Neutral Citation No: [2021] NICh 13	*Ref:* **HUM11570**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **30/06/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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Between:

NORMAN WILSON AS PERSONAL REPRESENTATIVE OF THE ESTATE OF SANDRA WILSON (DECEASED)

Applicant

and

MARK WITHINGTON

Respondent

_____

Roger Dowd (instructed by Dickson & McNulty) for the Applicant
Laura King (instructed by Campbell & Caher) for the Respondent

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HUMPHREYS J

Introduction

[1] This matter comes before the court as an 'Application for Expedited Pre-Proceedings Freezing Injunction', pursuant to section 91 of the Judicature (NI) Act 1978 and/or the inherent jurisdiction of the court.

[2] The relief sought is an order restraining the respondent from selling, disposing of or diminishing the value of a property situate at and known as Urbanisation 'La Calma' 3A, Block 31, Playa Flamenca, 003189 Oriheula Costa, Alicante, Spain ('the Spanish property').

[3] The applicant is the widower of Sandra Wilson ('the deceased') and the sole executor of her estate. The applicant and the deceased were married on 16 June 2018 and, sadly, the deceased died on 11 January 2020, leaving a Will dated 20 June 2018 ('the Will'). The Will was admitted to probate on 31 March 2020.

The Will and the Spanish Property

[4] The Will provides that certain items of jewellery were bequeathed and, otherwise, the residuary estate was devised and bequeathed to the applicant. There was no specific devise in relation to the Spanish property.

[5] The Spanish property was acquired in 2006 by the deceased and her son, the respondent, with each owning an undivided half share. It is the applicant's case that the deceased's undivided half share falls into the residuary estate and is to be distributed accordingly.

[6] The respondent makes the case, on affidavit, that the Spanish property was held as joint tenants and therefore the deceased's interest passed by him by operation of the doctrine of survivorship. In the alternative, the respondent asserts that he and his mother made mutual wills in 2007 following the acquisition of the property, which could not be revoked or varied, and therefore he was the owner of the entire beneficial interest in the property since the date of the deceased's death. A third argument advanced by the respondent is that an estoppel has arisen which would entitle him to an order transferring all legal and beneficial interest in the Spanish property.

[7] It is common case that the deceased executed a will in Spain on 25 May 2017 ('the Spanish Will') by which she named the respondent as the beneficiary of all her property in Spain.

The Applicant's Evidence

[8] The applicant has sworn two affidavits in which he refers to exchanges with the respondent. It is claimed that a conversation took place in December 2019, when the deceased was in hospital, when the respondent stated he would not challenge the Will if the applicant did not challenge the Spanish Will.

[9] On 6 April 2020 solicitors for the applicant wrote to the respondent, making the case that the applicant was entitled to the deceased's 50% interest in the Spanish property pursuant to the terms of the Will.

[10] On 4 June 2020 solicitors acting for the respondent claimed that the deceased had no capacity when executing the Will; that she had been subjected to undue influence and coercion and that it was the deceased's intention that the respondent own the Spanish property outright. Proceedings to challenge the Will and/or make an application for reasonable financial provision were intimated within 21 days.

[11] Such proceedings did not ensue but the parties would have had no doubt as to their respective positions following the exchange of communications.

[12] On 21 May 2020 the respondent instructed a Spanish notary to execute a deed to transfer the deceased's 50% interest in the Spanish property to himself. This deed relied upon the provisions of the Spanish Will. Registration of this deed took place on 3 August 2020.

[13] The applicant's evidence is that he became aware of the Spanish deed on 1 December 2020. It is his case that the act of registration constitutes unlawful intermeddling in the deceased's estate and demonstrates and evinces an intention to deal with or diminish the Spanish property. In support of this claim the applicant relies upon a report from the Official Solicitor, arising in a controllership application in 2019, where the respondent is said to have discussed the 'proposed sale' of the Spanish property.

[14] On 5 March 2021 the applicant's solicitors wrote seeking certain undertakings in respect of the Spanish property and indicating that proceedings would follow if these were not given. The undertakings in question were not forthcoming and this application was issued on 20 April 2021.

