

**THE HIGH COURT
MATRIMONIAL**

[2011 No.6 M.]

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

BETWEEN

D. J.

APPLICANT

AND

M. K. J.

RESPONDENT

JUDGMENT delivered this 31st day of July, 2013 by White Michael J.

1. These are divorce proceedings which were heard by the Court on the 10th, 11th, 12th, 13th, 14th and 21st June, 2013, when judgment was reserved.
2. The parties married on the 11th April, 1985 and have two children A, aged 17 and B aged 15.
3. The marriage ended in October, 2006 when the applicant left the family home in controversial circumstances.
4. Judicial separation proceedings were heard before Dunne J. in the High Court on the 8th and 9th June, 2010 and comprehensive orders were made in those proceedings on the 1st July, 2010.
5. The relevant financial provisions of those orders were:-
 - the family home was transferred to the respondent free of mortgage;
 - A periodic maintenance order of €4,167 for the respondent and €833 per month in respect of maintenance of each of the two dependant children making a total maintenance payment per month of €5,833;
 - An order for ancillary health and educational expenses;
 - A lump sum order by instalments as follows
 - €250,000 on or before the 7th July, 2010
 - €135,000 on or before the 9th December, 2011
 - €135,000 on or before the 9th June, 2013
 - €135,000 on or before the 9th December, 2014
 - €135,000 on or before the 9th June, 2016;
 - A pension adjustment order in favour of the respondent;
 - A financial compensation order.
6. The High Court proceedings for divorce issued on the 25th February, 2011. The only ancillary relief sought was a s.18(10) order.
7. In the grounding affidavit sworn by the applicant on the 25th February, 2011 the applicant averred that the orders made on judicial separation were comprehensive settlements of all matters at issue between himself and the respondent and made proper provision for both himself and the respondent together with the two dependant children. The applicant swore an unvouched affidavit of means on the 25th February, 2011.
8. By letter of the 28th April, 2011 Redmond & Co. solicitors for the respondent queried this affidavit of means.
9. By letter of response from McKeever Rowan & Co. solicitors for the applicant on the 29th April, 2011 it was stated:-

"We note with surprise that you intend to revisit all financial issues of this case which was fully adjudicated upon in the High Court in June, 2010. Our client's financial circumstances have disimproved since the date of the previous hearing and the circumstances where he is put to considerable expense to vouch the affidavit of means we will be seeking costs against your client on the basis that the decision of the judge on the day was comprehensive and recent".
10. Notwithstanding this letter the respondent continued to raise financial queries and sought vouching of the affidavit of means.

11. By letter of the 13th October, 2011 McKeever Rowan solicitors wrote to Redmond & Co. solicitors stating:-

"In addition our client's accountant has recently advised us that due to the economic downturn, the company has lost significant monies in the past two trading years. The value of the business has plummeted, the underlying core value of the properties has diminished further, in circumstances where they are now in significant negative equity and in these circumstances our client is considering his position and has instructed us to formally amend our pleadings to seek significant alterations in the order of the High Court of the 1st day of July, 2010".

12. By notice of motion of the 1st December, 2011 returnable for the 9th December, 2011 the applicant pursuant to s.22 of the Family Law (Divorce) Act 1996, sought to vary the orders of the court in the judicial separation proceedings and sought an amendment to the special summons to reflect this application.

13. This motion was grounded on the affidavit of the applicant of the 30th November, 2011 setting out certain changes in his financial circumstances. The court permitted the amendment of the summons by order of the 13th January, 2012.

14. The instalment of €135,000 due on the 9th December, 2011, was not paid by the applicant.

15. In a replying affidavit to this motion filed on the 9th February, 2012 the respondent averred at para.7 of her affidavit "that the orders made in the judicial separation proceedings do not make proper provision for your deponent or for the two dependant children and accordingly I pray this Honourable Court to refuse the relief sought in the Special Summons herein". At para.23 the respondent sought comprehensive orders in the divorce proceedings. In the substantive hearing before this court the respondent sought only to maintain the existing orders.

16. The respondent was not prepared to agree to an order for divorce and a s.18 (10) order, but was seeking to reopen the issues of provisions made in the original judicial separation proceedings.

17. It subsequently came to the attention of the respondent that the applicant intended to purchase a dwelling house, even though he had not discharged the instalment order due on the 9th December, 2011. He had been living in rented accommodation.

18. By letter of the 3rd February, 2012 from McKeever Rowan solicitors to Redmond & Co. solicitors the applicant denied that he was purchasing any property

19. By motion of the 5th July, 2012 returnable for the 10th July, 2012 the respondent sought orders pursuant to the provisions of s.35 of the Family Law Act 1995, restraining the applicant from purchasing the property pending the discharge of the monies due by instalment since the 9th December, 2011 together with interest thereon. This application was grounded on the affidavit of the respondent, where at para. 13 she referred to a letter from McKeever Rowan solicitors of the 14th June, 2012, wherein it stated that the applicant had:-

"determined that he must be entitled to provide himself and his children with an appropriate family home, and that he intended to purchase a home in the region of €440,000 together with stamp duty."

20. By order of this court of the 20th July, 2012 pursuant to s.35 of the Act of 1995, the applicant was restrained until the 27th July, 2012, from completing the intended purchase of the property.

