

Neutral Citation No: [2021] NIFam 4

Ref: HUM11432

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

ICOS No:

Delivered: 25/02/2021

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

A

Petitioner/Respondent

v

A

Respondent/Appellant

(APPEAL; DISCOVERY; CONDUCT)

Adele O'Grady QC and Janice Gilkeson (instructed by McKeone McGilloway Solicitors)
for the Petitioner/Respondent

James O'Brien (instructed by Faloon & Co. Solicitors) for the Respondent/Appellant

HUMPHREYS J

Introduction

[1] This is an appeal from an order of Master Bell made on 4 March 2020 whereby he ordered that the respondent husband provide discovery of:

"the committal papers relating to the recent criminal trial following which the Respondent husband has been convicted of a criminal sexual offence."

[2] The husband appeals against the making of this order. Given the nature of these proceedings and the subject matter of the documentation in dispute, I determined that this judgment be anonymised. Nothing should be published which identifies either the parties or the complainant in the criminal matter.

Background

[3] On 20 October 2015 the wife presented a divorce petition claiming that the marriage had broken down irretrievably on the grounds that the husband had behaved in such a way that she could not be expected to live with him. The particulars of the unreasonable behaviour alleged included one specific incidence of marital rape and infidelity with a young female. They also extended to coercive control, accessing and distributing confidential information.

[4] The husband failed to serve an answer and cross petition in time and leave to do so out of time was refused by O'Hara J on 11 October 2016 on which date he made a decree nisi. The wife issued a summons for ancillary relief on 20 March 2017.

[5] The grounding affidavit in the ancillary relief proceedings does not expand on the allegations of sexual violence or misconduct, although it does assert that the husband conducted a campaign of harassment which required the wife to seek alternative employment well away from her family home. It is claimed that this has resulted in a significant decrease in the wife's income. The wife did obtain a number of non-molestation orders against the husband, the subject matter of which concerned harassment, the making of unfounded criminal complaints and sharing of private and sensitive information with third parties. The wife states that the husband was prosecuted in respect of the disclosures to her work colleagues and employer and accepted a caution in 2014.

[6] In his replying affidavit, the husband denies any allegation of sexual impropriety or harassment and makes counter-allegations of physical violence and false complaints to the police. The husband admits that he accepted a caution for a 'technical breach' of a non-molestation order. He states that he was not responsible for his wife having to change jobs but alleges that this was due to "*competence issues.*"

[7] At the first directions hearing, the Master ordered the parties make discovery of financial documents relevant to the valuation of the matrimonial assets. He also required the parties to file questionnaires detailing any further discovery sought. Further discovery was ordered, on foot of correspondence requesting same, on 20 June 2018. The order under appeal was made as part of the directions for trial on 4 March 2020.

The Legal Framework

[8] Part III of the Matrimonial Causes (Northern Ireland) Order 1978 ('the 1978 Order') addresses the entitlement to financial relief for parties to a marriage in connection with, inter alia, proceedings for divorce. In determining the exercise of its powers under this Part, the court is directed by Article 27(2) to have regard to certain matters, often referred to as the 'check list.' These include, at Article 27(2)(g):

“the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.”

[9] The Family Proceedings Rules (Northern Ireland) 1996 govern the procedural aspects of matrimonial causes and, in relation to discovery, Rule 2.24 states:

“A party to a cause or matter may apply for an order for discovery and inspection of documents by an opposite party and RCJ Order 24 shall apply with the necessary modifications.”

[10] In the context of ancillary relief, Rule 2.64(4) provides:

“Any party to an application for ancillary relief may by letter require any other party to give further information concerning any matter contained in any affidavit filed by or on behalf of that other party or any other relevant matter, or to furnish a list of relevant documents or to allow inspection of any such document, and may, in default of compliance by such other party, apply to the Master for directions.”

[11] It is not necessary to rehearse in detail the provisions of Order 24 of the Rules of the Court of Judicature (Northern Ireland) 1980. The obligation to give discovery relates to the documents *“relating to any matter in question in the cause or matter”* (O24 r3) and is subject to the Court determining that discovery is *“necessary either for disposing fairly of the cause or matter or for saving costs”* (O24 r9).

