

Neutral Citation No.: [2009] NIFam 1

Ref: **McCL7379**

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

Delivered: **16/01/09**

2004/048759

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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FAMILY BENCH DIVISION

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MATRIMONIAL OFFICE

BETWEEN:

EILEEN LOGAN

PETITIONER:

-and-

FRANCIS GERARD LOGAN

RESPONDENT:

McCLOSKEY J

I INTRODUCTION

[1] This is an application to set aside a Mareva injunction. The parties are:

- (a) Eileen Logan – the Petitioner.
- (b) Francis Gerard Logan – the Respondent.
- (c) Padraig Logan and John Logan – sons of the Petitioner and the Respondent.

- (d) The Department of Agriculture and Rural Development, the agency against which the Mareva order in question was made.

The other agency which has had some involvement in this matter is the Ulster Bank of Lisnaskea, County Fermanagh, which, pursuant to a separate order made by the court, has been the source of certain material evidence.

[2] The application to set aside the Mareva order is made by Padraig Logan and John Logan, in the circumstances outlined below. The application was resisted by the Petitioner. No other party or agency participated in the matter.

II HISTORY OF PROCEEDINGS

[3] These are proceedings of considerable vintage. They began with a Petition, dated 1st November 2004, whereby the Petitioner sought a decree of judicial separation and ancillary relief including financial provision and a property adjustment order in respect of certain lands. The Petition avers that the Petitioner and the Respondent were married on 20th April 1987. The two sons of the marriage are Padraig Logan, born on 2nd December 1988 and John Logan, born on 3rd January 1990. The Petition further avers that the parties to the marriage have lived apart for a continuous period of at least five years preceding its presentation. It recites a history of custody orders and, having regard also to paragraph 4 of the affidavit of the Petitioner, sworn on 14th March 2006, it appears that the parties probably separated in late 1995. The Petitioner further avers that, at this time, she left the family home at Kilready, Newtownbutler, County Tyrone ("Kilready") where, it would appear, the Respondent operates a farm. In the events which have occurred, this asset has emerged as a matter of considerable significance.

[4] This is a sad case, in which the family has divided along the following lines. The Petitioner appears to have lived on her own during the past twelve years approximately. During this period, the two sons have lived with the Respondent, on the family farm. This unfortunate split continues.

[5] The Respondent has taken no active part in these proceedings since their initiation. The history and evolution of the proceedings may be understood by reference to the various orders made by the court from time to time:

- (a) On 16th February 2005, a decree of judicial separation was pronounced on the ground that the parties had lived apart for a continuous period of at least five years before presentation of the Petition.
- (b) On 16th November 2006, the Master ordered that the Respondent attend for examination, pursuant to Rule 2.64 of the Family Proceedings (Northern Ireland) Rules 1996 ("*the 1996 Rules*").

- (c) On 16th April 2007, the Master ordered that the Respondent pay the Petitioner £500 per month and that he transfer to the Petitioner, by 16th July 2007, the legal and beneficial title in certain lands (excluding the Kilready house and farm).
- (d) By a judgment summons issued on 3rd June 2008, precipitated by the Respondent's non-compliance with the Master's financial provision and property adjustment order, the Petitioner sought the committal of the Respondent and leave to enforce arrears. This summons has become the impetus for further applications and orders, at the instigation of the Petitioner, including the present application.
- (e) On 26th June 2008, Weir J ordered substituted service of the aforementioned application.
- (f) On 8th September 2008, the Master ordered that the Respondent execute all documents necessary to give effect to his earlier order dated 16th April 2007.
- (g) By further order of Weir J dated 11th September 2008, amendment of the judgment summons was authorised.
- (h) On 23rd October 2008, Weir J made an order pursuant to the Bankers Book Evidence Act 1879 requiring an official of the Ulster Bank, Lisnaskea to attend court to give evidence of the Respondent's bank accounts. It appears that the court also gave leave for the service of a *subpoena duces tecum* on an official of the Department of Agriculture and Rural Development ("*DARD*"), requiring the official's attendance at court for the purpose of producing records relating to *DARD* payments made to the Respondent.
- (i) On 28th October 2008, I made the first of the Mareva orders which have materialised latterly. By this order, the Respondent was restrained from disposing of or dealing in any way with any of his assets. This was a time limited order, to reflect its intrinsically intrusive character and the absence of notice to any other party.
- (j) On 10th November 2008, I made a further Mareva order against the Respondent in the same terms. This was, effectively, an extension of the initial order. No discharge or variation of this order has been sought by the Respondent.
- (k) On 28th November 2008, I made a further Mareva order, which the Respondent's sons now seek to discharge. By this order, *DARD* was restrained from making any grant or subsidy payments to the sons.

