Neutral Citation Number: [2009] IEHC 248

THE HIGH COURT

FAMILY LAW

2007 37 M

IN THE MATTER OF THE JUDICIAL SEPARATION AND

FAMILY LAW REFORM ACT 1989 AND

THE FAMILY LAW ACT 1995

BETWEEN

C. O'C.

APPLICANT

AND

D. O'C.

RESPONDENT

JUDGMENT of Ms. Justice Dunne delivered on the 14th day of May, 2009

The applicant herein brought proceedings seeking a judicial separation commenced by special summons issued on the 23rd May, 2007. The proceedings were listed for Thursday 7th February, 2008, and on that date a settlement was announced to the court and orders were made on foot of the terms of that settlement. I will refer to the terms of that settlement shortly.

The parties herein were married on the 22nd July, 1988, and there were six children of the marriage. The eldest of those children was born on the 20th July, 1989 and the youngest was born on the 26th June, 1998. Of the children the four youngest children reside with the applicant and the two older children reside principally with the respondent.

At the time of entering into the settlement, the parties had a number of properties and the settlement contemplated a transfer of various properties from one party to the other. The family home is a property known as Cluain Ard. There is also a property known as The Rivers. In addition to those properties, the parties were the joint owners of a commercial premises which was held subject to a loan in favour of Anglo Irish Bank Plc. That property was registered solely in the name of the respondent, but it was acknowledged by him that the parties were joint beneficial owners of that property. The parties had a holiday home, known as The Billows. There was also an apartment owned by the parties at The Dell. There was a computer company in which the applicant had an interest as did her parents.

The settlement made provision for the transfer of the various properties I have referred to above. There were also arrangements made in relation to the payment of maintenance and also the payment of a lump sum, I will deal with those matters subsequently.

The principal issues in the hearing before me relate to property adjustment orders made pursuant to s. 9(1) of the Family Law Act 1995. The settlement required the respondent to transfer to the applicant his legal and beneficial interest in the property known as The Rivers to the applicant free of encumbrance. The respondent was to discharge the existing mortgage on that property and to vacate the property by no later than the 1st October, 2008. The applicant was ordered by means of a property adjustment order pursuant to s. 9(1) of the Family Law Act 1995, to transfer to the respondent her legal and beneficial interest in the family home, Cluain Ard. The order provided that the applicant was to have the right to reside in the family home to the exclusion of the respondent until the 1st October, 2008. She was to vacate those premises not later than that date. In addition to those orders, orders were also made directing the applicant to transfer her legal and beneficial interest in the property known as The Billows; the commercial premises; her shareholding in the computer company and she further agreed to procure the transfer of her parents' shares in that company. A declaration was also made that the respondent was the sole legal and beneficial owner of two other properties including The Dell. One of the other provisions of the settlement noted that the applicant was to facilitate the respondent in preparing the family home for sale and she agreed to provide access to the premises and gardens and agreed to the placing of that property on the market. It was also agreed that in the event of a sale, the applicant was to vacate the premises to facilitate the closing of the sale of that property.

As can be seen from the above, it was contemplated that the terms of the settlement would be complete on or before the 1st October, 2008. A key element was the removal of the applicant from the family home to the property known as The Rivers, which property was to be mortgage free.

The applicant has complied with her obligations under the terms of the settlement save for the transfer of the family home. She has transferred her interest in The Billows to the respondent, her shares in the company and she procured the transfer of her parents' shares in the company. The respondent has also had the benefit of the declarations as to his beneficial interest in a number of properties made pursuant to the settlement.

There are some issues in relation to the maintenance required to be paid by the respondent to the applicant and it is also the case that the respondent has not discharged a sum of €20,000 which was to be paid to the applicant by the respondent by way of lump sum payment.