[12] The legal test of relevance requires disclosure of any document which it is reasonable to suppose contains information which may enable a party either to advance his own case or to damage that of his adversary. If it is a document which may lead to a train of enquiry which may have either of those two consequences, it must be disclosed (see *Peruvian Guano* [1882] 11 QBD 55). This must now be read in conjunction with the overriding objective enshrined in Order 1 rule 1A of the Court of Judicature Rules which requires Courts to interpret any obligation under the Rules in a manner which is proportionate and ensures cases are dealt with expeditiously and fairly (see *Flynn v Chief Constable of the PSNI* [2018] NICA 3).

[13] The Ancillary Relief Guidance Notes were issued in 2006 and amended in 2012. In relation to grounding affidavits, they state:

*“A short section concerning conduct may be included but **only** where it would be inequitable to disregard it in terms of the relevant case law.”*

[14] The Guidance Notes go on to set out the categories of document which the parties are obliged to furnish following the exchange of affidavit evidence. They continue:

“The Court appreciates that in more complex cases that more extensive discovery will be necessary but further discovery will only be ordered if it is proportionate to the complexity and value of the case. The parties may of course continue to request discovery pursuant to Rule 2.64(4) of the Family Proceedings Rules 1996; however, no further discovery will be ordered save by questionnaire ordered by the Court.”

[15] The legislation, rules and guidance therefore recognise a flexible and relatively informal approach to discovery in ancillary relief proceedings. Formal applications are neither required nor encouraged but the touchstones in relation to the discovery of documents remain relevance, necessity and proportionality.

The Caselaw on Conduct

[16] The circumstances in which the Court determining an application for ancillary relief ought to take into account the conduct of the parties have been considered in a range of authorities. In the seminal case of *Miller; McFarlane* [2006] UKHL 24, Baroness Hale held:

*“Once the assets are seen as a pool and the couple as equal partners then it is only equitable to take their conduct into account if one has been very much more to blame than the other: in the famous words of Ormrod J in *Wachtel v Wachtel* the conduct had to be ‘both obvious and gross.’ This approach is not only just it is also the only practicable one. It is simply not possible for any outsider to pick over the events of a marriage and decide who was the more to blame for what went wrong, save in the most obvious and gross cases.”*

[17] In *OG v AG* [2020] EWFC 52, Mostyn J stated:

*“Conduct rears its head in financial remedy cases in four distinct scenarios. First, there is gross and obvious personal misconduct meted out by one party against the other, normally, but not necessarily, during the marriage. The House of Lords in *Miller v Miller* [2006] UKHL 24, [2006] 2 AC 618 confirmed that such conduct will only be taken into account in very rare circumstances. The authorities clearly indicate that such conduct would only be reflected where there is a financial consequence to its impact. In one case the husband had stabbed the wife and the wound had impaired her earning capacity. The impact of such conduct was properly reflected in the discretionary disposition made in the wife’s favour. Mrs Miller alleged that Mr Miller had unjustifiably ended the marriage discarding her in favour of another woman. Therefore, she*

argued that Mr Miller should not be permitted to argue that their marriage was short. This argument was rejected by the House of Lords which held that the conduct in question, although greatly distressing to Mrs Miller, should not find independent reflection in the court's decision."

[18] Mostyn J goes on to describe the other three scenarios in which conduct may play a part: the dissipation of assets, litigation misconduct and the drawing of adverse inferences from the failure to give full and frank disclosure. Insofar as personal misconduct is concerned, however, Duckworth in *Matrimonial Property and Finance*¹ comments:

"Nowadays the court pays little regard to spousal conduct."

The Documents Sought on Discovery

[19] In January 2020 the husband was tried in the Crown Court on 11 charges of indecent assault and buggery against a relative, the said offences being alleged to have occurred between January 1980 and April 1988. He was acquitted on 10 of these charges by a jury but convicted on 1 charge of indecent assault which occurred in 1980 when the husband was aged either 11 or 12.

[20] The Master ordered disclosure of all the committal papers relating to these criminal proceedings. Ms. O'Grady QC submitted that this is a case in which the court hearing the ancillary relief application ought to take the husband's conduct into account. She is relying on various species of misconduct but accepts that it is spousal conduct which is relevant for the purposes of this appeal. In reliance on *OG v AG* [supra] she contends that the conduct in question does not necessarily have to have occurred during the marriage. It is submitted that the documents in question are relevant to the issue of conduct since they may demonstrate that the husband is controlling, abusive and given to sexual deviancy. At the very least, it is claimed, there is a legitimate train of enquiry associated with the committal papers.

