

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

Delivered: 17/12/09

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
FAMILY DIVISION

BETWEEN

F

Petitioner;

v

B

Respondent.

MASTER REDPATH

[1] This matter has a somewhat chequered history.

[2] In it the parties were married on 29th September 1973 and separated in or around 1998. A Decree Nisi was declared on 26th January 2000 in England and on 15th August 2001 a Consent Order in the related Ancillary Relief application was made at Blackpool County Court. The Order provided inter alia:-

“(a) the property [the matrimonial home] shall not be sold except with the consent of the Respondent until a period of six months has elapsed after the youngest child has ceased full-time tertiary education or until the death or re-marriage of the Respondent or until the 1st July 2005 whichever is the sooner;

...

(c) Subject to the above the property shall be sold in accordance with this agreement and the proceeds after payment of the legal and agency costs shall be divided between the parties in the proportions 60% to the Petitioner and 40% to the Respondent”.

[3] The relevant time having elapsed on 17th January 2006 a hearing took place before the Master in the Enforcement of Judgments Office following an application lodged on behalf of the Petitioner for an order that the Respondent deliver up vacant possession of the matrimonial home. Following the hearing, the Master having looked at the Consent Order and taking into account the absence of a specific provision for vacant possession of the property ruled that the said order could not be enforced unless it was amended to provide for eviction.

[4] Following this hearing the Petitioner lodged a summons and affidavit to have the English Order registered in this jurisdiction for the purposes of enforcement. The matter came first before Master Bell who then referred the matter to myself. The matter should properly be dealt with in the Queen's Bench Division and accordingly under Order 32 rule 11 I am taking this application in the guise of a Queen's Bench Master.

[5] The Respondent in the case argued that because the English Order dealt with matters of property adjustment rather than pure maintenance the order was not in fact enforceable under the Civil Jurisdiction and Judgments Act 1982.

[6] It was also argued on behalf of the Respondent that the matter was not one for the Queen's Bench Division, which I accept, and that because the order was not a money order it could not be enforced in the Family Division under Order 1 rule 18 of the Rules of the Supreme Court. This I also accept.

[7] Finally, it was argued that because the Enforcement of Judgments Office had declined to enforce the order the matter had in fact already been determined and that the court was therefore functus officio.

[8] Section 18 of the Civil Jurisdiction and Judgments Act 1982 provides:-

“(1) In relation to any judgment to which this section applies –

(a) schedule 6 shall have effect for the purpose of enabling any money provisions contained in the judgment to be enforced in a part of the United Kingdom other than the part in which the judgment was given; and

(b) schedule 7 shall have effect for the purpose of enabling any non-money provisions so contained to be so enforced.

(2) In this section “judgment” means any of the following (references to the giving of a judgment being construed accordingly) –

- (a) any judgment or order (by whatever name called (given or made by a court of law in the United Kingdom)).

[9] This obviously is a very widely drafted provision.

Section 2 of the 1982 Act also provides:-

- (i) the Conventions shall have the force of law in the United Kingdom, and judicial notice shall be taken of them”

[10] Article 1 of the 1968 Convention states that it applies to “civil and commercial matters whatever the nature of the court or tribunal” but it also makes it clear that it does not apply to “the status or legal capacity of natural persons, rights and property arising out of a matrimonial relationship, wills and succession”. By virtue of Article 5(2) of the Convention it clearly does extend to matters relating to maintenance. It was argued on behalf of the Respondent that it did not cover property adjustment orders or orders for sale.

[11] If this were so it would lead to the rather surprising situation that an order made in Blackpool County Court on consent requiring the sale of a house could not be enforced in Northern Ireland.

[12] The interpretation of Articles 1 and 5(2) of the 1968 Convention have in fact been considered by the European Court of Justice in the case of Van Den Boogaard v Laumen [1997] QB 759.

[13] In that case the parties had been married in the Netherlands under a regime of community of property and entered into a marriage contract in that country which altered their matrimonial regime to one of separation of goods. The parties later moved to London where the marriage was dissolved. In her application for ancillary relief the wife sought a clean break between herself and her husband and the court ordered that the husband, inter alia, transfer certain property to the wife and pay a lump sum to enable her to provide for herself. The court held that the Netherlands separation of goods agreement was of no relevance to its decision. The wife then applied in the Netherlands for enforcement of the ancillary relief order and the issue arose as to whether or not the Netherlands Court had jurisdiction in the matter or whether that jurisdiction was excluded by Article 1.1 of the Convention. In his opinion to the court Mr Advocate General Jacobs states at paragraph 38 of the judgment:

“38. There is no definition of “maintenance” in the Brussels Convention. Schlosser at page 101 para 92, [the Schlosser Report on the Convention on the accession to the Convention of the UK Denmark and Ireland] states that there is no significant difference regarding the concept of maintenance as used in that Convention and in the 1973 Hague Convention. That Convention similarly contains no definition.

...