- (1) By further order dated 4th December 2008, the court required the attendance of the Ulster Bank (Lisnaskea branch) manager and the Respondent's sons, pursuant to the 1879 Act and Rules 8.7(1) and 8.28(3) of the 1996 Rules. This precipitated a further hearing, conducted on 8th January 2009, when the present application was also made and duly considered.

[6] Pursuant to the aforementioned orders, the court has received evidence, both documentary and oral, from representatives of the Ulster Bank, a DARD representative and Padraig Logan. The main purpose of the most recent spate of orders has been the twofold one of (a) identifying as comprehensively as possible the Respondent's assets and (b) freezing all assets in which the Respondent is believed to have a legal or beneficial interest. Until 8th January 2009, the only party represented before the court was the Petitioner. At the hearing conducted on that date, Padraig and John Logan were represented by the firm of Seymour Major, solicitors. Subsequently, they have become the solicitors on record for the Respondent also. For completeness, I record that there were solicitors representing the Respondent at an early stage of these proceedings, but there has generally been no active participation on his behalf.

III THE PRESENT APPLICATION

[7] By summons dated 9th December 2008, Padraig and John Logan seek an order discharging the Mareva injunction freezing the DARD payments. The central contention on which their application is grounded is that the Respondent has no interest in the DARD payments as he has no continuing involvement or legal interest in the farm business. The sons claim to be the only legitimately interested parties in this respect. The evidence on which their application is based consists of an affidavit sworn by Padraig Logan, the examination-in-chief of the deponent and his cross-examination on behalf of the Petitioner.

[8] The main focus of the evidence was the Kilready farm. The essence of the case made by the moving parties is that during recent years their father (the Respondent) has effectively retired from the business, which has been operated exclusively by them. Padraig Logan is now aged twenty years and his brother John is aged nineteen years. It is asserted that, at an early age, the Respondent represented to them that the farm was their inheritance, over which they would assume control when of sufficiently mature age. The brothers claim to have worked full time on the farm since the age of sixteen. They suggest that it was run down and that they have built up the business during the past four years. Padraig Logan testified that it is a growing business.

[9] In support of their application, the brothers rely on documentary evidence purporting to relate to certain partnership arrangements involving their father and them. Firstly, there is a so-called "*deed of partnership*" dated 6th April 2007, apparently executed by all three of them, providing that they shall all become partners in the

farm business with effect from that date. There is a second partnership agreement, dated 1st November 2007, again apparently signed by all three parties. Clause 1 provides:

"Francis Gerard Logan [the Respondent] shall retire from the business of farming from 1st November 2007 and Padraig Logan and John Logan will continue to trade under the style of P and J Logan and shall continue until determined as hereinafter provided".

Clause 4 of this second agreement provides that the bankers of the business shall be the Ulster bank. By Clause 6, the profits and losses of the business are to be divided between and borne by the brothers in such proportions as may be agreed between them. The partnership accountants are Messrs. Crudden, Dolan and Company. Padraig Logan testified that each of the partnership agreements was prepared by Mr. Crudden. He would appear to be the person who has witnessed the various signatures.

[10] The documentary evidence before the court includes the trading and profit and loss accounts in the name of "F G Logan" for the year ended 5th April 2006. These disclose the following:

- (a) A gross profit of some £27,000, to be compared with a gross profit of some £17,000 in respect of the previous year.
- (b) A net profit of some £8,000, compared with a previous net profit of some £7,500.
- (c) Fixed assets worth some £127,000, compared with previous fixed assets worth around £92,000.
- (d) Net current liabilities of around £17,000.
- (e) Total assets less current liabilities of approximately £110,000.

Having regard to the contents of these accounts, it is apparent that the Respondent was trading actively in the farm business during year ended 5th April 2006. This preceded the financial provision/property adjustment order, made on 16th April 2007. The first of the alleged partnership agreements post-dated this order. I would observe that the evidence adduced by the moving parties does not include the farm business accounts in respect of the year ended 5th April 2007. Moreover, there is no explanation for this omission.

[11] The documentary evidence also includes *draft* accounts for the year ended 5th April 2008 in the names of "P and J Logan" viz. the brothers (and moving parties).