One of the issues that arose at the outset of the hearing before me was whether or not the hearing should take place by way of hearing on affidavit or by way of oral evidence. I indicated at the outset that I would reserve my position in relation to that aspect of the matter in circumstances where neither party had given any indication to the court that the matter ought to be heard on oral evidence and neither party had served notice of intention to cross examine the other party on the affidavits sworn herein. In the event, as the hearing progressed, it became clear that there were less issues of conflict between the parties than might have been anticipated and it seemed to me to be unnecessary to hear oral evidence in respect of the applications before the court save in respect of one issue which I deal with later.

I should briefly refer to the various applications before the court. Three notices of motion were before the court. The first of those was a motion seeking the attachment and/or committal of the respondent for his failure to comply with the terms of the consent order made herein on the 7th February, 2008. That notice of motion was issued by the applicant on the 19th November, 2008. In addition to that relief the applicant sought a number of further orders designed to give effect to the outstanding terms of the settlement. A number of affidavits were sworn by both parties on foot of that motion. A further motion was then issued by the respondent, in which he sought to set aside the ancillary orders made herein on the 7th February, 2008, or alternatively reviewing the ancillary orders or in the alternative, an order pursuant to s. 18 of the Family Law Act 1995, discharging and/or varying the ancillary orders. In addition, the respondent sought an order pursuant to s. 9 of the Family Law Act 1995, directing the applicant to transfer to the respondent such property or properties as to the court seemed just and equitable. The respondent also sought a lump sum payment from the applicant to the respondent. The final notice of motion was a motion issued on behalf of the applicant seeking an order pursuant to s. 9(1) of the Family Law Act 1995, directing the respondent to transfer the entire of the interest, legal and beneficial held by him in the family home.

Both parties exchanged affidavits of means. The affidavit of means of the respondent herein was sworn on the 13th March, 2009. In the course of that affidavit, the respondent has listed a series of assets and has also set out details in relation to his liabilities. The position painted by the affidavit of means is one of extreme financial difficulty. It is clear from the affidavit of means that the financial position of the respondent is critical. The commercial premises referred to above is currently valued at approximately €7m. There is a loan outstanding in excess of €9.5m due to Anglo Irish Bank. A further property is valued at €250,000 with a loan outstanding to Anglo Irish of €1.3m. The property known as The Billows has a value of approximately €650,000 with a loan outstanding of €61,500 approximately. The property known as The Rivers has a loan outstanding of just over €1m while it retains a value of approximately €650,000. The value of the family home is stated to be approximately €1m and there is a loan of approximately €250,000 outstanding on foot of that property. There is also the property known as The Dell, which has a value of €200,000 and a loan outstanding of €206,000.

The total income of the respondent is stated to be €112,900 approximately. In the course of his affidavit of means, the respondent set out various other debts and liabilities including extensive credit card indebtedness. It can be seen from the above that the position of the respondent is very serious.

It is clear from the affidavits sworn herein by the respondent that when contemplating the settlement, the subject matter of these proceedings, the respondent availed of the advices of his legal team and of a financial adviser. It appears that negotiations took place with Anglo Irish Bank with whom the respondent had the majority of his borrowings. Anglo Irish Bank was aware of the parties impending proceedings and discussions took place with Anglo Irish Bank with a view to restructuring the respondent's borrowings to take account of the circumstances of the applicant and the respondent and in particular to provide for a release of the security over the property known as The Rivers held by Anglo Irish Bank in order to permit the transfer of that property to the applicant free of encumbrance and to permit the sale of the family home. According to an affidavit sworn herein by Harry Gleeson, the respondent's financial adviser, Anglo Irish Bank was aware of the circumstances and willing to facilitate such an arrangement. It is the respondent's case that the settlement entered into, could only have been entered into on foot of the assurances given by Anglo Irish Bank that it would release the security over the property known as The Rivers.

It subsequently transpired that Anglo Irish Bank did not agree to the release of the security held over the property known as The Rivers. The word used by the respondent during the course of the hearing before me was that the bank "reneged" on the arrangement. This became apparent to the respondent in May 2008. Notwithstanding that this was made known to the respondent in May 2008, at no stage prior to mid October 2008, did the respondent make the applicant aware of any difficulty in implementing the settlement by reason of the change of heart on the part of Anglo Irish Bank.