The Respondent's Evidence

[15] The respondent denies that any conversation took place about the Spanish property in November 2019 but asserts that in January 2020, just prior to her death, the deceased informed him she did not wish the applicant to contest the Spanish property. He further states that the applicant confirmed this following the deceased's demise. On 28 January 2020 the respondent states that the applicant advised his solicitor that he would not contest the Spanish Will on the basis the respondent made no claim over the deceased's estate in the UK. In fact, although the respondent makes no reference to it, he procured the signature of the applicant to a document, bearing the date 20 January 2020, and which states the applicant *"will not contest the ownership of the apartment."*

[16] It was a result of this that the respondent contacted a Spanish notary in order to begin the process of registration of title. He says that he did this long before he was aware of the Will. The respondent did not exhibit any documentation to substantiate the position in relation to the date of instruction of the notary, or the detail of the instructions which were furnished to him.

[17] The respondent has averred that he has no intention of selling the property or diminishing its value in any way.

Spanish Law

[18] For the purposes of this application, I had the benefit of a report on Spanish legal issues from Susana Lajusticia of Keystone Law, London, who is a qualified Spanish *abogado*.

[19] In summary, she states:

(i) There is no right of survivorship in Spanish law, co-owners own property as tenants in common;

(ii) In the Spanish Civil Code all wills can be revoked even where the testator declares his wish not to revoke them;

(iii) In this case, the deceased was informed by the notary that the Spanish Will would be revoked if she later executes a will in another country unless, in doing so, she expressly saves the effectiveness of the Spanish Will.

The Legal Issues

[20] The court had the benefit of detailed written and oral submissions from both Counsel and is very grateful for the concise and accurate manner in which each party presented its case. The following key issues emerged for consideration:

(i) Does this court have jurisdiction to grant the relief sought? (The Jurisdiction Issue)

(ii) Has the test for pre-proceedings relief been met? (The Urgency Issue)

(iii) Has the applicant satisfied the necessary criteria for the grant of an injunction? (The Injunction Issue)

Jurisdiction

[21] Counsel for the respondent argued that the court had no jurisdiction to make the order sought since it lacked jurisdiction to hear the substantive dispute. This contention was based on the common law rule in *British South Africa Company v Compania de Mocambique* [1893] AC 602. In that case, the House of Lords held that the courts of England did not have jurisdiction to hear and determine proceedings relating to alleged trespass to land committed in a foreign country. This was the extension of a more general principle that the United Kingdom courts could not determine any question of title to real property in foreign land.

[22] As a result of the position at common law, it was contended, the applicant would have to rely on a statutory provision to give the court jurisdiction to hear the instant dispute. The impact of the *Mocambique* principle was substantially diluted by section 30 of the Civil Jurisdiction and Judgments Act 1982, which gave the UK courts jurisdiction to entertain proceedings for torts against immovable property "*unless the proceedings are principally concerned with a question of the title to, or the right to possession of, that property.*"

[23] The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 caused, with effect from 31 January 2020, both the Brussels Conventions and the Lugano Convention to cease to be part of UK law.

[24] Following the repeal of these conventions from domestic law, only the Hague Conventions give the courts of the United Kingdom jurisdiction to adjudicate upon a foreign substantive dispute. However, these are limited in scope to family law and choice of court agreements, neither of which have any bearing on the instant case.

[25] In Dicey, Morris & Collins on The Conflict of Laws (15th Ed.), the learned authors state:

> *"The court has no jurisdiction to entertain proceedings for the determination of the title to, or the right of possession of, immovable property situated outside the United Kingdom, except where:*
>
> *(a) The claim is based on a contract or equity between the parties; or*
>
> *(b) The question has to be decided for the purpose of the administration of an estate or trust and the property consists of movables or immovables in England as well as immovable outside England."*

[26] The 'equity' exception to the *Mocambique* rule arises in circumstances where the court is being asked to enforce obligations which exist *in personam*, as a result of some contractual or fiduciary relationship. Thus the action is concerned with the personal obligations which arise regardless of the location of the immovable property. In *Webb v Webb* [1994] 3 All ER 511, a case relating to the interpretation of the Brussels Convention, the Court of Justice held that an action against a defendant seeking declaratory relief in relation to the existence of a trust of real property and consequential orders for the execution of documentation was a claim *in personam* and not *in rem*. As a consequence, the UK courts had jurisdiction even though the property was located in France.