[21] Mr. O'Brien BL, for the husband, contended that the caselaw on spousal conduct limited it to conduct occurring during the marriage. He points out that the criminal allegations related to a period of some years before the marriage was solemnised and the one matter in respect of which the husband was convicted occurred when he was only just over the age of criminal responsibility.

Consideration

[22] Given that this is an appeal from the Master, this court will consider the matter *de novo*. Applying first principles, it is for the wife to establish that the documents are relevant to an issue in question between the parties, applying the

¹ B3 para [64]

Peruvian Guano test. If it is determined that the documents are relevant, the court must then decide if it is necessary and proportionate for them to be disclosed in these proceedings.

[23] In order to determine relevance, one must first examine the issues in dispute and then consider how the documents sought may serve either to advance the wife's case or damage that of her husband. The divorce petition includes a specific allegation of marital rape as one of the particulars of unreasonable behaviour. However, the grounding affidavit in ancillary relief does not make the case that this conduct ought to be taken into account on financial provision under Article 27 of the 1978 Order. It does depose to allegations of harassment which take the form of the making of unfounded complaints and the disclosure of confidential information to a former employer and it is said that this misconduct has caused the wife to suffer financial harm.

[24] It is the grounding affidavit and the husband's response thereto which define the issues in an ancillary relief hearing. The Guidance Notes indicate that a section on conduct may be included in the grounding affidavit, but only where this may fall into the type of behaviour recognised by the caselaw as being inequitable to disregard. It is, of course, not a matter for this court to make a determination on this issue. However, when considering an application for discovery which goes beyond the categories of document set out in the Guidance Notes, it is essential to define the issues in dispute and consider whether the documents sought would advance the wife's case or damage that of her husband, or would at least lead to a train of enquiry having either of these results.

[25] I accept the submission that the personal misconduct may not necessarily occur during the marriage. One can envisage circumstances where conduct in the period prior to the marriage or, more likely, following its dissolution, has a direct bearing on financial provision and which would be inequitable to disregard.

[26] In the instant case, the question resolves as follows: does the fact the husband faced criminal charges in relation to alleged sexual assault on a relative between 1980 and 1988, a period of between 4 and 12 years prior to the marriage, advance the wife's case that he was guilty of the spousal misconduct which she alleges?

[27] The fact of such allegations, even if they were demonstrated to be true, does not tend to prove that the husband perpetrated a campaign of harassment, engaging the wife's employer, which caused her economic harm. I say this for a number of reasons, viz:

- (i) It is only in a rare and exceptional case that spousal personal misconduct is relevant in a claim for financial provision in ancillary relief;

- (ii) In this case, the type of conduct alleged in the criminal proceedings is quite different from that relied upon in the ancillary relief claim;
- (iii) The husband was aged between 11 and 20 years when the alleged offending took place and the one matter of which he was convicted occurred when he was 11 or 12;
- (iv) A finding that a sexual assault had occurred would not make it more likely that the same individual, many years later and in the course of a marriage, committed other unrelated acts;
- (v) If the documents were merely relevant to the husband's credibility, then discovery should be refused unless the circumstances are exceptional – see *First Subsea v Balltec* [2013] EWHC 584 (Ch.); *Re Oaklee Housing* [1994] NI 227.

[28] This finding is sufficient to dispose of the appeal. However, if I had found that the documents were relevant, within the broad train of enquiry test, the issues of necessity and proportionality would then fall for consideration. Even if I had determined the committal papers were relevant, I would have refused the application for discovery on the grounds that same were not necessary either for the fair disposal of the matter or for the saving of costs.

[29] The disclosure of the documents would raise the spectre of the ancillary relief court embarking on an enquiry as to whether the husband was guilty of the behaviour alleged in the criminal trial. Such an exercise could only serve to greatly increase the time and cost associated with these proceedings and would be neither necessary nor proportionate.

Conclusion

[30] I therefore allow the appeal and set aside the order of the Master in relation to the discovery of the committal papers. I will hear the parties in respect of costs.