It is not necessary to go into all of the matters set out on affidavit between the parties leading up to October 2008. Suffice it to say that an arrangement was made to close the transfer of the family home on the 3rd October, at 3.00 pm. It was only on the morning of that day that the applicant's solicitor received a letter from the respondent's solicitors saying that the respondent was unable to redeem the mortgage on the property that was to be transferred into the sole name of the applicant. It was suggested that this difficulty arose because of a failure to transfer the family home into the respondent's sole name, thus delaying the respondent's efforts to dispose of the property. It appears that there was indeed a purchaser available around this time for the family home. Not surprisingly, in circumstances where the respondent indicated that he was not in a position to transfer the property known as The Rivers into the sole name of the applicant free of encumbrance, the applicant did not proceed with the transfer of the family home into the sole name of the respondent.

I should refer briefly to one other somewhat unusual feature of the case. The respondent had been residing in the property known as The Rivers and obviously could not continue to do so, once the property was transferred to the applicant. The respondent therefore entered into an arrangement to purchase another property. This property was known as The Green Gables. It was a significant property. He paid a non-refundable deposit on the signing of the contract for the purchase of The Green Gables and the contract provided a period of eighteen months for the closing of the sale. In the interim, the respondent was permitted to reside in the property as a tenant. I fully understand and appreciate the desire of the respondent to have a home to reside in and to provide a place where his children could reside with him or visit on access with him. I do find it surprising that he chose to enter into a contract for the purchase of a property on the 18th September, 2008, in circumstances where he was already aware of the difficulty in relation to Anglo Irish Bank releasing the security over the property known as The Rivers; where he agreed to purchase a property for €1.250m with a non-refundable deposit of €62,500 and the respondent did not seek to protect himself by ensuring that that special conditions of the contract provided that the agreement to purchase was subject to loan approval.

There was an issue between the parties as to damage which had occurred to the property known as The Rivers. Unfortunately, it seems that significant damage was caused to that property as a result of a water leak. That damage is

the subject of an insurance claim. Nothing of significance turns on that issue in the context of the matters I have to decide in this hearing.

As I have said there is no significant dispute between the parties as to the financial position of the respondent. Indeed at the outset of the hearing before me, counsel on behalf of the applicant indicated that having regard to the circumstances, the application to attach and commit the respondent for failure to comply with the terms of the settlement was not being pursued. It was emphasised that the principal application at this stage was for a property adjustment order whereby the family home would be transferred into the name of the applicant. On the part of the respondent, the relief sought was in essence to allow the respondent to retain some interest in the family home.

Mr. O'Riordan S.C. on behalf of the applicant in the course of his submissions made the comment that there were matters set out in the affidavit of means of the respondent in relation to day to day expenditure and income that could be the subject of challenge by way of cross examination. To that extent, there is obviously some dispute in relation to the affidavit of means furnished by the respondent herein.

I referred earlier to the issue of oral evidence and I think it is fair to say that both parties are in agreement that for the purpose of dealing with the issue of maintenance it would be preferable if there was oral evidence given in relation to that aspect of the matter. In regard to that aspect of the matter I accept that it would be inappropriate to deal with the maintenance issue in the absence of oral evidence. In any event, some concessions have been made by the applicant in respect of the maintenance payable under the settlement in the course of the hearing before me. Accordingly I do not propose to rule on that issue now.

The following facts are apparent from the affidavits before me or are not in dispute between the parties:

1. The applicant has complied fully with the terms of settlement save for the transfer of the family home by her to the respondent given the respondent's inability to transfer The Rivers house to the applicant free of encumbrance.

2. The applicant could not have been expected to complete the transfer of the family home to the respondent in the absence of proper arrangements and safeguards in putting in place to ensure the transfer to her of The Rivers property free of encumbrance.