39. The most that can be derived from the Travaux Préparatoires for the Hague Convention of the 24th October 1956 on the law applicable to maintenance obligations towards children and the Hague Convention of the 15th April 1958 concerning the recognition and enforcement of decisions relating to maintenance obligations towards children, referred to in the above quotation, is that it was intended that the term should be interpreted broadly”.

[14] The Schlosser Report goes on to state at page 102 paragraph 95:-

“In continental Europe a motivating factor in assessing the amount of maintenance due to a divorced spouse by his former partner is to compensate an innocent spouse for his loss of matrimonial status ... however, English law, which is characterised by judicial discretionary powers and which does not favour inflexible systematic rules, does not make a distinction as to whether the payments ordered by the court are intended as damages or as maintenance.”

[15] At paragraph 52 of the judgment the Advocate General states:-

“Against the broad interpretation of “rights in property arising out of a matrimonial relationship” endorsed by the court it may be objected that, as an exception to the ‘Civil and Commercial matters’ governed by the Convention, the phrase should rather be narrowly construed. It is indicated in the Jenard Report that the expression ‘Civil and Commercial matters’ is very wide and that the formula of specific exclusion rather than an exhaustive positive definition of the scope of the Convention was adopted with a view to preserving that breadth; “in this respect the Convention should be interpreted as widely as possible””.

[16] Further on at paragraph 73:-

“73. Turning to the criteria for the categorisation of particular lump sum orders, it is clear that, at one end of the spectrum, where the recipient has no earning power and the lump sum is awarded in the context of a “clean break” in lieu of periodical payments for the recipients spouse, at least part of that sum must be in the nature of maintenance. This is expressly recognised by Schlosser: indeed he goes further and states at page 102 para 93 quoted in paragraph 41 above, that the transfer of property on divorce may in certain circumstances be in the nature of maintenance. The Commission makes the same point noting that a transfer of property is not automatically excluded as such in the scope of the Convention, but only to the extent that it is not in the nature of maintenance. The Commission refers to the view it expressed in its written observations in de Cavel (No 2) [1980] ECR 731, to the effect that if “a payment fixed in the course of divorce proceedings is intended to ensure the support of the spouse is in need, this is a matter of a maintenance obligation who within the meaning of the 1968 Convention”. The Commission rightly concludes that a lump sum payment or a transfer of property will, if it has that objective, be in the nature of maintenance notwithstanding its form”.

[17] This opinion was adopted by the court which concludes at paragraph 27 of its judgment:-

“27. Consequently, the answer to be given must be that a decision rendered in divorce proceedings ordering payment of a lump sum and transfer of ownership on certain property by one party to his or her former spouse must be regarded as relating to maintenance and therefore falling within the scope of the Brussels Convention if its purpose is to ensure the former spouse’s maintenance”.

[18] In a very modest case such as this the sale of this property is of course intended for the maintenance of the Petitioner and in my view therefore clearly falls within the scope of the 1982 Act.

[19] I am also unimpressed by the argument that because this matter was not enforced in the Enforcement of Judgments Office that the court is functus officio. It seems to me that the application before the Enforcement of Judgments Office was misconceived for the reasons pointed out to the parties by Master Napier. The proceedings were also different in nature from the proceedings before me today and accordingly I take the view that the Petitioner is not estopped from making this application.

[20] Accordingly I am of the clear view that this judgment can be registered for the purpose of enforcement. I have given some considerable thought as to how this might be achieved and the issue is not entirely straightforward.

[21] Enforcement of such orders made in this jurisdiction will generally be done on foot of an application for consequential directions under Article 26(4) of the Matrimonial Causes (Northern Ireland) Order 1978 which states:-

“Where the court make an order under any provision at paragraph (1) it may give such consequential directions as it thinks fit for giving effect to the order (including directions requiring the making of any payments or the disposal of any property)”.

[22] This gives the court wide power to enforce by way of ordering the sale of property or ordering vacant possession of it.

[23] The difficulty with the instant case is that although this court has power to register this order it would appear that it has no power to vary. Butterworths Family Law Service at paragraph [1024]:-

“There is no power to vary orders when using this Act to enforce an order”.

[24] Interestingly enough earlier in the same paragraph it is stated that property adjustment orders cannot be enforced under the Convention, a view I cannot agree with provided the purpose of the Order is for maintenance.

[25] It seems to me that to enforce this order it may be necessary to do one of two things. The first is to return to Blackpool County Court and seek consequential directions amending the order into such form as it can be more readily enforced. Apart from being expensive that would not be a straightforward course of action. It seems to me that another way of enforcing this order would be by way of a committal summons under Order 52 of the Rules of the Supreme Court as I do not believe that the Family Proceedings (Northern Ireland) Rules 1996 have any application to enforcement of Orders registered in the Queen’s Bench Division. I appreciate that such applications, although common in the Family Division, are virtually unheard of in the Queen’s Bench Division.

[26] Accordingly I will register this Order for the purposes of enforcement. I will also extend the time for appeal of this order to twenty eight days from today’s date and will now hear argument as to costs.