

Neutral Citation No: [2023] NIMaster 2

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

Delivered: 09/02/2023

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

Duffy

Petitioner;

and

Duffy

Respondent.

(Order requiring consent to a Data Subject Access Request)

Master Bell

[1] A difficulty arose in these Ancillary Relief proceedings listed for Financial Dispute Resolution Hearing before me. The Petitioner (hereafter referred to as “the wife”) stated in her core issues that she believed that the Respondent (hereafter referred to as “the husband”) was employed by a company in Dublin but she was unable to say which company he was working for. In his core issues the husband, however, denied that he was currently working.

[2] This factual dispute created a difficulty because the legislation requires that one of the factors which the court must consider is the income of the parties. Article 27(2) of the Matrimonial Causes Order (Northern Ireland) 1978 states:

“As regards the exercise of the powers of the court under Article 25(1)(a), (b) or (c), 26 or 26A in relation to a party to the marriage, the court shall in particular have regard to the following matters-

- (a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future ...”

[3] There is of course objective information from an independent source which is capable of confirming what the factual position actually is. It is held by the Revenue Commissioners in Ireland. The issue is how the court can obtain that information.

[4] I therefore issued an order requiring the husband to sign a consent and provide his personal public service number (which is a unique reference number that is used to access social welfare benefits, public services and information in Ireland) within seven days of his solicitor being provided with a draft consent by the wife’s solicitor. The consent shall make a data subject access request under Irish data protection law and request that the Revenue Commissioners provide him with the information that they hold in relation to his employment and earnings over the past three years, and that the commissioners should reply to that request by sending this information to Myler McGuigan (the solicitors who represent his wife in these ancillary relief proceedings). Myler McGuigan is then ordered to provide a full copy of whatever material is received to the husband’s solicitors.

[5] I anticipate that, upon the issuing of the order from the Matrimonial Office, the wife’s solicitor will inscribe the penal notice on the top of the order and then serve it upon the husband. If the husband’s version of events is correct and he is currently unemployed, then he will have no difficulty signing the consent and will subsequently be completely vindicated and proved to have been telling the truth. If, on the other hand, the wife’s version of events is correct, then the husband will find himself between Scylla and Charybdis, risking contempt proceedings for failure to sign the consent or risking the consequences which he may experience for failure to make true discovery.

[6] I informed counsel that, in addition to the order issuing, I would provide a written ruling explaining the basis for the order which the court was making, not least because the combination of data protection legislation in other jurisdictions, with the inherent jurisdiction of the court in this jurisdiction, may provide a powerful tool to those who might otherwise be lacking an effective remedy in asset tracing. This is that ruling.

[7] There are a number of important propositions which underlie the order that the court has made. Firstly, there is the proposition that the High Court can act of its own motion. This means that in its supervision of litigation before it, it does not have to wait passively for an application to be made before it acts. Indeed, the concept of the court acting of its own motion is built into the Rules of the Court of Judicature and the Family Proceedings Rules and appears in those rules on multiple occasions. Hence, although no application was made by the wife for an order such as the one made by the court, the court was not obliged to wait for such an application. In the interests of fairness, and to fulfil its statutory obligation to take into account the income of the parties, it could act without such an application.

[8] Secondly, underlying the making of the order in this case, there is the proposition that there is a distinction between proceedings which are *in rem* and proceedings which are *in personam*. An *in rem* proceeding (meaning "against a thing") is essentially an action in respect of a piece of property and, generally speaking must be commenced in the jurisdiction where the subject property is located. An *in personam* proceeding (meaning "against a person") decides the personal rights and interests of parties named in an action. The jurisdiction of the court in ancillary relief proceedings possesses a mixture of both *in rem* powers and *in personam* powers. A court has jurisdiction to order the transfer of certain property but may also require the parties to carry out certain acts.