3. At the time of entering into the settlement, it was clearly contemplated that there would be sequenced closing in respect of the family home and The Rivers.

4. The respondent is in breach of the settlement insofar as it concerns the transfer of the family home and The Rivers property.

5. The financial circumstances of the respondent have deteriorated to a significant extent between the date of entering into the consent and the date by which the terms of the consent were to have been implemented in full.

6. The respondent's current financial circumstances are such that it is not possible for him to comply with his obligations under the settlement insofar as the transfers of the family home and The Rivers are concerned.

7. It is clear that the co-operation of Anglo Irish Bank Plc was a significant element in facilitating the terms of the agreement entered into by the applicant and the respondent and that in circumstances where Anglo Irish Bank Plc is not willing to release its security over The Rivers, the respondent is not now in a position to complete those transfers.

8. Although there are some matters in dispute between the applicant and the respondent in respect of the affidavit of means sworn by the respondent herein, it cannot be disputed that the respondent finds himself in a situation where a number of his significant assets are now in negative equity.

I should say at this point, in parenthesis, that I do not necessarily accept the values given for all of the properties referred to in the affidavit of means as these values are unvouched and may have been provided by a representative of Anglo Irish Bank, as was indicated to me in the course of the hearing but I do accept that the properties are not worth what they were previously worth by reason of the economic downturn and the reduction in property prices generally and I further accept that the figures given in relation to the loans in respect of the said properties is as set out in the affidavit of means.

9. The income of the respondent as disclosed in the affidavit of means is such that the respondent is not in a position to service the borrowings in respect of the various properties referred to therein.

10. The respondent has a number of other forms of indebtedness.

11. The respondent has not paid to the applicant the lump sum payment provided for in the consent of €20,000 although a facility was provided by Anglo Irish Bank plc for the purpose of making that payment.

It is now necessary to consider the legal principles applicable having regard to the facts as found or not in dispute between the parties. The first point to note is as I have already mentioned, that the applicant herein no longer presses the court for an order of attachment and committal in circumstances where it is manifestly clear that committing the respondent to prison for failure to comply with the orders made pursuant to the settlement would not have the effect of compelling the respondent to comply with the orders. It is quite clear that the changed circumstances of the respondent are such that he is not in a position to comply with the orders. Therefore the issue to consider is whether it is open to the court to make further property adjustment orders as sought by both parties or whether it is appropriate to set aside or discharge or vary the consent orders made herein as sought by the respondent.

The first point to note in relation to property adjustment orders is that it is open to a court to make such orders on more than one occasion. The concept of a property adjustment order was first introduced by the provisions of s. 15 of the Judicial Separation and Family Law Reform Act 1989. It provided at s. 15(1) as follows:-

"(1) On granting a decree of judicial separation or at any time thereafter, the court may, on application to it by either spouse, make a property adjustment order, that is to say, any one or more of the following orders –

(a) an order that a spouse shall transfer to the other spouse, to any dependent child of the family or to such person as may be specified in the order for the benefit of such a child such property as may be so specified, being property to which the first-mentioned spouse is entitled, either in possession or reversion;

. . .

(2) The court may, following the granting of a decree of judicial separation, consider and determine whether an order or orders should be made by it in favour of a spouse under this section on one occasion only unless on that occasion a spouse wilfully conceals information of a material nature relevant to the making of any such order or orders."

That provision was amended by s. 9 of the Family Law Act 1995, which in turn was amended by the provisions of the Family law (Divorce) Act 1996. It is significant to note that s. 9 of the 1995 Act, does not contain a provision such as that contained in s. 15(2) of the 1989 Act. Therefore it is open to a spouse to make an application for more than one property adjustment order save in certain circumstances which are not of relevance in the context of the application before me.

The mechanism adopted by the parties herein in relation to the transfer of the family home and the property known as The Rivers was effected by means of s. 9(1) of the Family Law Act 1995. The making of an order pursuant to s. 9(1) of the 1995 Act, is subject to the provisions contained in s. 16 of that Act. That provides that the court in deciding whether to make such an order and in determining the provisions of such an order shall have regard to a number of matters set out in section 16(2). I will refer to those provisions in more detail later.

