NEUTRAL CITATION: [2012] IEHC 621

THE HIGH COURT

[2006 No. 56 M]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996,

BETWEEN:

M. O'B.

APPLICANT

AND

B.O'B.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 20th day of January, 2012

1. This judgment relates to the enforcement and adjustment in the course of execution of a decree of divorce made between the parties on the 18th December, 2008.

2. The applicant wife and the respondent husband were married to each other on the 28th July, 1980. They shall hereinafter be referred to as the husband and wife. They had three children, the first daughter born on the 28th September, 1981, the second daughter born on the 17th December, 1984 and a son born on the 15th December, 1992. Of the children, the son is dependent still and is in third level education.

The Decree

3. The decree was made as a result of a settlement and the order setting out the details of the decree and settlement is appended hereto appropriately redacted . The discussion in this judgment centred around the main facts that the divorce settlement left the parties holding property which they had in their own names, and importantly allowed for a lump sum of €350,000 to be paid to the wife on or before the 1st February, 2011, from an account in the Nationwide Building Society, maintenance of €45,000 per annum, pension adjustment orders in respect of several pensions the total value of which then was somewhat over €300,000 to be made, an adjustment order making over the entitlement to the pensions to the wife, and blocking orders under s. 18(10). Even though the parties had not been particularly well off, this Court noted when ruling the settlement that the case was not an ample resources case but nevertheless was satisfied to rule a "full and final settlement" clause, subject to parties having a right to have maintenance varied, as being part of the provision, and, as having a significant value as an intangible to the parties.

Unravelling of Settlement

4. The matter soon came back into court, the parties still being represented by senior counsel but with wife taking a different approach from her legal team. There were two problems relating to the non-payment of €350,000 to the wife. This payment was in many respects the "jewel in the crown" of the settlement. The first reason appeared that the wife objected to her solicitor taking her legal costs out of the sum of €350,000, and distanced herself from her solicitors on that aspect. Since then (as a result of the variation hearing and on reading extensive papers in the case) this Court has found that the wife had been significantly prompted during this period by the husband, as indicated by his numerous emails, to take issue with the amount of fees which her solicitor was charging, and to demand a "s. 68" statement from her solicitors. He added that she had a right to complain about her solicitors to the Law Society if such s. 68 notice had not been given to her. Her husband certainly was, despite the terms of the settlement ruled in court, at least giving the wife the choice as to whether she was going to receive the money from him personally or via payment by him to her solicitors in accordance with the settlement. Having sown the seeds of instability in this way, the husband however ultimately was prepared pay over the €350,000 in any circumstance, but the wife ultimately opted for payment to herself personally. This prompted the husband to insist on waivers and indemnities being signed in relation to the handing over of title documents which he had to some of the wife's property and to some other formalities to be carried out by the wife. Such waivers were in the back page of the settlement but the wife's senior counsel in later addressing the court did not rely on this express provision leading me now to the view that the wife was not fully advised of her clear obligations when she began to show signs of recalcitrance on the issue. An impasse developed and the €350,000 was not paid. Ultimately the wife's solicitors were allowed to withdraw from the case by the court, as it had become obvious that the wife had discharged them.

5. It must be remembered that by the end of 2008 and moving into the new year of 2009, the beginning of the Irish and then World financial crisis had developed and this began to have ramifications for the income and property values of the parties. As the impasse in relation to the payment of €350,000 by the husband to the wife in accordance with the settlement continued, eventually counsel for the husband, indicated that the husband had financial difficulties. This Court has no doubt that the €350,000 would have been paid to the wife had she not engaged in the grand standing exercise over her solicitors taking fees from the sum to be paid, and then unreasonably refusing to sign the waivers. This conclusion does not really cast full light on the problems which emerged between the parties, as the developing financial crisis rapidly became a more substantial factor in the case than any problems arising from the recalcitrance or grand standing of the wife (which had been sometimes prompted by the husband's conspiring attitude against the deduction of fees by her solicitors from the lump sum). Ultimately, the husband's solicitors and team of counsel withdrew having no instructions and the parties continued to appear before the court on a regular basis, the wife insisting on payment and the husband pleading her lack of co-operation and his inability to pay. Eventually the husband initiated a variation application which the court has taken as a variation during the course of execution and, in accordance with the practice, this Court considers that it is at large in relation to ensuring a just and equitable solution, having regard to the changed circumstances.

