Neutral Citation No. [2013] NICh 12 | *Ref:* **HOR8959**

*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **15/08/13**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

MICHAEL GERARD McCANN

Plaintiff;

and

HUGH KENNETH McCANN

Defendant.

HORNER J

Introduction

[1] I gave judgment in this case on 17 April 2013. In my concluding paragraphs I urged the parties to try and resolve all their differences without further recourse to litigation. I did point out at paragraph [32] that the taking of accounts, following the sale of the Mountain Lands in lieu of partition, should be dealt with by the Master. I offered to provide such guidance and directions as the Master might require. I did point out that Dr Conway in her treatise on "Co-ownership of Land" dealt with this topic comprehensively in chapter 11 which is entitled "Accounting Adjustment Between Co-Owners".

[2] Unfortunately, but perhaps not unexpectedly, the parties have been unable to achieve resolution and have returned to me on the issue of what should be the form of the account and enquiry to be taken by the Master. The arguments made on behalf of M for the wide-ranging accounts was clearly a pre-emptive strike to the anticipated argument of H that he should be entitled to a vast sum for his work on the Mountain Lands over the past 30 years and more which had been made in his much amended Defence and Counterclaim. However, H, well advised by his legal team, and with commendable restraint, has made only a modest claim for half of the net cost of reclaiming the Mountain Lands, that is £12,907.99 or failing that half of the term loan of £20,000 taken out to cover the reclamation costs. To be added to such a sum, H has also claimed interest at the judgment rate (presently 8%) from December 1983.

Findings

[3] In my judgment I expressly found that:

(a) H did not oust M from the Mountain Lands. M remained in possession of the Mountain Lands.

(b) The parties had always agreed that H would farm the Mountain Lands.

[4] No evidence was given that H was to pay a rent or how, if he was to pay such a rent, that rent should be calculated. My understanding from the evidence was that there was no agreement, express or implied, that H would pay any rent in respect of the occupation of the Mountain Lands. I quite understand why this would be so given that H had used his own lands in addition to the Mountain Lands to secure the debt due by both H and M to the bank for the cost of the reclamation works. In addition H had assumed sole responsibility for paying off this loan which H and M jointly had taken out with the bank. M had freedom to use the Mountain Lands in any way he saw fit other than farming them. I did find expressly that M had not, as he claimed, paid H £1,000 on his return from the United States in the early 1980s.

Legal Discussion

[5] Dr Conway at 11.01 states:

> "The principles of equitable accounting refer to the procedure for making financial allowances between co-owners when expenditure on and income derived from the property has not been shared rateably."

[6] Girvan J pointed out in Official Receiver v Kearney [1999] NIJB 27 at G-H:

> "The principles of equitable accounting find their origin in the equitable principle that he who seeks equity must do equity. One aspect of equitable accounting is the principle that 'where a fund is being distributed, a party cannot take anything out of the fund until he has made good what he owes to the fund.' (see Re Rhodesia Goldfields Limited (1910) 1 Ch 239 at 245, per Swinfen Eady J.) A second aspect is that a party who discharges another's secured obligation wholly or in part is entitled to be repaid out of the security the amount of the sum or sums paid by him or her (see Pitt v Pitt (1823), Turn and R 180 and Outram v Hyde (1875) 24 WR 268) …." (emphasis added)

I pause to note that H had discharged M's share of their joint indebtedness to the bank which was incurred as a direct result of the cost of the reclamation works and for which they were both jointly liable. M is therefore liable in equity, as well as at law, to reimburse H in respect of his half share.

[7] At 11.17 Dr Conway states:

> "A co-owner who enjoys exclusive occupation of the common property is usually under no obligation to account to the other co-owners for its use and occupation. However, the position is different where one person is in sole occupation and has agreed to compensate the others for this or, more usually, where the remaining co-owners have been ousted or wrongfully excluded from the property."

As I have made clear in this case I found that M was still in possession of the Mountain Lands and that he had not been ousted from them by H. As Brereton J said in McKay v McKay [2008] NSWSC 177 at [46]:

> "Absent ouster or exclusion, the law treats a co-owner not in occupation simply as one who chooses not to exercise his or her legal right to occupy the property."