[9] Thirdly, underlying the making of the order in this case, is the concept that the court has the power to order the carrying out of certain actions which must take effect in a foreign jurisdiction. A memorable example of the exercise by the courts of such an *in personam* power can be found in *Derby & Co Ltd and Others v Weldon and Others (No 6)* [1990] 3 All E.R. 263 which concerned whether a receiver appointed by the English courts could be ordered to transfer assets out of Switzerland. The case had initially come before Sir Nicolas Browne-Wilkinson V-C. In the key passage of his judgment at first instance he said:

"I think this court should hesitate long before taking steps, even though it may have power to do so under its right to act *in personam*, which require people to do things in foreign jurisdictions which may offend the sensibilities of the foreign jurisdiction in question, let alone requiring the doing of acts which may be unlawful by the law of the place where the act is to be done. In my judgment, the correct approach is to seek, if possible, to obtain the co-operation of the foreign court rather than seek to force people to do things in foreign countries under threat of penalty."

[10] On appeal, Dillon LJ, giving the principal judgment of the Court of Appeal for England and Wales, observed that Sir Nicolas Browne-Wilkinson's view was similar to the view which he himself had expressed in his own judgment in *Ashtiani v Kashi* [1987] QB 888, when he favoured a limited territorial approach to the grant of *Mareva* injunctions. However, Dillon LJ then went on to say:

"But the more recent developments of the law in relation to *Mareva* injunctions show, in my judgment, that those views are wrong. The jurisdiction of the court to grant a *Mareva* injunction against a person depends not on the territorial jurisdiction of the English court over assets within its jurisdiction, but on the unlimited jurisdiction of the English court *in personam* against any person, whether an individual or a corporation, who is, under English procedure, properly made a party to proceedings pending before the English court."

[11] This position remains the current law and is now regarded as unremarkable. Where an individual is a party to proceedings before the High Court in Northern Ireland, the court has jurisdiction to grant *in personam* orders in respect of property in other jurisdictions. Instances in Northern Ireland jurisprudence of where the High Court has granted this type of order include, for example, repatriation orders under the proceeds of crime legislation such as *In Re McCullough*, 6 December 1995 (Unreported), *In Re Bradley*, 20 March 1996 (Unreported) and *In Re Shuttleworth*, 25 April 1996 (Unreported). (See "*Restraint Orders under the Proceeds of Crime Legislation*", Northern Ireland Legal Quarterly Vol 48, No 2, (1997) p 135.)

[12] Hence the court has the power to require the husband to make a data subject access request to the Revenue Commissioners in Ireland and would have the same power to require a party to sign a consent seeking information held in foreign jurisdictions by state agencies, by financial institutions or even by lawyers (assuming that in respect of the latter only non-privileged information was being sought).

[13] A fourth important concept underlying the order of the court is the inherent jurisdiction of the High Court. Sir Jack Jacob, the former Master and Senior Master of the High Court in England and Wales between 1957 and 1980, in his 1986 Hamlyn Lectures "*The Fabric of English Civil Justice*", stated that, in England, (he omitted to mention Northern Ireland) the position was as follows:

"The most extraordinary source of law in the English legal system is commonly called "the inherent jurisdiction of the court." There is no equivalent to this peculiar English concept of judicial power in any European country. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, mainly civil but also criminal, and not part of substantive law. It is normally exercisable by the Superior Courts of Law and to a limited extent by inferior courts but not by tribunals. It is not to be confused with the statutory jurisdiction of the court nor with the exercise of discretionary judicial powers. It is not derived from any statute or rule of law, but from the very nature of the court as a court of law, which is why it is called "inherent." The underlying principle in English procedural law is that the essential character of a court of law necessarily involves that it should be invested with the power to maintain its authority, to control and regulate its process and to prevent its process from being abused or obstructed. Such a power is intrinsic in a superior court of law; it is its very lifeblood, its very essence, its immanent attribute. The court must needs have such a power in order to enable it to maintain and fulfil its character as a court of justice. ... The inherent jurisdiction of the court is thus a virile and viable doctrine of English procedural law. It has been defined as being a reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just and convenient to do so, and in particular to compel the observance of the due process of law to prevent improper vexation

or oppression, to do justice between the parties and to secure a fair trial between them.”

Sir Jack Jacob’s analysis represents the classic and oft-quoted understanding of the inherent jurisdiction of the court.

[14] For the reasons set out above, the court considers that, in order to fulfil its statutory obligations under Article 27(2) of the 1978 Order, it has jurisdiction to make, and should in the exercise of its discretion, make an order requiring the husband to act as indicated above.