Neutral Citation: [2013] IEHC 635

THE HIGH COURT

FAMILY LAW CIRCUIT COURT APPEAL

[2012 No. 96 CAF]

[2010 No. 599 Circuit Court]

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

BETWEEN

P. C. R. (OTHERWISE C. R.)

APPLICANT

AND

G. R.

RESPONDENT

JUDGMENT of Mr. Justice Michael White delivered on the 15th day of March, 2013.

1. This is an appeal from an order of the Circuit Court of the 17th October, 2012, arising from an original order of the 23rd June, 2010, when a decree of divorce was granted with ancillary orders.

2. The parties were married on the 12th September, 1974. They have three children none of whom is legally dependant, but two of whom require some financial support. The parties' marriage irretrievably broke down in November, 2006 and they have been living apart since.

3. The parties purchased their family home in 1978 and subsequently in 2001 and 2004 purchased properties in S. Those properties are referred to in this judgment as Property A and Property B. The applicant is an architect and the respondent is a medical scientist.

4. The applicant issued a civil bill seeking a divorce and ancillary orders. On the second hearing day of the proceedings on the 23rd day of June, 2010, after negotiations, terms of settlement were agreed between the parties subject to the Court's decision on proper provision. The Court granted a decree of divorce with the ancillary orders as set out in the terms of settlement. The essence of the settlement was that the family home would be transferred to the respondent and the two properties in S would be transferred to the applicant. The applicant further agreed to pay the sum of €200,000 towards the mortgage on the family home, which had an outstanding balance of approximately €400,000. A portion of the mortgage on the family home had been used to acquire one of the properties in S.

5. The applicant subsequently sold one of the properties in S, Property B, but did not realise the valuation anticipated. His income as an architect has also deteriorated substantially.

6. An order was made pursuant to s. 13(2) of the Family Law (Divorce) Act 1996 ("the 1996 Act") directing the sum of €200,000 be paid to the respondent by the applicant by way of instalments, the first on the 22nd June, 2011, of €100,000 and the balance on the 22nd June, 2012. The sum of €95,000 was paid to the respondent on the 25th January, 2012, and applied to reduce the mortgage on the family home to the sum of €305,000.

7. The applicant states that the sum of €5,000 had already been paid to the respondent. The sum of€100,000 due on the 22nd June, 2012, has not been paid. By notice of motion of the 24th November, 2011, returnable for the 14th December, 2011, the applicant sought to vary this order for payment of the second instalment pursuant to s. 22 of the 1996 Act.

8. Paragraph 12 of the terms of settlement states:-

> "An Order pursuant to the provisions of section 10 of the Family Law (Divorce) Act 1996 providing for the sale of premises at [Property A]. Upon the discharge of legal and auctioneering costs of sale and any capital taxes which arise upon the sale, the respondent will be entitled to the entire net proceeds remaining thereafter up to a maximum of €200,000, or such sum as may be due and owing to her pursuant to paragraph 2 above, whichever is the lesser. In the event that there are any surplus proceeds of sale, those proceeds will be retained by the applicant for his sole use and benefit absolutely. The parties' respective solicitors shall have joint carriage of sale. This order is to be stayed and shall not be capable of being enforced against the applicant except in the event that he defaults in making either of the lump sum payments contemplated in paragraph 2 above; in the event of such default, the stay on this order shall be deemed to have been lifted and the order will become enforceable against the applicant's rights. This portion of the order shall be registered as a burden on the property to which this order relates. The applicant shall not pledge or alienate his interest in the property save for the purposes of fulfilling his obligations under paragraph 2 above."

9. The applicant thus acknowledged that if he was in default of the instalment order, there was to be an order for sale of the property at Property A pursuant to s. 19 of the 1996 Act.

10. The applicant has also acknowledged that he was fully advised at the hearing date by his solicitor and counsel.

11. In compliance with the original court order the respondent transferred Property B to the applicant.

12. The applicant applied pursuant to s. 22 of the 1996 Act to vary the order of the Circuit Court of the 23rd June, 2010, which was refused in October, 2012 and that refusal is the subject of this appeal.

