Neutral Citation No: [2019] NIFam 6	*Ref:* **OHA10889**
*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **08/03/2019**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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PROBATE & MATRIMONIAL OFFICE

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FAMILY DIVISION

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18/5078/01

BETWEEN:

MRS CAVE

Petitioner

and

MR CAVE

Respondent

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O'HARA J

Introduction

[1] Due to specific commercial sensitivities about the circumstances of the parties in this case, I have anonymised their identities by giving them false names for the purposes of this judgment. Nothing must be said or done which identifies the parties in any way, directly or indirectly, without the authority of the court.

[2] On 18 January 2018, I granted a Mareva Injunction following an ex-parte hearing. In this application by the respondent, I have been asked to set aside that injunction on 3 grounds:

a. Lack of candour on the part of the petitioner when applying for the order.

b. Procedural flaws following the making of the order.

c. There is no basis for the injunction in any event on any proper enquiry into these circumstances.

[3] In this application to set aside the ex-parte Order, Ms O'Grady QC leads Ms R Lyle for the respondent husband. Mr Orr QC leads Ms P O'Kane for the petitioner. I am grateful to counsel for their submissions.

The Ex-Parte Application

[4] The application on 18 January was advanced on the basis that undertakings given through solicitors in Dublin acting on behalf of the respondent had not been honoured or could not be relied on. The petitioner's affidavit referred at paragraph 7 to 3 undertakings in respect of his 2017 company dividend, the partial cashing-in of a pension lump sum and his anticipated share of the proceeds from the likely sale of a major company. That share is likely to be very substantial.

[5] At paragraph 8 it was averred that the undertaking to hold the dividend on deposit had not been honoured "and despite requests made, no specific documentary details were given as to the amount of the dividend and the tax payable". The petitioner then acknowledged that she had received a cheque for €175,000, said to be her share of the dividend, but that no cash statements were provided as to the totality of the award. So far as the pension is concerned, the applicant averred that she had signed some documentation. However, she said that the 25% cash lump sum was to be paid out at the end of January 2018 and she had no documentation showing details of the exact amount despite having requested this information.

[6] At paragraph 9 she expressed concern that the undertaking to give her half of the pension lump sum might not be honoured because the respondent had failed to provide relevant documentation and because he had breached his undertaking to hold half of his 2017 dividend on deposit.

[7] The petitioner went on in her affidavit to complain about the respondent's erratic behaviour and referred to him having to seek significant intervention to help him with personal issues. At paragraph 15 she said that in relation to the sale of his shareholding in a major company:

> "Presently I cannot securely rely on the undertakings given since in respect of the dividend to hold monies that was not upheld".

[8] Other issues were raised in the ex-parte application including an alleged failure on the part of the respondent's Dublin solicitors to respond to correspondence but the central issue on the ex-parte application was clear – the respondent had given three undertakings, he had already breached one and the others therefore could not be relied on.

[9] The injunction was sought in relation to eleven assets including bank accounts. I granted it only in relation to his shareholding in the company and the 25% pension lump sum. Since I did not grant it in relation to any other assets and accounts, I did not need to make allowance in the order for ordinary living expenses or legal costs.

[10] Despite this limitation, the order which was issued referred not only to the shareholding in the major company and the pension lump sum but also to all money held by the respondent "in any bank or building society account, any solicitor's account or other institution … ". In other words the order, as issued, went far beyond the order which I had made.

[11] The ex-parte order contained two standard provisions, namely that the respondent be notified of the contents of the order "forthwith" and that a copy of the order and the petitioner's affidavit on which it was granted be served on the respondent "as soon as possible". In fact the affidavit was not served until 1 February because in error the wrong affidavit was served on 23 January with the court order. That meant that it was not until that later date that the respondent and his advisers saw the averments which led to the injunction being granted. That fact aggravated the major errors in the order itself i.e. the freezing of the bank accounts.

Respondent's Reply

[12] On 14 February an application was issued by the respondent to discharge the injunction. That application was supported by an affidavit from him in which he averred:

a. The injunction was obtained without full and frank disclosure.

b. The injunction (as issued and received by him rather than as granted) made no allowance for personal spending money or funding for legal fees.

c. The injunction did not provide for payment of the mortgage on the matrimonial home or any other bills.

Grounds b. and c. were the direct consequence of the unfortunate mistakes referred to at paragraphs 9 and 10 above.

[13] However the main focus of the respondent's affidavit was on the incomplete and inaccurate information put before the court to obtain the injunction in the first place. His contentions were:

a. In December 2016 his solicitors in Dublin wrote to the petitioner's solicitors providing various financial documents. In addition it was confirmed that the petitioner's accountant could contact the respondent's accountant "who is authorised to discuss and deal with matters on our client's behalf and

they will be able to explain the restriction on share transfer both from the tax perspective and the shareholder's agreement." The name and direct line telephone number of the respondent's accountant was provided. This letter was not disclosed by the petitioner when she sought her order ex-parte.

b. Nor did the petitioner's solicitors disclose a letter they themselves had written on 9 May 2017 from which it is apparent that they knew "that there is a plan that your client's family business is to be sold within the next 2 years".