They are accompanied by the customary accountant's certificate. These accounts disclose the following:

- (a) Total sales of some £124,000.
- (b) Cost of sales totalling around £81,000.
- (c) A gross profit of approximately £43,000.
- (d) A net profit of some £15,000.
- (e) Fixed assets worth around £134,000.
- (f) Current liabilities totalling some £65,000, which include a bank overdraft of some £23,000 (as to which see paragraph [15], *infra*).

In the "Notes to the Accounts", it is recorded that the Respondent was the source of "*funds introduced*" totalling £144,762, whereas a nil investment is attributed to the sons. Continuing, the notes document a "*capital redistribution*" of half of this amount in respect of each of the sons. On their face, these notes appear to recognise a tripartite partnership whose members are the Respondent and each of the sons, with the "*net divisible profit*" for the year being distributed thus:

- (a) Padraig Logan: £6,031.
- (b) John Logan: £6,031.
- (c) The Respondent: £3,015.

Thus, according to these accounts, the Respondent was a partner in the farm business during year ended 5th April 2008, to the extent that he received 20% of the net profits, while the balance was divided equally between the two sons. It is recalled that, on the face of the second written partnership agreement, the Respondent retired from the business on 1st November 2007.

[12] There is no sworn affidavit evidence on behalf of the Respondent. However, it should be recorded that there is a letter from his solicitors (dated 15th December 2008) containing the following assertions:

- (a) The Ulster Bank (Lisnaskea branch) account is the Respondent's only bank account and is currently overdrawn to the extent of around £23,000.
- (b) There is a "land asset" (by implication, the farm) of 18 acres, in the Respondent's name. This does not include the lands which the Master

ordered to be transferred to the Petitioner. The Respondent has no other assets.

- (c) The Respondent's only income is Incapacity Benefit of £179 per month. An application for Income Support is currently being determined. The value of the contents of the three-bedroomed farmhouse is negligible. The Respondent has no capital resources.
- (d) There has been no transfer of assets by the Respondent to his sons.

DARD Evidence

[13] According to the DARD records, there were three "operators" of the Kilready farm: the Respondent and his sons. These records further document that on 5th March 2008, the Respondent left the business. The farm business has been the beneficiary of various DARD subsidies for several years. The practice is to make such payments to all named operators. The most important of these subsidies is the "Single Farm Payment", which was some £21,400 in December 2007, having been approximately £21,000 the previous year. A further payment of this *genre*, expected to be in excess of £ , would have been made very recently by DARD to the Respondent's sons but for the impugned Mareva order.

[14] It would appear that, to date, all DARD payments in respect of the Kilready farm business have been made to the Respondent's account in the Ulster Bank, Lisnaskea. This is confirmed by one of the documentary items of evidence, Form BACS 10, apparently signed by the Respondent and dated 11th May 2006. There is a related document, a completed Form BACS 14, signed by Pdraig Logan and dated 12th May 2008. This appears to be a mandate to DARD to make all future subsidy payments to an account in the joint names of Pdraig and John Logan at the Bank of Ireland, Lisnaskea. The documentary evidence further includes a completed "2007 Single Application Form", apparently received by DARD on 11th May 2007, in which the Respondent and his two sons are represented to be the operators of the Kilready farm. In this and other DARD records, the business name is specified as "Messrs. Francis and Patrick and John Logan" or "Messrs. Francis and P and J Logan".

Ulster Bank Evidence

[15] This evidence was to the effect that the Respondent holds an account at the Ulster Bank, Lisnaskea Branch. This account has an overdraft facility of £25,000. It has been overdrawn for some time and the currently overdrawn balance exceeds £24,000. The overdraft facility was granted in respect of the Respondent's farming business. The overdraft was last formally reviewed in July 2007. On that occasion, there was a meeting attended by the bank manager (Mr. O'Hara) and the Respondent. According to Mr. O'Hara, a conventional "balance sheet" was completed by him during this meeting and the outcome was the continuation of the overdraft facility of £25,000. Mr. O'Hara testified that he had received no

communication from the Respondent subsequently. There has been no further review of the overdraft facility.

[16] Mr. O'Hara further testified that the following events would constitute a highly material change of circumstances:

- (a) The retirement of the Respondent from the farm business.
- (b) The Respondent divesting himself of livestock.
- (c) The relinquishment by the Respondent of any DARD subsidies.

The last DARD subsidy was paid into the account in 2007. The security for the overdraft is two deeds, in the joint names of the Petitioner and the Respondent, apparently lodged in January 1992. These relate to Folios 11387 and 11386, County Fermanagh, consisting of 24 acres. It was further testified that the bank holds an unexecuted "partnership mandate". In short, the bank knows nothing about the asserted retirement of the Respondent from the farm business or the establishment of a partnership between the sons relating thereto.