13. Paragraph 12 of the terms of settlement supersedes paragraph 2, as the applicant was in default of the lump sum payment. The order for sale pursuant to s. 19 of Property A was activated.

14. Pursuant to the provisions of s. 22 of the 1996 Act, it is not open to the court to vary an order made pursuant to s. 19 of the Act.

15. The only remedy open to the applicant is in accordance with the principles set out in the High Court judgement of *N.F v. E.F (Divorce)* [2008] IEHC 471, [2011] 2 I.R. 100. Abbott J. stated at p. 108, para. 7:-

> "In an extreme case, as in orders following a dispute on a contract or specific performance, it may arise that performance of the contract, or compliance with the order, is impossible, and it may well be that the discretion of the court would dictate that notwithstanding non-compliance by the defendant with the order, he would be discharged from his obligation to comply therewith without the risk of being in contempt of court."

16. Abbott J. then went on to prescribe the test to be applied. He stated at p. 109, para 8, of the judgement:-

> "If circumstances prevail during the course of the execution of the order whereby the circumstances of the case have fundamentally changed through a dramatic and unforeseen drop in property values, short of the impossibility of a sale of some crucial asset available for the provision in the order then, on the test of *Thwaite v. Thwaite* [1981] 3 W.L.R. 96 there may be circumstances where the court might not enforce that part of the order relating to the sale of such property unless alternative arrangements may be made for provision to ensure the balance and symmetry of the order previously made. However, the test in *Thwaite v. Thwaite* [1981] 3 W.L.R. 96 that it would be 'inequitable' to enforce the order in circumstances prevailing at the time of the application may be so general and neutral as to be misunderstood, and I would prefer the application of the test posited by me in my judgment in *A.K. v. J K. (Variation of Ancillary Orders)* [2008] IEHC 341, [2009] 1 I.R. 814, in the following passage at pp. 822 to 823:-
>
> > '[14]... hence I conclude that the test as to whether a change, or changes, in circumstances ought to ground a strategic application going outside the limited circumstances envisaged by s. 18 [of the Family Law (Judicial Separation) Act 1989], should be that ("other things" being equal) if they are of such a fundamental nature that it would be unfair and unjust to ignore such change or changes. The "other things" to be considered before this necessary condition for a further strategic order to be made after a separation order may be made sufficient, must, I conclude, be guided by the statutory framework set out in the provisions of s. 16(1) and (2), with the final overriding test of fairness and justice contained in subs. 5.'"

17. Abbott J. then went on to say at p. 110, para. 8:-

> "As the court has no power to appeal itself or reverse itself, the court should, in the case of an executory order, be careful to ensure that, insofar as the circumstances of the case allow, the original intent, balance and symmetry of the order are maintained, while at the same time adopting whatever changes and adjustments in provision are necessary to ensure fairness and justice.
>
> > Along the lines suggested in my judgment in *A.K. v. J.K. (Variation of Ancillary Orders)* [2008] IEHC 341, [2009] 1 I.R. 814, the question as to whether there would be any change in the provision and the nature thereof depends not only on the necessary condition of a change of circumstances or of execution arising so as to make it fundamentally inequitable to seek to enforce that part of the order but also that, the sufficient condition of the appropriateness of altered provision is met. I consider that while the court has a large discretion in relation to the course it might adopt in relation to this matter, it is not at large, - as the Act of 1996 and the Constitution of Ireland 1937 apply to provision no matter how or when it is made."

18. In *D.T v. C.T (Divorce: Ample Resources)* [2002] 3 I.R. 334 at p. 336, para. 6 of the head note of the report, it is stated:-

> "That neither the Constitution nor the law expressly envisage the concept of financial 'clean break' between the parties to divorce proceedings. However in appropriate cases, in particular ample resources cases, a clean break could be affected by the use of a lump sum order to achieve proper provision in all the circumstances of the case. Such an approach was consistent with the legal principles of certainty and finality and discouraged further unnecessary litigation between the parties".