c. The respondent's solicitor replied by letter 31 May 2017. This was another and even more important letter which was not disclosed. Its significance is that it sets out the precise terms of the undertakings given by the petitioner. They were:

   i. To hold all of the 25% of the value of the pension benefits the respondent is entitled to as a tax-free lump sum when he reaches his 55th birthday pending resolution of any proceedings and/or agreement between the parties.

   ii. To divide the net value of the dividend due in October 2017 equally with the petitioner.

   iii. To place in a deposit account the respondent's share of his shareholding in the family business when it is sold but noting that for tax reasons, no sale could take place before February 2019.

d. That none of these undertakings had been breached.

e. That he had already shared with his wife the net value of the annual dividend which he has received.

f. That at a joint consultation in Dublin in September 2017 his accountant had orally given details of the dividend payment to the petitioner's lawyers and that his accountant had then provided the petitioner's accountant, by email in December 2017, considerable further information relating to the dividend. This document was another one which was not disclosed by the petitioner when applying for the order ex-parte.

[14] The affidavit continued by setting out other detailed responses to the petitioner's various allegations but the central thrust of the response was clear:

- The petitioner had failed to disclose relevant documents and information and was therefore in breach of her duty of candour when applying to the court on an ex-parte basis.

- The respondent had not in any way breached any of the three undertakings given by him.

- Since he had already honoured the first one, there was no basis for fearing that he might breach either of the other two.

- The order as made had been breached in that the respondent had not been served with it and the critical accompanying papers as soon as possible.

- Even on an inter-parties hearing the granting of an injunction would have been entirely unnecessary.

- The injunction should be discharged and costs awarded against the petitioner.

Petitioner's Rejoinder

[15] The petitioner responded to this affidavit to discharge the injunction making the following main points:

a. The failure to serve the full papers following the ex-parte order was an administrative error and oversight which was corrected when it was highlighted.

b. The undertakings given could not be relied on, even though they had not been breached and one had in fact been honoured, because they were not legally binding and because the respondent was not engaging fully in the negotiation process.

c. Relevant financial information such as the details surrounding the payment of half of the net dividend had been provided but by the respondent's accountant, not his solicitor.

Conclusion

[16] On any analysis, the obligation on the petitioner to disclose information fully and with candour in order to obtain an ex-parte order was not met. It is beyond dispute that:

i. The petitioner misrepresented the undertaking given by the respondent in May 2017 to divide equally the net value of the dividend payment.

ii. Instead of that undertaking having been breached, as was alleged and relied on, it was fully honoured.

iii. The petitioner and her advisers knew or should have known this, in particular from exchanges between the accountants.

iv. The documentation which should have been before the court on these various issues was not presented.

[17] Had the court known that the first undertaking had been honoured, it is highly likely that a different approach would have been taken to the ex-parte application, particularly if the very significant exchanges between financial representatives had been disclosed.

[18] It is not necessary, however, for the respondent to prove that a different course would have been taken. As the authorities make clear, an ex-parte injunction can be set aside solely on the basis of misrepresentation and/or non-disclosure. That approach emphasises the extent of the obligation on parties making ex-parte applications to be both careful and accurate and to be candid in their presentations.

[19] After I heard submissions on the inter-parties hearing, I discharged the Mareva Injunction. I was satisfied from the fuller information disclosed by the respondent that the injunction was unnecessary in this case. At that time I reserved my position on costs. I also wanted to reflect on the additional elements of the case including the errors in the court order as issued which did not properly reflect the order which I had made.

[20] So far as the court order is concerned, the fact that the order which was issued was incorrect in important respects was not the fault of the petitioner. It is, however, the responsibility of all legal representatives, especially solicitors, to check court orders when they are issued. If they are incorrect, as they occasionally are, that should be drawn to the attention of the court office immediately. In this case a great deal more damage could have been caused to the respondent if the banks in which he held accounts had been notified of the order which was issued in error. The order which I granted ex-parte was much narrower than the one which had been sought. Only by good fortune was the damage not more significant.

[21] The administrative error on the part of the petitioner's solicitor to serve the affidavit on which the injunction had been grounded was a major one. It was also avoidable had proper care been taken. Once again, this failing highlights the obligation on the part of legal representatives to ensure, particularly when draconian orders are being made ex parte, that obligations imposed by the courts are complied with.

[22] Of greater concern however, is the failure of the petitioner to make full disclosure in this case. It may very well have been the case that there was perceived to be a level of disengagement by the respondent in the divorce proceedings and in the negotiations which were leading towards efforts to resolve the division of assets. However, much more than that is required in order to justify an application for an

ex-parte order, especially one with such potentially serious consequences. It is incumbent on parties seeking such orders to ensure the information which is provided to the court is complete and accurate. In this case, on the petitioner's own admission, it clearly was not. The order which I made was based on accepting, from the information put before me, that one undertaking had been breached so that there was a substantial risk that the other two undertakings might also be breached. The case would have been entirely different had I known that the petitioner had misrepresented the terms of the undertaking and that it had in fact been honoured with information relevant to it having been provided by the respondent's accountant. In these circumstances I award costs to the respondent to be taxed in default of agreement.