IV THE PARTIES' ARGUMENTS

[17] It was argued on behalf of the Petitioner that the issues to be determined by the court should be considered against the background of the negative, unco-operative and evasive conduct on the part of the Respondent throughout these proceedings. While it was acknowledged by Mr. Lannon, on behalf of the Petitioner, that a presumption of advancement applies to the apparent transfer of the Kilready farm business by the Respondent to his sons, it was argued that this is rebutted, by inference. Mr. Lannon further submitted that the steps superficially taken to transfer the farm business to the sons and to have the DARD subsidy payments made directly to them should properly be regarded as a sham. The Petitioner's arguments also highlighted the absence of any evidence from the Respondent and his pitiful income of a State disability allowance of £171 per month. Finally, it was submitted that the court should reject the evidence of Pdraig Logan on the ground that he was an unconvincing and untruthful witness.

[18] At the hearing, Mr. Major, on behalf of the sons, informed the court that his clients were "desperate" to have the injunction discharged. DARD subsidy payments of some £38,000 are, it is claimed, pending and the farm business has substantial present debts, in excess of £30,000. In support of this assertion, the court was supplied with an invoice for silage and winter cattle accommodation, in the amount of £21,000, dated 30th December 2008. Other comparable farm debts were asserted, though neither detailed nor substantiated in evidence. It was further submitted that the onus of establishing the sham asserted on behalf of the Petitioner is a heavy one, which has not been discharged in the circumstances. The

submissions on behalf of the sons, while emphasizing the pressing financial situation surrounding the farm business, also hinted at the possibility of further evidence becoming available.

V CONCLUSIONS

[19] These are civil proceedings in which the applicable standard of proof is the balance of probabilities. In *Regina (D) -v- Life Sentence Review Commissioners* [2008] UKHL 33, the House of Lords has recently reaffirmed that this is a single, uniform standard. Lord Carswell stated:

"[25] ... *It is indisputable that only two standards are recognised by the common law, proof on the balance of probabilities and proof beyond reasonable doubt. The latter standard is that required by the criminal law and in such areas of dispute as contempt of court or disciplinary proceedings brought against members of a profession. The former is the general standard applicable to all other civil proceedings and means simply, as Lord Nicholls said in Re H ... that 'a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not'*".

Lord Carswell highlighted further:

"[28] ... *in some contexts a court or tribunal has to look at the facts more critically or more anxiously than in others before it can be satisfied to the requisite standard. **The standard itself is, however, finite and unvarying.** Situations which make such heightened examination necessary may be the inherent unlikelihood of the occurrence taking place ... **the seriousness of the allegation to be proved** or, in some cases, the consequences which could follow from acceptance of proof of the relevant fact. The seriousness of the allegation requires no elaboration: **a tribunal of fact will look closely into the facts grounding an allegation of fraud before accepting that it has been established.***"

[Emphasis added].

The passages highlighted above are germane in the present context, given the suggestion of a dishonest conspiracy on the part of the Respondent and his sons, ventilated on behalf of the Petitioner. The decision in *Re D* also exposes the fallacy in the argument advanced on behalf of the Respondent to the effect that the more serious the allegation, the higher the standard of proof.

[20] Having regard to the nature and history of the "split" recorded in paragraph [4] above, the court must treat with some circumspection the evidence, both sworn

and documentary, adduced on behalf of the Respondent's sons in support of their application to discharge the Mareva order. Moreover, the Respondent's sons have an obvious interest in securing that any subsidy payments due from DARD be released as quickly as possible, to the benefit of the farm business. The Petitioner's arguments contend that the evidence of Padraig Logan was unsatisfactory and, in particular, that he testified, in terms, that each of the successive partnership agreements, noted in paragraph [9] above, was executed at the same time. Padraig Logan's evidence about this issue was undoubtedly uncertain and unsatisfactory. However, in my view, it did not undermine his overall credibility to the extent that the court should reject the central thrust of his evidence, which was to the effect that, during recent times, the Respondent has effectively retired from the farm business and it has been operated exclusively by the sons. No contrary evidence was adduced and I accept the evidence of Padraig Logan in this respect. Further, the documentary evidence before the court (the partnership agreements, the accounts and the DARD mandate) reinforces this finding.