Disclosure on the Variation Application and Attempted Parallel Divorce Proceedings

6. Although the husband has good insights in relation to these matters, it took very serious persuasion on the part of the Court, and even threats of committal for contempt, to persuade the husband to set out, and swear an affidavit of means and then vouch same. Disclosure by the wife in response was not perfect, but was, indeed, a good deal better. This slovenliness in relation to disclosure and vouching reflected the position when the matter came first before the court as a divorce action, as the transcript on the 15th

December, 2008, would show, where the case had come put before the court (supposedly ready for hearing when the parties were still finding and disclosing bank accounts which had not appeared hitherto) and in a situation where the husband had only recently authorised his lawyer legal representatives in a foreign country [hereafter; the "F.C.") to withdraw his divorce proceedings in the F.C.

The Wife's Case
7. From the outset the wife submitted to the court that the settlement ought to be set aside in its entirety by reason of the lack of disclosure by the husband. In particular, she focused on the existence of land in the FC owned by the husband which he had not disclosed in the proceedings (this was not strictly accurate as there is a record of this land, but the husband never seems to have admitted having an interest in it). She also challenged a number of six figure sum dispersements from his bank account, which was fast diminishing notwithstanding a freezing order of the court. She also alleged that the husband had not disclosed his income from his regulated business [hereafte;r the "R.B."), and made numerous other complaints about other matters. It must be remembered that the case came on for hearing with the benefit of two forensic accountants' reports, one for each side. There was a certain amount of disclosure given on both sides in respect of such forensic accountants reports so the wife had a good deal of material already from which to launch new attacks on the husband. Ultimately, the wife's first ground of attack was the allegation of the husband's beneficial interest in the property in the foreign country [hereafter; "N.5.I.F.C." (No. 5 in foreign country)]. The husband's affidavit of means and disclosure did not admit any beneficial interest in N.5.I.F.C. and his clarifications to the court in the course of case management indicated that there was, in fact, a N.5.I.F.C. in respect of which he was registered in the F.C. as joint owner with his mother, but he explained that his mother (who had been from the F.C.) became involved in an activity which seemed to her to require a vow of poverty and hence, she decided to conceal N.5.I.F.C. by way of transfer to her son (the husband). The wife also alleged that the husband had paid a sum in the region of €140,000 to his brother which ought to be recovered as an asset available for provision in the proceedings. The wife also produced correspondence which showed that a wealthy relative of the husband had recently died having made a last minute codicil to his will cutting off the husband from his inheritance in the will. She said the relative had a shaky hand, but the signature on the codicil was steady, therefore she claimed the codicil was a forgery.

The Husband's Case
8. The husband ultimately set out his position that he had taken on all of the debt of the family and had left the wife with a number of properties, including the family home which was essentially debt free, and that she also had a number of cash rich bank accounts in addition to an entitlement to an apartment registered in the first daughter's name (the funds having been provided in cash by the husband). He claimed that his income had declined from approximately €160,000 per annum to €66,000 as his RB accounts would show, the rents from the building which he valued at €1.2M where he carried on his RB, had declined due to loss of tenants and reduction of rents. He made an open offer which in outline involved non-payment of lump sum and reduction of maintenance consistent with his income.

9. After much case management of the variation application (which was now being conducted by the two personal litigants against each other), the matter came on for hearing. At the conclusion of that hearing and having regard to the multiple discussions, challenges and counter challenges which took place between the parties in what might be described as the case management run up to the hearing, the following facts emerged:-