[27] The administration exception is well illustrated by *Nelson v Bridport* (1846) 8 Beav. 547. The King of Two Sicilies granted lands in Sicily to Admiral Nelson. By his will, Nelson devised the land to trustees upon trust for his brother for life with remainders over. Subsequently, a law was passed in Sicily abolishing entails and providing that the person in possession become the absolute owner. The plaintiff brought a claim as remainderman under the Admiral's will and the court held that it had jurisdiction.

[28] In *Re Duke of Wellington* [1948] Ch. 118, the Duke by a Spanish will devised his lands in Spain to the person who on his death became the Duke of Wellington and Duke of Ciudad Rodrigo. After his death, his brother became Duke of Wellington, his sister Duchess of Ciudad Rodrigo and his mother was his heiress by Spanish law. The Court of Appeal held that the English courts had jurisdiction to determine to whom the Spanish lands passed.

[29] In *Griggs [R] Group Limited v Evans* [2004] EWHC 1088, Peter Prescott QC, sitting as a Deputy High Court Judge, held that the English Courts had jurisdiction to enforce equitable *in personam* rights in respect of foreign intellectual property. He commented:

> *"Thus when our courts of equity exercise their in personam jurisdiction they are not questioning the local land laws. They are not setting up a rival title. There is in truth no conflict at all between English equity acting in personam and the foreign land laws, less if anything than there was between equity and the common law before the Judicature Act. The foreign land laws allow a man to assume personal obligations with respect to that land."*

[30] The court also considered the position in relation to the administration of estates, at paragraph [70]:

> *"There is another way in which our courts may make orders which affect ownership of foreign land. It often happens that an Englishman dies having made a will disposing of his property both in this country and abroad, including land. In those circumstances our courts may be called upon to administer the estate and, in so doing, to adjudicate upon this question: who succeeds to the title to the foreign land?"*

[31] The applicant says that by application of either, or both, of these two exceptions, this court has jurisdiction to determine to whom the Spanish law passes.

[32] In *Stevens v Hamed* [2013] EWCA Civ 911, Lloyd Jones LJ described the modern application of the *Mocambique* principle as being "*relatively narrowly confined*" and:

> *"The fact that proceedings involve a right* in rem *in immovable property or that they have some link with immovable property is not sufficient to bring the rule into play."*

The claim to be advanced in these proceedings will seek to aver that the respondent holds the deceased's undivided half share of the Spanish property in trust for the estate. This is a claim *in personam*, similar to that advanced in *Webb v Webb* and in

Griggs. The fact that this involves immovable property in another jurisdiction is not sufficient to enable the respondent to invoke the exclusionary rule. Indeed, it is notable that the respondent will seek to advance arguments based on mutual wills and proprietary estoppel which also invoke equitable principles. On this basis, I find that the court in Northern Ireland has jurisdiction to hear and determine the claims in relation to the ownership of the Spanish property.

[33] By article 35 of the Administration of Estates (NI) Order 1979, the principal duty of a personal representative is to collect in the assets of an estate and administer them in accordance with law. This must entail, where necessary, bringing legal proceedings to establish that certain assets fall properly into the estate. The prospective proceedings in this case seek to ascertain whether or not the deceased's undivided share in the Spanish property falls into the estate. I am therefore satisfied, in line with the exception to the *Mocambique* principle in relation to administration of estates, that the Northern Ireland courts have power to hear and determine this dispute on this basis also.