[21] The impending DARD subsidy payments constitute the asset to which the Mareva Order dated 28th November 2008 is addressed. The rationale of this order, when it was made, was that the Respondent (rather than the sons) could be the real beneficiary of the payments, in whole or in part. Bearing in mind the essential character and purpose of this type of order, there were sufficient concerns and indicators to warrant its making at the time. The main question which the court must confront at this stage, in the light of a substantially expanded evidential picture, is whether the Respondent may derive a financial benefit from the impending DARD payments. The court must consider whether the Respondent could establish some beneficial interest in these payments. In determining this question, I consider the most important piece of evidence to be the draft accounts in respect of year ended 5th April 2008. The impending DARD payments will overlap, at least partly, with this financial year. The draft accounts indicate a one-fifth share by the Respondent in the Kilready farm business in respect of this year. I have already highlighted that the court has received no evidence of the accounts in respect of the immediately preceding year. As regards the year before that viz. year ended 5th April 2006, the accounts disclose that the farm was operated in the Respondent's sole name.

[22] I find that, on all the evidence, in particular the draft accounts for year ended 5th April 2008, the Respondent may be able to establish a beneficial entitlement, which would probably not exceed one-third, in respect of the impending DARD payments. The draft accounts record unambiguously that the Respondent was partially involved in the Kilready farm business during financial year ended 5th April 2008, while the second of the partnership agreements documents that this involvement continued until 1st November 2007. I find that the Respondent was actively involved in the farm business until this date. I make this finding on the basis of the draft accounts, the second partnership agreement and the sworn testimony of Padraig Logan, applying the balance of probabilities standard. While there may have been some imperfections in the evidence of Padraig Logan and

while he was not an overly impressive witness, I accept his evidence about this matter. The evidence of Padraig Logan was that the anticipated amount of payment is around £38,000. In the circumstances, I consider that it would be inappropriate to discharge the Mareva order of 28th November 2008.

[23] The court's jurisdiction to make, vary or revoke a Mareva order entails the exercise of a discretion. At the initial stage, the court applies the well known principles enshrined in *American Cyanamid -v- Ethicon* [1975] AC 396. At subsequent stages, as in the present case, I consider that the court should aspire to do what is just, equitable and reasonable in all the circumstances, having regard to the various interests in play. At the stage which proceedings have reached in the present litigation, the court will frequently, as in the instant case, be more fully informed than at the outset. The importance of acting justly and equitably was emphasized by Lloyd J in *PCW (Underwriting Agencies) -v- Dixon* [1983] 2 All ER 158, at p. 164G. Furthermore, a Mareva injunction should not be the cause of undue oppression: see per Clarke LJ in *Halifax plc -v- Chandler* [2002] EWCA. Civ 1750, paragraph [19]. It has also been observed that the court should be careful to ensure that a Mareva order does not bear harshly on innocent third parties. A mechanism designed to prevent abuse should not become an instrument of oppression: see *Searose -v- Seatrain* [1981] 1 WLR 894, at p. 897 per Robert Goff J).

[24] I consider that the perpetuation of the Mareva order dated 28th November 2008 would have an oppressive impact on the parties' sons. I find that the impending DARD payments are an important and necessary source of income for the farm business. The indefinite suspension of these payments will have adverse financial consequences for the business. In light of my findings above, this suspension, in full, is no longer justified. Significant damage to the farm business would not be in the interests of any of the parties concerned. To reflect my findings, I propose to vary the order, so as to permit DARD to make payments to Padraig and John Logan not exceeding £26,000, subject to clarification of the precise amounts involved. I am not satisfied that the order should be fully discharged at this juncture.

[24] I propose to reserve the costs of this application. The Petitioner's costs will be taxed as a legally assisted person. One would expect the Respondent and his new solicitor to reflect carefully on the Respondent's outright failure to comply with the financial provision and property adjustment order dated 16th April 2007. While it has been suggested that there may be a belated attempt to challenge this order by appeal, appropriate consideration will doubtless be given to the first partnership agreement and the accounts adduced in evidence. The Respondent's inertia throughout the greater part of these proceedings would also appear to be a factor of some significance.

[26] Bearing in mind the overall state of play, it will be necessary for each party to address the court clearly on the following matters:

- (a) The still outstanding judgment summons.
- (b) Any further application to the court proposed on behalf of the Petitioner.
- (c) Any further application to the court proposed on behalf of the Respondent.

Suitable co-ordination and programming in the further conduct of these proceedings will be necessary.

[27] In the meantime, the injunction remains fully in force and is binding on all affected parties. The court awaits receipt of the evidence necessary to finalise the contemplated variation.