> 1. The main income of the husband has been from his R.B., This (during the good years leading up to 2008) was very substantial. While the husband sought to reduce his income down to the level of activity from professional activity in his RB, the court queried him in relation to income arising from interest and other benefit from a regulated dedicated account (hereinafter referred to as the "RDA") in his RB. While he disputed that this was actually income at all, eventually he conceded that it was so related and would relate in the future primarily to interest which he was legitimately allowed to recover in respect of certain balances in the R.D.A. subject to very rigid regulation. His professional body (hereinafter referred to the "P.B.") had been alerted to unsatisfactory accounting in his R.D.A. and would henceforth be keeping a watchful eye on it. He did accept eventually that this income was in fact income but stated that the P.B. required contingency sums to be kept for claims, redundancy of staff and the like and required a certain degree of solvency within the R.B., and that this income while taxable would not be all regarded as disposable income. He also conceded (as apparent to the forensic accountants before the settlement) that he had used the R.D.A. in an inappropriate manner by accumulating net turnover which should have been drawn down to another business account which would have had the effect of not showing the true position of the business and how well it was doing, not only to the P.B. but also to the Revenue Commissioners. One particular aspect of this inappropriate accounting related to the fact that his mother (now 93) had an account in the R.D.A. to which the net turnover of at least ten separate customers had been credited without further processing. There was no suggestion that his mother had anything to do with this and it was obviously highly irregular, the court will deal with its significance later in this judgment. Notwithstanding the irregularities, This Court is satisfied that the husband in relation to his customer base, past and potential, will be regarded as an honest and skilled operator with integrity and subject to the downturn of the economy will continue to attract and keep a certain clientele which will ensure the continuation of his R.B. However, the income from the RB, having regard to the further economic devastation suffered in the economy, will hardly be able to sustain by itself the requirement of even the reduced maintenance envisaged by the court on this variation and the requirements of maintenance for the husband himself and now an infant child which he has fathered with another woman. This young child is about commencement of school going age.
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> 2. The Accounts of the husband of the ownership and tenure of N.5.I.F.C. were numerous and inconsistent. From his first explanation noted above, the wife drew the attention of the court to a handwritten amendment in his forensic accountant's report finalised before the settlement (which had not been seen prior to the settlement by the court) showed the valuation of €250,000 for N.5.I.F.C. and that she had made searches on the internet in relation to comparable properties in the neighbourhood in the F.C., and that the valuation of the property now was more in the region of €900,000. Quite extraordinarily the husband, apparently at the request of one of the siblings (with whom the husband had a complex financial relationship) effected a transfer from him and his mother to himself and his siblings of N.5.I.F.C. When cross examined about this, he candidly admitted that he had done so in the light of the marauding attitude of his wife and the fact that he regarded himself as holding the property in trust for the family - his mother while she was alive - and then as his mother would direct for the siblings. This Court must say that it has severe doubts about the credibility of this story and the court strongly suspects (as the court has indicated throughout the case management on the hearing) that if a court in the F.C. were to determine the matter it would decide that the property was indubitably that of the husband. This suspicion is strongly reinforced by the fact that in the R.D.A. a number of years ago the mother was credited with money which arrived through business done with ten or more individuals, and given the nature of the R.D.A., there was an ideal opportunity to siphon the money into the name of the mother from which property could be bought anywhere in the world without attracting the gaze of the Revenue Commissioners or any regulatory authority. This view is to be taken in the light of the allegations of the wife that the mother had spent all her money in educating the husband and his siblings and in the light of the counter argument from the husband that the mother had been from F.C., that her people were well

off and that his brother had managed investments for her without being specific, not to mention having any documentation in relation to these matters, and notwithstanding this whole issue had been contentious almost from the collapse of the settlement.

3. At first sight it could be suggested (as the wife did suggest) that the court (even if it could not effect a sale and recovery of this asset in F.C. as a matter in *rem*), could direct an order in *personam* against the husband to do so, or, alternatively, could take into account the value of this asset as a potential replacement for the lump sum of €350,000 and direct a property adjustment order or charge in respect of some of the existing Irish property. This Court does not accept this view for the following reasons:-

(i) The court suggested to the wife that the mother would be joined (and by extension of this suggestion now the siblings) but the wife notwithstanding several promptings by the court did not take this course.

(ii) While at first glance the transfer of N.5.I.F.C. into the siblings name, during the course of the variation application, seems to be an appalling contempt, the action may have indirect benefits for the husband in his P.B. through improving and maintaining relationships with his siblings and their networks from which he seems to have had a particular business benefit over the past number of years, and also will ensure "a foot in the door" to F.C. as a destination for business or emigration for the husband or his family in times when F.C. is prospering and this country is in recession.

(iii) The existence of several accounts disclosed in the F.C., do not show the mother or, indeed, the siblings getting any benefit out of N.5.I.F.C., as the outlay involved almost submerges the rent being obtained therefrom.