Urgency

[34] Section 91 of the Judicature (NI) Act 1978 states:

> *"The High Court…may at any stage of any proceedings…grant a mandatory or other injunction…in any case where it appears to the Court to be just and convenient to do so…and, if the case is one of urgency, the court may grant such an injunction before the commencement of the proceedings."*

[35] Order 29 rule 1(3) of the Rules of the Court of Judicature (NI) 1980 provides as follows:

> *"The plaintiff may not make such an application before the issue of the writ or originating summons by which the cause or matter is to be begun except where the case is one of urgency, and in that case the injunction applied for may be granted on terms providing for the issue of the writ or summons and such other terms, if any, as the Court thinks fit."*

[36] The respondent contends that this application lacks the necessary quality of urgency in that the act of registration complained of took place in August 2020 and came to the applicant's attention in December 2020 but this application was not launched until April 2021.

[37] However, the applicant's solicitor wrote a detailed letter on 5 March 2021 which set out the case being advanced and sought specific undertakings from the respondent. There was no substantive reply to this correspondence and I am

therefore satisfied that the applicant was entitled to assert that the case was one of urgency and seek pre-proceedings relief.

The Criteria for an Interlocutory Injunction

[38] A freezing or Mareva injunction is designed to prevent a defendant from dissipating his assets and thereby depriving a plaintiff of the ability to enforce a judgment against him. As Gee QC states in Commercial Injunctions at 3-030:

> *"If there is a claim to the assets themselves, the jurisdiction is not 'Mareva' jurisdiction but an injunction granted in support of a proprietary interest…The purpose of the injunction based on a proprietary claim is to preserve those assets so that they can be made over to the claimant as his property if this is the case. This is different from the Mareva jurisdiction where the purpose is to prevent unjustifiable disposals of the defendant's assets"*

[39] Thus, whilst the applicant's claim is framed in terms of a freezing injunction, it is more properly considered as an interim injunction to preserve assets pending the hearing of the dispute. In such circumstances, the court needs to consider the *American Cyanamid v Ethicon* [1975] AC 396 principles:

(1) Is there a serious issue to be tried?

(2) Would damages be an adequate remedy?

(3) If not, where does the balance of convenience lie?

(4) If the other factors are evenly balanced, should the court preserve the status quo?

[40] The principal point of departure between a Mareva injunction and an injunction seeking to preserve a proprietary right is that in the latter, there is no need to show evidence of the risk of dissipation of assets – see, for example, *Polly Peck v Nadir (no. 2)* [1992) 4 All ER 767 per Lord Donaldson MR.

Consideration

[41] There can be no real dispute that there is a serious issue to be tried. On the evidence available to me at this stage, there is no doctrine of survivorship in Spanish law and therefore the deceased's share in the Spanish property would devolve to her estate.

[42] By article 12 of the Wills and Administration Proceedings (NI) Order 1994, the deceased's marriage in 2018 revoked the Spanish Will. In the alternative the Will

revoked the Spanish Will. On either analysis, the deceased's interest in the property fell into her residuary estate. There are arguments advanced by the respondent in relation to mutual wills and proprietary estoppel and it may well be that he seeks to obtain separate evidence in relation to the questions of Spanish law which arise. It cannot be said at this stage that either party's case is unarguable.

[43] The question of the adequacy of damages then falls for consideration. In any case where the dispute in question concerns proprietary rights, the courts are much less likely to find that damages are an adequate remedy – see, for example, *Republic of Haiti v Duvalier* [1990] QB 202. In this dispute, each party asserts a proprietary claim over the Spanish property. In such circumstances, I am not satisfied that damages would be an adequate remedy for either, nor do I have evidence of the ability of either party to meet an award of damages.

[44] The grant or refusal of an interim injunction therefore turns on the question of the balance of convenience or, the least irremediable prejudice. If the respondent were to dispose of the Spanish property and dissipate the proceeds, as he could do on foot of his registered ownership, there would be irremediable harm caused to the deceased's estate. By contrast, an order restraining disposal of the asset pending the determination of the dispute would not prevent the respondent from enjoying use of the property in circumstances where he has stated that he has no intention of disposing of it or diminishing its value.

Conclusion

[45] I have therefore concluded that it would be just and convenient to grant relief, not by way of a freezing injunction, but by an order restraining the disposal or dissipation of the Spanish property until further order of the court. The applicant will be required to give the usual undertaking as to damages and also undertake to issue legal proceedings against the respondent within 14 days.

[46] I will hear Counsel as to any consequential relief and on the issue of costs.