

THE HIGH COURT**FAMILY LAW****[2004 No. 63 M]****IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996 AND IN THE MATTER OF THE FAMILY LAW ACT 1995****BETWEEN****E. S.****APPLICANT****AND****B. S.****RESPONDENT****JUDGMENT of Mr. Justice Abbott delivered on the 23rd day of April, 2010**

1. This application was made on behalf of the respondent to prohibit the applicant from disclosing an affidavit and certain internal memoranda of his solicitors in relation to the mortgaging of a property by the respondent with the bank, who is the notice party to the proceedings but currently taking no part in them, on the grounds that the notes and memoranda constitute advice to the respondent by his solicitors and are thus, subject to legal professional privilege. The respondent alleges that any disclosure of the affidavit would be in breach of the implied undertaking not to use same outside the scope of the proceedings in which the said affidavit was made as an affidavit of discovery.

Background to the Application

2. The background to the application arises as follows. The proceedings herein commenced as divorce proceedings; the summons having been issued on the 7th September, 2004. The proceedings were settled between the parties on the 11th June, 2007. By order dated the 11th June, 2007, the High Court granted the applicant and the respondent a decree of divorce pursuant to s. 5(1) of the Family Law (Divorce) Act 1996 and orders were made according to the terms of the settlement executed by the parties on the 11th June, 2007. The High Court accepted that the terms of the settlement constituted proper provision for the parties hereto and accordingly granted a decree of divorce to the parties.

3. The said order of the High Court made the 11th June 2007 provided that the respondent was directed to transfer to the applicant the entirety of his legal and beneficial interest of the premises and contents of the property known as H.P. it being valued at €2.2m together with the benefit of the existing rental income of €42,000 per annum, free from encumbrances, on or about the 15th February, 2008. The order further directed that the respondent was to pay to the applicant a lump sum of €550,000 on or before the 15th February, 2008. The applicant claims that the respondent represented to the applicant that the respondent needed time until the 15th February, 2008, in order to remove the €800,000 mortgage attaching to H.P., and to raise (presumably by borrowing) the further sum of €550,000.

4. The respondent failed to transfer H.P., and failed to pay the sum of €550,000 by the appointed date or thereafter. The applicant brought an attachment and committal notice of motion to enforce the said order in respect of H.P. and the payment of €550,000 returnable for the 4th July, 2008. The respondent provided a replying affidavit which was sworn on the 24th July, 2008 and an order was made by the High Court on the 25th July, 2008 granting the respondent an extension until the 1st October, 2008 within which to transfer H.P. in accordance with the divorce decree and to pay the said sum of €550,000. The motion for attachment and committal was adjourned to the 31st October, 2008. As a result of averments contained in a supplemental affidavit filed on behalf of the respondent, sworn on the 30th October, 2008 the applicant claims that she became aware that the respondent had substantially re-mortgaged the H.P. premises before the order of the High Court of the 11th June, 2007, had been made. The respondent claimed that he had increased the mortgage on H.P. by €640,000 in order to provide funds for the re-development of S.A..

5. The High Court made an order on the 31st October, 2008, granting inspection facilities to the applicant's solicitor of the conveyancing files held by the respondent's conveyancing solicitors (hereinafter referred to as "the conveyancing solicitors") relating to the properties at S.A. and H.P. and to any loans made by the bank in relation to the mortgages attaching to these properties. The respondent consented to these orders being made.

6. Additionally, the said order of the 31st October, 2008, granted liberty to the applicant to issue a notice of motion returnable for the 4th November, 2008, seeking to set aside the mortgages or mortgage made by the respondent in favour of the bank on H.P..

7. The respondent furnished a further affidavit in respect of the notice of motion seeking to set aside the mortgage on H.P. against the bank; this affidavit was sworn on the 4th November, 2008. In this affidavit the respondent claimed that he needed the additional funds, being proceeds of the top-up mortgage of H.P., to develop S.A., however; the applicant's representative inspected S.A. following a direction from the court so to do and claims that it was established that no works had been carried out on the property known as S.A..

8. An order was made on the 4th November, 2008, by this Court granting the applicant's solicitors liberty to inspect the conveyancing files of the conveyancing solicitors relating to S.A. and H.P. (among other properties). Inspection was also granted in relation to files of the insurance company concerned. The respondent consented to these orders and to other orders made at that time in relation to the furnishing of documentation.

9. On the 7th November, 2008, upon hearing the notices of motion dated the 3rd November, 2008, 5th November, 2008 and the 20th June, 2008, the High Court ordered that the applicant should have further inspection relating to relevant matters concerning the sale

referred to in para. 3 of the notice of motion, that the bank should have access to the affidavits filed in respect of the notices of motion and that the in-camera rule would be lifted to facilitate the inspection process. The respondent consented to this order.

10. By notice of motion dated the 6th April, 2009, returnable for the 23rd April, 2009, the respondent seeks to vary the order, being the divorce decree of the 11th June, 2007, which motion is grounded on the affidavit sworn on the 17th April, 2009. On the 23rd April, 2009, M.D., solicitor from the conveyancing solicitors, attended court and sought liberty to file an affidavit and on the 19th May, 2009, and the respondent by letter consented to M.D. providing this affidavit to the court, such affidavit being sworn on the 20th May, 2009. At all times it appeared that it was the intention of the applicant to pursue her claim against the respondent and the bank to have the top-up mortgage on H.P. set aside and for that purpose, the applicant proposed to serve the affidavit of M.D. of the conveyancing solicitors on the bank. The respondent has objected that to do so would be a breach of legal professional privilege and a breach of the implied undertaking to the court by the applicant for an affidavit of discovery in the nature of the affidavit sworn by M.D. in relation to the involvement of the conveyancing solicitors in the top-up mortgage transaction.