As mentioned previously, the respondent seeks a number of reliefs including the setting aside of the ancillary orders made herein as part of the consent or alternatively reviewing those orders or alternatively staying those orders on such terms as may seem just and equitable or in the alternative discharging and/or varying those orders pursuant to s. 18 of the Family Law Act 1995. The outstanding matters that require to be dealt with in terms of the settlement are the transfers of the family home and the property known as The Rivers and the payment of the lump sum of €20,000. I should briefly refer to the provisions of s. 18 of the 1995 Act. Section 18(1) sets out the orders to which it applies and at s. 18(1)(e) it is clear that an application to vary a property adjustment order made pursuant to s. 9(1)(a) which is the provision providing for the transfer of property cannot be varied. This is notwithstanding the fact that a property adjustment order pursuant to s. 9(1)(a) can be made on more than one occasion. Therefore the position appears to be that although s. 18 cannot be invoked for the purpose of varying an order providing for the transfer of property pursuant to s. 9(1)(a) of the 1995 Act, there is nothing to preclude the possibility of an application being made for a property adjustment order on more than one occasion. In the event both parties have made such an application.

I should at this point refer briefly to a number of authorities that were opened to me by Ms. Clissmann S.C. on behalf of the respondent. The first of those decisions was a case of *Benson v. Benson (deceased)* [1996] 1 F.L.R. 692, in which the parties entered into a consent order in the County Court in December 1992, which provided for the transfer of the former matrimonial home to the wife, the making of a lump sum payment by instalments and the continuation of periodical payments until the lump sum was paid in full. After the making of the consent order the wife was diagnosed as suffering from terminal cancer from which she died in June 1993. In 1993 the husband contended that there were a number of crises in his business life which caused his financial position to deteriorate. He thereafter sought to vary the 1992 consent order and sought leave to appeal out of time. In dismissing his appeal it was held that the general rule was that the courts would uphold agreements freely entered into at arms length by parties who were properly advised. Leave to appeal out of time could be granted where new events had occurred since the making of the order, which invalidated the basis of the order so that the appeal would be likely to succeed. The new events should have occurred within a relatively short time of the making of the order and the application for leave should in the circumstances be made reasonably promptly. The grant of leave should not prejudice any third party with an interest in the property. In that case it was held that the business crises alleged by the husband did not constitute a new event in that he had been aware of the potential problems with his businesses which did not divert him from consenting to the order in December 1992. The death of his wife was not contemplated and did constitute a new event. Because of the delay in making the application to set aside, the court refused to grant leave to the husband to review the consent order.

I was also referred to the decision in the case of *Barder v. Caluori* [1988] 1 A.C. 20, a decision of the House of Lords; *Dixon v. Marchant* [2008] E.W.C.A. Civ. 11, which considered the decision in the *Barde*r case referred to above and to the decision in the case of *V.B. v. J.P.* [2008] E.W.H.C. 112 (Fam) a decision of the family division of the High Court of Justice in the United Kingdom. The factual matrix in the *Barder* decision is extremely unusual. In that case the parties entered into a consent in proceedings for divorce, which provided that the wife was to have care and control of the two children of the marriage and provision was made for the husband to transfer to the wife the legal and equitable interest in the family home. Before the order had been complied with the wife had killed the children and committed suicide. The husband applied for leave to appeal out of time against the consent order and the wife's mother obtained leave to intervene to oppose the application. The matter ultimately came before the House of Lords where it was held, *inter alia*, that the consent order had been based on the fundamental assumption that the wife and children would for a substantial period require a suitable home; that that assumption had been totally invalidated by their deaths; and that on the hypothesis that leave to appeal out of time had rightly been given, the appeal should be allowed and the judge's order restored. It was also held that the conditions on which a court might properly exercise its discretion to grant leave to appeal out of time from an order for financial provision or property transfer made after divorce on the ground of new events were, that new events had occurred since the making of the order that invalidated the basis on which the order had been made so that an appeal would be certain or very likely to succeed, that the new events should have occurred within a relatively short time after the making of the order, that the application for leave to appeal out of time should have been made reasonably promptly in the circumstances of the case and that the grant of leave should not prejudice third parties who had acquired, in good faith and for valuable consideration, interests in property the subject of the order; that all four of those conditions have been satisfied, the judge had been entitled to exercise his discretion to grant leave to appeal out of time and there had been no ground in which the Court of Appeal could properly have reversed that exercise of discretion.