Having regard to the foregoing, this Court considers that on balance it is safer not to take the value of N.5.I.F.C. into account in the proceedings, at least without joining the 93 year old mother (a course which the wife was ultimately resolutely against). This Court considers that in the final resolution of this issue the wife sees the subtle benefit of the existence of N.5.I.F.C. in its ambivalent state, and no doubt would have regard to the interests of her children none of whom have absolutely settled down to the stage where they could rule out the benefit of a short stay or permanent emigration to F.C., where it would be of particular benefit to be related to a person who not only has citizenship of F.C. but also has property in respect of which they are registered in F.C. While the wife has not pressed home a possible advantage as suggested by the court in relation to N.5.I.F.C., she has nevertheless got some benefit from intensively canvassing and probing the present status of N.5.I.F.C. to the extent that she has shown that, (true to his form prior to the settlement on the 18th December, 2008), the husband continues to have ambivalence in relation to describing and disclosure of assets and has little credibility or dependability when dealing with his family. This conclusion, of course, is reinforced by an analysis of his history on the R.D.A. account and its investigation by the P.B. official and by his regular disclosure default in the case and ability to engage in little tax avoidance schemes for example:- involving his children apparently without their knowledge.

10. In view of the foregoing conclusions and general conclusions in relation to the ambivalence if not downright undependability of the husband, there should be a stay on any blocking order pursuant to s. 18(1) in the existing settlement, at least until the wife's pensionable age of 65. This applies regardless of whether the life policy, of €200,000 until age 65, is in place or not (I have not seen it) as experience has shown that unless such policy is a single premium policy (which this Court doubts), providers tend to stop payment of same and hence, loose the benefit of the policy whenever they are in difficulty about maintenance or unilaterally stop payment of same. Although the parties stopped cohabiting in 1996, they continued to contribute to the family. The parties generously purchased a property for daughter No. 1 in the city. A loan was obtained for that purchase but was not used for same and it is not mortgaged. The husband has suggested that it may be part of the wife's property but the court consider that it would be very difficult to prise that property from the first daughter as it appears to be an outright gift from both of them. Again, the papers show that the husband did not always take this view that it really is the parents' property, and was an enthusiastic supporter of an outright gift. The settlement obviously reflected the contribution of the wife in the home – she was made redundant from her secretarial job in 1984 and remained at home to rear the children – and the award of the lump sum together with generous maintenance leaving the wife's own property, including the family home, in her ownership reflected a structure that was common until recently whereby the provider with the R.B., capable of generous cash flows, would retain the business and the risk attached to it together with the debt.

11. Since the recession has bitten, a new model must of necessity replace this. In addition, by reason of the decision of the Supreme Court in *Y.G. v. N.G.* [2011] 3 I.R. 717., this Court is less obliged to take a distributive approach which tends towards equality and crowding out the other statutory considerations in s. 20 of the Act of 1996. One of the dicta in the judgment of Denham J. in YG. v. NG. relates to the requirement that stewardship ought to be considered as a factor. In this regard it impresses me that, while the wife has always owned a piece of unused property at B. of almost seven acres valued variously between €200,000 and €2.7M, it emerges that over the years there have been encroachments by one or, perhaps even two neighbours. There have been mealy mouthed efforts made by the wife to either eject them, agree new boundaries or otherwise establish and maintain the boundaries of a plot of land which will have some value (and possibly should have been sold in the good times). The wife must now realise that for the time being the good times are over, and, while she is entitled to reasonable maintenance on a reduced level, she cannot expect a lump sum by reason of the fact that although he did it in clandestine ways, the husband was obliged to reduce his debt as such debt would be unsustainable given the trends in income generation and asset values both past, present and future. This Court is satisfied that the wife has the capacity to maintain her present standard of living if she gets a job or redeveloped her business. The judgment will contain an order that the husband is not entitled to seek downward review of the maintenance by reason only of the wife trading profitably again in any prior or new business, or engaging in employment for a period of at least three years, as an incentive to the wife to maintain her situation having regard to the new realities of the world. Both parties are in advanced middle age, Their health is not good, (particularly the husband's). He is in need of medication. The present litigation lasting from 2006, no doubt, has frayed their nerves and may have impinged on their health. This Court is satisfied that both of them have a sufficient property base from which to recover lost ground sufficiently, and, with proper care and attention to medical advice, their health will bear up to this challenge especially if litigation is eliminated with the consequent avoidance of unnecessary tension for them personally. This Court must ignore the inheritance lost by the codicil which has now been probated in FC, notwithstanding that the husband conceded that the codicil was probably influenced by the divorce proceedings but that he "could do nothing about it".