[8] However the court may take into account expenditure on permanent repairs and improvements by one of the co-owners and compensate that person accordingly. As Cotton LJ said in Leigh v Dickenson (1884) 15 QBD 60 at 67:

> "… one party cannot take the increase in value, without making allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value."

However if the co-owner who carries out such improvements wants to be reimbursed for such expenditure, he may as a consequence have to pay an occupation rent although the other co-owner has not been ousted because of the maxim that "he who seeks equity must do equity" and that therefore such a claim will render him accountable for his use and occupation.

[9] In Re Pavlou [1993] 1 WLR at 146 at 150 Millet J said:

> "First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forceful exclusion therefore is far from conclusive." (emphasis added)

Very often a court will take the payments of interest on the loan secured on the property as being the occupation rent. However as Vinelott J said in Re Gorman (a bankrupt) [1990] 1 WLR 616 at 626:

> "It is a rule of convenience and more readily applies between husband and wife or co-habitees …"

[10] In this case H has not sought to claim the costs of repairs and improvements to the Mountain Lands from M during the period he has farmed them. He has sought only to recover the initial cost of the reclamation of the Mountain Lands. This was subject of an agreement between H and M whereby, as I have recorded, M agreed to pay 50% of the costs. Both counsel for the respective clients agreed that equitable accounting was designed to achieve fairness between the parties. I note that in the Republic of Ireland the Land and Conveyancing Law Reform Act 2009 at Section 31(4)(b) stipulates a number of accounting adjustments that might be made between co-owners and concludes at (v) "any other adjustment necessary, to achieve fairness between the co-owners".

[11] Dr Conway said that it appears that such a provision is intended, as a restatement of the basic accounting rules: see 11.90.

Conclusion

[12] These proceedings have, as I have stated, been wasteful of time and expense and destructive of relationships. I consider that, if possible, further litigation should be avoided. I do not consider it is in the interests of H or M to have the Master take detailed accounts as contended for on behalf of M. Mr Coyle BL for M has submitted that the courts should take into account all the grants paid to H. He was unable to advise me whether the grants which were paid to H attached to the land or the animals which grazed the land or to the crops grown on the land. It is not difficult to see considerable time, industry and money being expended on this issue. Furthermore, such a claim is bound to provoke a reciprocal response from H who will want the court to take into account his expenditure on improvements or repairs to the Mountain Land. It does not take much imagination to envisage detailed enquiries, wasteful of court time and harmful to any prospect of improved relations between H and M, taking place. My view is that the wide-ranging accounts and

enquiries sought by M will be wasteful, profligate and disproportionate. It seems likely the costs of taking such an account (including any appeal) may well exceed what is in dispute.

[13] M agreed to pay H half the net cost of the reclamation works to the land. M should be required to make good his obligation. Accordingly M should be required to account to H for 50% of the net reclamation costs, that is 50% of £25,815.98, namely £12,907.99.

[14] I do not consider that it is fair that H should pay an occupation rent because:

(a) It was not agreed that an occupation rent should be charged to H.

(b) There is no claim for repairs or improvements to the Mountain Land other than what was agreed would be paid initially by M and that sum remains outstanding. While of course H has had use of the lands for farming, M has also, as I have found, been able to use the lands for any other purposes save that of farming. Furthermore H has had to fund the term loan taken out on the lands and has also used his own lands as part of the security for the joint indebtedness of himself and M.

I have been urged to award interest at the judgment rate for what amounts to almost 30 years. But the judgment rate does not reflect actual loss. If I direct an enquiry as to the interest rates, then this is likely to involve detailed consideration of all H's bank accounts and what should be the appropriate rate for what period and how H has organised his finances. It may also provoke a claim for an occupation rent: see the discussion at 11.56-11.61 of Conway.

[15] The fair way, I conclude, is to require M to put H in the position he should have been in in December 1983 if M had carried out his side of the bargain. In other words M should give H today's value of the sum he should have given him all those years ago. This will require M to give H £12,907.99 which will then be increased pro rata to reflect the increase in the Retail Prices Index from December 1983 to 31 August 2013. I consider that in those circumstances accounts are not required and that this is all that "is necessary to do equity between the parties".

[16] Again I counsel the parties to co-operate on the sale of this jointly owned property as per the Order in order to try and achieve the best possible price, to put these disputes behind them and to try and repair their fractured relationship.