It may well be appropriate in a particular case to consider the possibility of allowing a party to extend the time within which to appeal an order, albeit a consent order, on the basis of the occurrence of new events. It is interesting to note that in the cases of *Benson v. Benson*, *Barder v. Caluori*, the issue to be determined was whether leave to appeal the consent orders should be granted. It is not entirely clear how the matter came before the court in the case of *V.B. v. J.P.* referred to above. The matter at issue therein related to the application by the wife for an increase in the amount of periodical payments made in that case. The application was made in the context of a "clean break" settlement. The decision in the case of *Dixon v. Marchant* was an appeal following the making of a consent order and the question at issue in that case was whether the fact that a wife had remarried shortly after a consent order had been made which provided for payment of a lump sum to capitalise the periodical payments due to her did that constitute a "*Barder* type event" which invalidates that basis or fundamental assumption upon which the order was made. Leave to appeal had been granted in that case and the matter was dealt with by way of an appeal. It is important to note that the applications to set aside the consent orders were dealt with either by way of appeal or in the context of an application to extend the time for leave to appeal in three out of the four cases referred to above and possibly in the fourth case as well. In my view, the criteria laid down in those decisions, namely, that new events had occurred since the making of the order that invalidated the basis on which the order had been made so that an appeal would be certain or very likely to succeed, that the new events should have occurred within a relatively short period of time after the making of the order, that the application for leave to appeal out of time should have been made reasonably promptly in the circumstances of the case and that the grant of leave should not prejudice third parties who had acquired, in good faith and for valuable consideration interests in property, the subject of the order. I am of the view that the courts in this jurisdiction would take the same approach as that in the UK where the general rule referred to in *Benson v. Benson* is that the courts would uphold agreements freely entered into at arms length by parties who were properly advised.

In the present case, part of the application before me is to set aside/discharge an order of this Honourable Court. I have some doubt as to whether that is an appropriate application in the present case. I do not think the respondent meets the criteria set out above as to new events that have occurred since the making of the order which invalidate the basis of the order. I accept that the respondent's financial position has deteriorated since the making of the order and that the position of Anglo Irish Bank has not helped. However, at the time of entering into the consent, it is clear that the respondent was already in a position where his finances were fully stretched. He could not have entered into the settlement without some co-operation from Anglo Irish Bank. It seems to me that what is at issue herein is not so much the occurrence of a new event so much as the continuation of an existing trend. I would therefore be of the view that this is not an appropriate case in which to set aside/discharge the settlement and in particular the consent orders made thereunder.

I do feel that I should sound a note of caution as to the proper procedure to be followed on such an application as the matter of the correct procedure to be followed on an application to set aside/discharge a consent order was not argued before me. In this case, the parties freely entered into a settlement having been properly advised. Is it appropriate that the court which made the orders pursuant to the settlement should subsequently be asked to set aside those orders? The approach in the UK seems to be to grant leave to appeal the consent orders on the basis of new events which have arisen since the making of the consent order. A decision on this point should be left over until an appropriate case in which the arguments are made before the court.