19. In assessing the applicant's motion for relief it is appropriate to consider what was agreed by way of a division of the assets and their value. The family home was valued as of the 10th June, 2010, at €850,000. The capital value of the mortgage outstanding as at the 25th May, 2010 was €400,000. Property B was then valued at €375,000 and the property at Property A was valued at €200,000, a total valuation for both properties in S of €575,000.

20. Taking into account the total lump sum ordered of €200,000 the net value of the respondent's share of the property assets in the original court order was €650,000.

21. Taking into account the valuations of both properties in S and the transfer of the lump sum of €200,000 to the respondent, the applicant's net value of the property assets was the sum of €375,000. In percentage terms in respect of the gross estimated value of the three properties minus the mortgage, the applicant received 36.5% of the net property assets and the respondent received 63.5% of the net property assets.

22. If the court were to affirm the terms of the original settlement based on present day values of €750.000 for the family home, €299,500 as the sale price of Property B, and €100,000 as the valuation of Property A, then the net allocation of the property assets to the parties would be €455,000 to the respondent and €199,500 to the applicant. This is an apportionment of 73.4% of the net property assets to the respondent and 26.6% of the net property assets to the applicant, which is, effectively, a transfer from the original Circuit Court order of 9.9% from the applicant to the respondent.

23. The court is obliged to balance the rights and actions of the parties. From the respondent's perspective the following facts are relevant.

(a) The applicant entered into terms of settlement with the respondent in the course of the Circuit Court proceedings, which were accepted in good faith by the respondent who abided by the terms of settlement.

(b) To ensure as much certainty as possible a specific clause was entered into the terms of settlement at para. 12, that if default on the lump sum payment arose a default provision would be a s. 19 sale of Property A with the lump sum balance being discharged from the net proceeds of sale.

(c) In para. 24 the applicant acknowledged that "the parties hereby agree and acknowledge that the terms herein constitute proper provision for each party and that they are intended to be in full and final settlement of any present or future financial or property claims which either of them may have against each other".

(d) As well as risks for the applicant in the fall of the property values in S, the respondent also assumed risk in indemnifying the applicant fully in respect of the mortgage and assuming the risk of a decrease in the value of the family home.

(e) At the time of the conclusion of the terms of settlement on the 23rd June, 2010, property values were already uncertain and had been falling since 2007, and the economic outlook was unpredictable.

(f) The terms of settlement which were approved by the Court as proper provision envisaged a substantial reallocation of the net property assets of the parties as already set out herein of63.5% to the respondent and 36.5% to the applicant.

24. From the perspective of the respondent the following facts are relevant.

(a) The value of the two properties in S fell by the sum of €175,500.

(b) His income as an architect has fallen considerably.

25. In exercising the discretion vested in the court, when an order is in the process of execution, the court applies the test set out in *N.F. v. E.F.,* referred to herein at paras. 15 to 17.

26. Whilst always being conscious that there is not a clean break in divorce or separation proceedings, the legal principles of certainty and finality in litigation should not be disregarded in family law litigation.

27. This case was one in which the facts disclosed an intention of a clean break. The parties' three children were all no longer legally dependant. Neither party was seeking periodic maintenance from the other. There was to be no formal pension adjustment order except the contingent liability, which was preserved for each of the parties. The intention of the parties as reflected in the settlement agreement, which was entered into by both with legal advice and all assets disclosed, was a reallocation of the net property assets of the parties.

28. This court is conscious of the difficulties facing the applicant, including the substantial loss of his income and other financial difficulties.

29. The terms of settlement were very carefully drafted to deal with default. If this court acceded to the application to vary, one would have to say that certainty of any sort in family law litigation would be impossible to achieve.

30. The court also finds that the applicant has not gone far enough to establish that the test in *N.F. v. E.F.* has been met. In particular in this case, the applicant freely acknowledged in the terms of settlement, which were approved by the Circuit Court as proper provision, that in default of the lump sum payment there would be an automatic default provision of a sale of Property A, pursuant to s. 19 of the 1996 Act.

31. This Court cannot accede to the application to vary, even though it would seem somewhat harsh on the face of it not to do so.

32. The Court affirms the order of the Circuit Court of the 17th October, 2012.