The Facts

A. The conveyancing solicitors were not the solicitors acting for the respondent in the divorce proceedings. The separation of legal representation in this way is quite common in family law cases, as sometimes quite complex transactions are involved on the conveyancing-taxation-corporate end of the a respondent's business, and the family law solicitors dealing with the divorce proceedings may not have the historical familiarity with or, indeed, the expertise in relation to these complex matters to confidently or efficiently deal with same. This duality of representation does, however, give rise to problems in family law cases, especially in the area of conveyancing in the run up to the disposal of the case and, indeed, subsequently during the course of the execution of the divorce decree. These difficulties arise by reason of the care which is required to ensure that a proper title to any property conveyed by a respondent is given to a purchaser and to ensure that no interest in land is conveyed or transferred in a way which tends to defeat the interest of an applicant therein, arising by virtue of the existence of the proceedings, or by virtue of the Family Home Protection Act, 1976. There are also difficulties in the lead up to a court hearing arising from difficulties in disclosure insofar as the family law solicitor in many instances is not in a position to obtain details of the title and, extent of property held by reason of the fact that the solicitor acting in relation to conveyancing and other matters is bound by legal professional privilege of confidentiality and would not, without the express authorisation of the client or order of the court, reveal these details to the family law solicitor. This difficulty has been met many times by the High Court during the course of case management in family law cases by the making of an order directing the respondent to expressly authorise the second solicitors, acting in the conveyancing and other business matters, to disclose to the family law solicitors all relevant matters on the basis of the standard of disclosure required by the family law case management practice direction. These orders have never been challenged, and it may well be that in the future a practice direction, or perhaps even amended solicitors regulations, might bring about the same effect on a general basis without the necessity for separate court applications to be made. The production of the affidavit of M.D. of the conveyancing solicitors was, in every respect, on the consent of the respondent.

B. The affidavit of M.D. discloses certain internal memoranda in the office of the conveyancing solicitors dealing with issues as to whether the top-up mortgage was permissible in circumstances where divorce proceedings were pending between the respondent and the applicant, and in circumstances where the conveyancing solicitors were not put in possession of the full details of the family law proceedings, either by the respondent or the respondent's solicitors. (It must be remembered that the respondent's solicitors, in the absence of specific authorisation from the respondent, are similarly hampered in relation to the extent to which they may disclose the details of the family law proceedings to the other solicitors, not only on the basis of the constraints of legal professional privilege but also, the in-camera rule).

C. The conveyancing solicitors were also the certifying solicitors for the purpose of certifying the title to the bank.

D. The applicant seeks execution of the divorce decree and the respondent seeks alteration of the divorce decree in the course of execution.

E. Regardless of determining other issues in relation to whether the court was, prior to the decree of divorce, misled in relation to factual matters, the respondent misled the applicant and the court in relation to the non-existence of the top-up mortgage on H.P. prior to the signing by the parties of the of the consent to divorce proceedings which was the basis for the issuance of the Divorce order of the court of 11th June, 2007.

Considerations

11. I accept on the authority (among others) of the case *Greencore Group Plc. v. Murphy* [1995] 3 I.R. 520 and, *Ambiorix Ltd. v. Minister for the Environment (No. 1)* [1992] 1 I.R. 277, that there is a rule based on public policy that a party obtaining the production of documents by discovery in an action is prohibited by law from making any use of any description of such documents where the information contained in them, otherwise than for the purpose of the action, and that to go outside that prohibition is to commit a contempt of court. However, in this case I am satisfied that this prohibition does not extend to the production of, and disclosing of an affidavit of the respondent's solicitors in relation to the mortgaging of the property with the bank, notice party to the proceedings for the following reasons:-

1. The conveyancing solicitors were solicitors certifying the title to the bank as well as conveyancing solicitors for the respondent. Such advices and internal memoranda as were produced in this work were, therefore, common to both bank and respondent and I cannot see any public policy reasons why in litigation, such as these family law proceedings (where the bank is to become an active notice party) that it should not have the benefit of sight of such discovery and disclosure.

2. I do not accept that the production of the affidavit and other material to the notice party bank comes within the prohibition of the implied undertaking in relation to obtaining documents on discovery by reason of the fact that, these proceedings relate to the execution of a divorce decree between the applicant and the respondent made pursuant to the Divorce Act 1996, and the provisions of the Constitution where the bank has been joined as a necessary party pursuant to the legislation and the Rules of the Superior Courts, therefore; it is in the interests of justice to ensure that proper and full disclosure would be made between all parties, and no claim of public policy should prevent this.

3. In view of the family law practice directions past and present, having regard to the conclusions of this Court in the

case W. v. W., [2008] IEHC 452 providing for full disclosure of assets and all vouching documentation in relation thereto, it is not justifiable for the respondent, who was a party in a contested divorce proceeding until settlement herein and now a party seeking alteration of that settlement in the course of execution and pursuant to all legislative provisions available to him, to seek to obfuscate and hinder proceedings by incorrectly relying on either legal professional privilege or the implied undertaking.

Privilege

4. In order that the conveyancing solicitor gave disclosures and made an affidavit the respondent expressly or implicitly waived his legal professional privilege *viz-a-viz* the applicant. I am satisfied that this waiver would not be sufficient to enable such matters to be disclosed to the bank notice party, however; as the documents and internal memoranda relating to conveyancing aspects of the property in the area of family law legislation and proceedings are not privileged by reason of the fact that the respondent's solicitors, in effect, acted jointly as the bank's solicitors insofar as they were certifying title for the bank. As such certifying solicitors, they had an equal obligation to disclose to the bank their internal memoranda regarding family law aspects of the conveyance, as much as they were so obliged to disclose to the husband.

12. Accordingly, I dismiss the respondent's application.