Despite the fact that I have some doubts about the procedure to be adopted on an application to set aside an agreement or consent order where new events have occurred since the making of the agreement or consent order, I am satisfied that this court has jurisdiction to consider the applications for a further property adjustment order in the context of the events that have occurred. On that basis s. 16(2) of the 1995 Act sets out a number of matters to be taken into consideration in deciding whether to make an order pursuant to section 9(1)(a). It seems to me that the matters set out in s. 16(2) which are of particular relevance for the purpose of this hearing relate to the income, earning capacity, property and other financial resources of the spouses now and in the foreseeable future, the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future and the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family. I have also taken into account the income of the spouses and the accommodation needs of the spouses. Having regard to the change of circumstances that has occurred, the applicant wife has now sought an order transferring the family home into her sole name. The respondent sought that the court should make an order directing that the family home be held in the joint names of the spouses. It was also proposed that at the stage that the youngest child had reached the age of 23 that the property should be sold.

In considering what the approach should be in this case, I feel that it is impossible not to have regard to the terms of the consent order that was entered into by the parties. That consent order provided for a disentangling of the applicant and the respondent's ownership and interests in a variety of properties. The applicant was to be left, after transferring any interest she had in a number of properties with an unencumbered interest in the property known as The Rivers. The respondent was to have the benefit of effectively all of the other properties accumulated over the years. He also has the computer business which appears to be trading still, albeit at a loss at the moment. There is no suggestion made that the properties transferred by the applicant to the respondent were of no value at the time that she complied with the terms of the order. There was apparently no imminent threat to the respondent's financial viability at the time of entering into the consent. It is the decision of Anglo Irish Bank Plc not to provide the facility which had been available in February 2008 that has apparently caused the respondent the difficulty in complying with his obligations under the settlement.

In considering the applications for property adjustment orders made by the applicant and the respondent herein, I am satisfied that the respondent is not now in a position to comply with that part of the consent order that requires that transfer of the family home by the applicant to the respondent in return for the transfer by the respondent to the applicant of The Rivers free of encumbrance. Having said that, I find it difficult to understand why the respondent did not inform the applicant of these difficulties once he found out about the problem with Anglo Irish Bank Plc in May 2008. Even if the facility from Anglo Irish Bank Plc was not forthcoming, there is nothing to suggest that the respondent made any effort to overcome the difficulties that had arisen. There was a purchaser available for the family home but it was unreasonable and unrealistic to expect the applicant to transfer her interest in the family home in the absence of any indication as to how or when The Rivers would be transferred to her free of encumbrance. It is all the more surprising that this should be the case in circumstances where the respondent himself was in a position to enter into a contract for the purchase of a substantial property in September 2008, albeit with a closing date some eighteen months thereafter.

Given the current financial circumstances of the respondent, I am concerned that the applicant finds herself in a situation where she has complied with the terms of the consent order to the extent that she can and now finds herself in the position where she does not now have the option of the transfer of The Rivers to her. The current position in relation to the property known as The Rivers is that it has reduced in value, and has borrowings secured on it well in excess of its value. The only property at the moment with any realistic equity is the family home. (There is another property which does have a value in excess of the loan outstanding on that property but it is held as a security for the borrowings from Anglo Irish Bank Plc.) I am mindful of the provisions of s. 16(5) which provide that the court shall not make an order under s. 9(1)(a) unless it would be in the interests of justice to do so. In attempting to do justice, I am considering not just the needs of the applicant, but so far as possible the needs of the family as a whole. I am conscious of the fact that four of the children reside with the applicant. It seems to me that the proposition put before the court on behalf of the respondent, does little or nothing to ensure that the accommodation needs of the applicant and the dependent children of the family will be provided for into the future. Indeed the proposal involves the sale of the family home when the youngest child reaches the age of 23. Given the precarious financial position of the respondent, it seems to me that the needs of the applicant and the dependent children are best met by the making of a property adjustment order in favour of the applicant, such that the entire interest of the respondent in the family home is transferred to the applicant. Making an order in the terms sought by the respondent would put the applicant into an even more precarious position than the one in which she presently finds herself.

I will hear the parties further in relation to the consequences of this ruling as the completion of the property transfer order, the maintenance issue and the lump sum payment.