21. This aspect of the dispute between the parties was resolved when the applicant agreed to discharge the instalment due together with the interest and the purchase of the property proceeded.

22. By letter of the 3rd September, 2012, in accordance with the directions of this Court McKeever Rowan solicitors set out the source of the funds to acquire the property.

23. From that letter it can be established that the applicant paid a booking deposit of €12,000 on the property on the 26th April, 2012. The balance of the booking deposit of €32,000 was paid on the 6th June, 2012. The balance of purchase monies of €396,000.50 was paid on the 13th June, 2012. Legal fees and stamp duty of €9,244.60 were paid on the 12th July, 2012.

24. The present personal net asset worth of the applicant taking into account estimated legal fees of €123,000 is €2,276,180. The applicant also has a pension valued at €637,530. This is set out in the first schedule.

25. The court accepts the standard practice that the value of assets should include an estimated amount for disposal costs of 3% even though the assets may not be immediately sold. The court is at all times valuing the net assets of the parties.

26. The applicant controls a major company in Leinster. He has provided a personal guarantee to the company "B" Limited the owner of the building from which the company "A" Limited operates.

27. The valuation placed on the net assets of the applicant in the judicial separation proceedings at the 4th June, 2010 was €4,883,496 together with a separate pension valuation of €913,250. That is set out in the second schedule.

28. The Court has treated the investments managed by Davy's as the approximate encashment valuations rather than the current value.

29. There has been substantial reduction in the Davy portfolio and also reduction in the net book value of the companies.

30. The trading company "A" Limited has gone through a difficult period. Its turnover has decreased from €6,806,102 at year end 31st January, 2011 to €5,996,363 to year end 31st January 2013, but while the company has an operating loss for year end 31st January, 2012 of €8,554 the company has returned to profit for year end 31st January, 2013 with an operating profit of €79,000.

31. In the application for variation by the applicant the court is guided by the test set down by Dunne J. in *OC v. OC* [2009] IEHC 248 (Unreported, High Court, Dunne J., 14th May, 2009) which found as follows:-

The spouse who wishes to have ancillary orders reconsidered by the Court must show the following:

(a) That new events had occurred since the making of the order that invalidated the basis on which the order had been

made.

(b) That the new events had occurred within a relatively short period of time after the making of the order.

(c) That the application had been taken promptly, and

(d) That there was no prejudice to third parties who had acquired interests in property in good faith and for valuable consideration.

32. The orders of the court in the judicial separation proceedings have not become unworkable and incapable of implementation. It is a case of the applicant being under much more financial pressure than he was at the time of the judicial separation orders, by reason of the substantial decrease in his investments and the value and trading difficulties of the companies under his control.

33. The applicant still retains considerable net worth. He was in a position to purchase a new residence without a mortgage.

34. Both parties acted unreasonably in the conduct of these divorce proceedings.

35. The court accepts that if the first notice the respondent received of the divorce proceedings was the letter from the applicant's solicitors of the 1st March, 2011, then it was an insensitive start to the process. However due to the proximity of the judicial separation orders of the 1st July, 2010, to the issue of the divorce proceedings on the 25th February, 2011, and in light of the financial provision for the respondent in those proceedings, this court is surprised that the respondent did not before October 2011, consent to a decree of divorce and a s.18(10) order. Some amendments may have been required, for example, security for the lump sum payments and more clarity on the expenses part of the periodic maintenance. Those could have been dealt with, without the need for extensive financial disclosure, and a lengthy substantive hearing.

36. The applicant was justifiably frustrated by the respondent's insistence that there would be further financial vouching after considerable vouching for the judicial separation proceedings.

37. The applicant acted unreasonably in not complying with the order of the court to pay the instalment of €135,000 on the 9th December, 2011, while subsequently expending €449,245 on the purchase of a new dwelling house without a mortgage. This was particularly insensitive because of the circumstances surrounding the breakdown of the marriage.

38. The Court can certainly understand the postponement of the payment in the late autumn of 2011 when the applicant's trading companies were under pressure but certainly when in April 2012, the applicant decided to proceed with the purchase of the dwelling house he had an obligation to immediately discharge the outstanding instalment.

39. Because of the unreasonable actions of both parties they have become involved in more protracted litigation at great expense in this court.

40. This court is reluctant to interfere substantially with orders made after a contested High Court hearing, when the court made comprehensive and fair orders to ensure proper provision, and when the applicant is hard pressed financially, but still capable of complying with the orders.

41. However the applicant is entitled to some variation of the orders, because of the financial pressures on him.

42. The Court will vary the sum of €135,000 due on or before the 9th June, 2013, to €67,500 in consideration of the responsibility placed on the applicant at para.14 (e) of the judicial separation order that he shall be responsible for the educational fees and expenses in regard to the third level education of A and B.

43. The Court will extend the time for payment of the revised instalment of €67,500 to the 1st April, 2014.

44. The court will extend the date for the payment of the following instalment to the 9th June, 2015.

45. The court would like to see some security in place for the instalments due in 2015 and 2016. That may not be possible but the court wishes to hear some submissions on that. The court would also recommend that aspects of the order at para. 14 of the order of the 1st of July, 2010, be more exact.

46. The Court will grant a decree of divorce together with mutual orders pursuant to s.18 (10) of the Act of 1995.