12. Consequently, this Court will take the settlement underlying the order already made as a template and deal with in the manner hereinafter appearing. The 1996 Act requires the court to take an overall look at the proposed settlement and to refrain from making the order unless it would be in the interests of justice to do so. It might be argued in this context as to how it could be just to allow the husband, who has been uncooperative with the court, ambivalent, untruthful and otherwise undependable, to get the benefit of this jurisdiction. In answer to that concern the court must consider the jurisprudence which has emerged in relation to striking out the defence of a providing husband. This has occurred in the English and Welsh Jurisdiction and this Court has been persuasively

influenced by the jurisprudence arising therefrom to take that course in one case. However, there have been many others where the threshold proposed for such action has not been met where more egregious and scandalous instances of non-disclosure had occurred than occurred in this case, and yet the court proceeded to make provision as mandated by the Constitution and the 1996 Act. In this context this Court remains mindful of, that while the husband may have been full of intent in many instances to hold onto a position of non-disclosure, he either relented or was frustrated in the attempts and ultimately the court obtained sufficient information to follow its constitutional and statutory mandate.

13. However, the order has reporting requirements and possibilities for charging arrears on property to allow for past lack of co-operation and lack of disclosure. Neither can the full and final settlement clause stand. As has been pointed out by the court before the apparently flexible jurisdiction to vary in the course of jurisdiction demonstrated in practice by the courts many times since the Lehman collapse of 2008, should not be misunderstood as a "rogue's charter". If the husband had paid the lump sum of €350,000 as obliged by court order, the "full and final" requirement would have meant that he could, with comparative ease, succeed in having maintenance reduced without worrying about having other parts of the settlement altered by the order indicated below. In availing of the opportunity of putting property in F.C. beyond the reach of this Court with devices of "colourable" legality, the husband has lost the benefit of a good settlement to be now condemned to work "in the black pool of legal uncertainty" of Irish divorce law, unprotected by what was a good "full and final" order.

Order

14. The following modifications shall be made to the order of the 18th December, 2008:-

1. Delete lump sum of €350,000.

2. Provide for maintenance of wife - €2,700 per month.

3. Husband to provide for son's education, health insurance and college maintenance.

4. The husband shall no longer be responsible for the payment of utilities.

5. Husband shall not be entitled to apply for any reduction in maintenance of wife by reason only of the wife establishing profitable business or employment within three years of today's date.

6. Maintenance to be increased in accordance with the cost of living index every three years.

7. Maintenance to be paid on the same basis having regard to procedures and details as hitherto.

8. All blocking orders pursuant to s. 18 shall be stayed until the wife reaching pensionable age at 68, or earlier date depending upon the wife's entitlement to draw the pension depending on the husband's age.

9. In view of the part of the husband in the conspiracy to frustrate the payment of costs to the wife's solicitors and in view of the reduction in their lump sum and to prevent the wife from being unjustly exposed to costs, the husband shall be liable for the costs of the proceedings on Circuit Court proceedings with a certificate for half senior counsel's fees.

10. Delete full and final settlement clause.

11. Husband shall not increase his indebtedness unless granted liberty so to do by the court.

12. Commencing on the 31st December, 2013, the husband shall furnish every year, Revenue returns and account underlying same together with PB accounts for every second year preceding same and shall instruct his accountant to certify compliance with accounting aspect of this order in a note to these accounts.

13. The wife shall be entitled to effect a charge in respect of arrears of maintenance in excess of €5,000 being due and owing for any period in excess of six calendar months from the due date, and to apply to court for such order as is necessary to effect and enforce same.

14. The parties shall be at liberty to apply to reinstate full and final settlement clause upon agreeing appropriately and reasonable increased lump sum and to have this order changed back to approximate terms of order of 18th February, 2008, within six months of date of this judgment.