993] 2 I.R. 476. It was stated that in the Supreme Court decision of *McKinley v. Minister for Defence*, [1992] 2 I.R. 333, the court held that the affect of the principle of equality of spouses was to extend the benefit of the common law rule to the wife. The majority of 3:2 took the view that the defect should not be remedied in a positive manner, while the minority thought the solution was to abolish the action entirely. It was further stated and submitted that the presumption of advancement relied upon by the applicant is incompatible with Article 5, Protocol 7 of the European Convention on Human Rights which states:-

> "Spouses shall enjoy equality of rights and responsibilities of a private law character between them and, in their relations with their children, as to marriage during marriage and in the event of its dissolution. This article shall not prevent states from taking such measures as are necessary in the interests of the children."

It was further submitted in the alternative that the presumption of advancement relied upon by the applicant can be rebutted.

13. The decision in *R.F. v. M.F.*, [1995] 2 I.L.R.M. 572, was referred to. It was further submitted that the case *Shell UK Ltd. v. Lostock Garage Ltd*. [1976] 1 W.L.R. 1187 that the applicant could not rely on the equitable principle of the presumption of advancement if the applicant does not come to court with clean hands, and that in refusing to allow the respondent to negotiate with the bank, had acted unreasonably and unfairly.

14. The respondent's submissions proceed to deal with issues regarding dispensing with consent to the sale of the family home pursuant to s. 4(2) of the Family Home Protection Act, 1976. It was submitted that it would be inappropriate to dispense with consent in the circumstances given that the respondent has not been unreasonable in withholding his consent to the sale of the family home in circumstances where the respondent is attempting to liaise with the bank. As in *Somers v. W.*, [1979] I.R. 94, the onus for proving that the withholding of consent is unreasonable rests "fairly and squarely" on the spouse seeking an order dispensing with the consent. It was submitted that the respondent had made every effort to discharge the loans to the bank, which have now become a charge on the property. It was submitted that the applicant was actively attempting to sell the family home in which the respondent resides and has made no attempt to negotiate with the lending institution in relation to the debt. In the case of *E.D. v. F.D.* (Unreported, High Court, Costello J., 23rd October, 1980), Costello J. (as he then was) was satisfied that the husband's behaviour was deliberate in not making any efforts to sort out his financial situation as it pertained to the family home and made an order transferring the family home to the wife in the circumstances.

Conclusions

15. The greater part of the respondent's defence to the applicant's claim to have consent to the sale of the family home dispensed with rests in his allegation that there was a resulting trust in the property. While counsel for the respondent in oral submissions emphasised the written submissions and added that the court should be reminded that in many situations where there is a registered title the court, notwithstanding in family law cases, enters upon inquiry in relation to where the "beneficial" ownership lies, and may adjust with the appropriate order, the circumstances of this case are not such that such an inquiry is necessary or relevant for the following reasons:-

> (1) These inquiries occur where the parties have the property registered in the name of one spouse but where there is an express or implied agreement to pay down a loan through the efforts of both spouses, or where it is shown that the spouse not registered in respect of the land has made a contribution towards the purchase of the land or the construction of buildings on the land. The affidavits in this case show that this clearly was not the situation.

16. I am, therefore, of the view that the status of the registered ownership of the folio concerned should be governed by the principles set out in *Tinker v. Tinker* [1970] 2 W.L.R. 331 dealt with in the submissions. This is on the basis that the court should take, as a separate exercise, the position of the respondent as an honest man, who intended in the face of some apprehended (but not present) financial collapse of his business, to protect his assets for his wife. In these circumstances the authority of *Tinker v. Tinker* [1970] 2 W.L.R. 331 would indicate that there is a clear intention to be inferred that the respondent intended a clear gift and the presumption of advancement is not required to save it. Additionally, on the basis of the respondent's submissions, through his first senior counsel, that the transfer of the lands comprised in the folio was to safeguard him against potential personal injuries claims arising for the spectacular accident, the court must look at the situation where it might not take the respondent as an honest man. In that instance, I am of the opinion that the court should not give him any relief by way of a declaration of resulting trust in respect of the transfer of the folio by reason of the application of the principles clearly set out in *Parkes v. Parkes*, [1980] ILRM 137. In consequence of these decisions it is not necessary to decide whether the presumption of advancement has any application.

17. In view of my conclusions in relation to the non-application of the doctrine of resulting trust, saving any interests of the respondent in the said folio, I am of the opinion that the extensive disclosure and discovery sought by him in this notice of motion is not necessary and is quite vexatious. Neither is any discovery relevant as it seeks material created only after the completed gift by transfer. Accordingly, the application for such discovery and disclosure should be dismissed. To argue that this discovery and records of payments allegedly made by the respondent are necessary to negotiate with the bank, it is important to realise that the respondent has held himself out as a business man at all times and is under an obligation under ss. 886 and 903 of the Taxes Consolidation Act 1997, to maintain records of such business. In these particular circumstances, the court should be most reluctant to alleviate the respondent's neglect in relation to his obligations on record keeping and keeping his tax affairs in order, thereby compelling at this stage on onerous discovery and disclosure as sought by him.

18. Finally, there is a further ground for refusing discovery arising from what I consider to be the bad faith of the respondent proposing to negotiate with the bank in respect of a debt owed by the applicant by first enlisting the support of this Court by way of order declaring a resulting trust in the main asset of the applicant to meet (at least part) of the debt. When the respondent first appeared before me in relation to the application for consent to be dispensed with, he did represent to the court that he required a chance to negotiate with the bank and an adjournment was facilitated to him for this purpose. This anxiety to negotiate with the bank ultimately turned out to be potentially a subterfuge to deny the bank any effective remedy by being denied the possibility of recourse against the lands comprised in the folio, through same being declared to be in the ownership of the respondent, while at the same time having no privity of the contract for the debt or judgment in respect thereof against the respondent. The question must be

asked if the court would have any influence to retrieve a situation where the respondent held the land but failed or refused to negotiate.

19. Having refused the respondent's application for discovery and disclosure, the application for dispensing with consent without considerations of resulting trust in the property in favour of the respondent and without disclosure or discovery shall now proceed.