Neutral Citation Number: [2011] IEHC 229

THE HIGH COURT

1997 58 M & 2001 168 M

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW ACT 1989, AND

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

L.E.

APPLICANT

AND

U.F.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 15th day of April, 2011.

Factual Background
The applicant and respondent married each other on 1st December, 1979. Following the institution of legal proceedings, the parties were granted a decree of divorce by the High Court on 20th December, 2001. The parties entered into a financial settlement. This settlement was approved by the Court and its terms were deemed to provide proper provision for the parties and their dependents at the time it granted the decree of divorce. In December 2006 the applicant brought an application seeking to set aside all or part of the settlement and sought that the order made be set aside on the basis of fraud and non-disclosure on the part of the respondent. On the 10th June, 2009, Irvine J. delivered judgment, holding that the respondent had concealed his ownership of or interest in properties and directed a further lump sum of €2,500,000 to be paid by the respondent to the applicant. Prior to the perfection of the Order of Irvine J., the respondent applied to the Court for an order to permit him to adduce further evidence. Irvine J., in refusing the application, imposed terms on a stay pending appeal, including a term that the respondent was to discharge arrears of maintenance and to discharge the maintenance as it fell due. The Court granted the applicant a mareva injunction. The respondent ceased paying maintenance in accordance with the order of the Court in December, 2009 and brought an application to vary the order, having already appealed against the making of the order.

On the 19th December, 2010, the applicant issued a motion for contempt which was returnable in front of Irvine J. The applicant and the respondent entered into an agreement and an order was made in respect of the variation application that the respondent would be allowed pursue his maintenance application only if he made proper disclosure and complied with his maintenance obligations.

Submissions of the Parties
The respondent in this case seeks an order pursuant to s. 22 of the Family Law (Divorce) Act 1996, varying or discharging a periodical payments order made on the 21st December, 2001. The applicant seeks an order dismissing the respondent's application for a variation on the basis that he has not made full disclosure and that he has been in contempt of court orders and has abused the court process, including his breach of the Mareva injunction to include his purported transfer of assets in course of the proceedings; his disposal of €338,000 on deposit; his purported alienation of monies received from N partnership and his attempt to alter the ownership of O. property.

The applicant relies on case law to show authority that to allow a person in contempt of court to pursue relief would be an abuse of process. The applicant points to such cases as *Mubarak v. Mubarak* [2004] 2 FLR 932, *Arab Monetary Fund v. Hashim* 21st March 1997, and *Hadkinson v. Hadkinson* [1952] FLR 287, where Denning L.J. stated:-

> " I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may, in its discretion, refuse to hear him until the impediment is removed or good reason is shown by why it should not be removed."

The applicant submits that the contempt of the respondent arises in respect of two orders. The applicant contends that the failure of the respondent to pay maintenance means that the applicant cannot properly defend the application for a variation. Secondly, the applicant submits that the respondent's on-going litigation misconduct and breach of directions as to disclosure means that he is in contempt. In relation to non-disclosure the applicant relies on the cases *C v. C* [1994] 2 FLR 272*, B v. B* [1988] 2 FLR 491, *P v. P* [1994] 2 FLR 381 and *Y v. Y* [1997] 3 FAM.L.J 86 to argue that the Court should have regard to the respondent's inadequate disclosure and to draw adverse inferences from this. In *Baker v. Baker* [1995] 2 FLR 827, Ward J. stated:-

> "I am compelled to draw the adverse inference that he does not wish me to know the truth. That compels me to draw the further inference that there must be more monies available."

The orders made in that case were that the husband pay a lump sum of €160,000 and periodical payments of €17,500 despite the husband's assertions that he had no assets and was living on an income of €33,000 per year. On appeal, Butler Sloss L.J. reaffirmed the principle that in cases where a party deliberately conceals his/her true financial position from the court, that the court was entitled to draw adverse inferences against that party. The Court of Appeal expressly rejected the husband's argument that unless the assets can be shown positively to be available, an order cannot be made.

The applicant submits that Irvine J, in her judgment in this case, at paragraph 4.12, found that there is duty of disclosure owed by each party to the other and to the Court in divorce proceedings which arose from the statutory and constitutional provisions. The

learned judge accepted at paragraph 10.6 that "if there has been a history of evasion and equivocation on the part of the spouse in respect of their financial affairs in family law proceedings that the courts are not prepared to permit the spouse to benefit from that conduct." The applicant submits that to allow the respondent continue his application to discharge his maintenance obligations would be to allow him benefit from the most gross and obvious misconduct in the conduct of litigation.

The respondent submits that the applicant is in breach of the agreement of the 14th May, 2010, and in clear breach of its terms, in particular the agreement of the applicant not to bring an application to stay or postpone or object to the making or hearing of the section 22 application. The respondent submits that the applicant relies very largely on allegations of non-disclosure that pre-date the 14th May, 2010, and that have been the subject matter of previous applications, including the very application that was settled on the 14th May, 2010. The respondent submits that the approach described in *Hadkinson* is objectionable in principle as the respondent applies pursuant to s. 22 because he contends that he does not have sufficient resources to meet the periodical payments order. According to the respondent, therefore, the very thing he wants to establish becomes the reason that he cannot establish it. Secondly, the respondent argues that, while it may be more difficult for those who have not complied with a previous court order or failed to make full disclosure, to obtain the financial relief that they seek, this is not the same as saying that they are not entitled to seek it. Thirdly, the respondent submits that the approach in *Hadkinson* is inconsistent with the constitutional entitlement of the respondent with access to the courts as there is no precedent for limiting that right by reference to the coincidental question of whether the respondent has abided by orders of the court made on other occasions. The respondent argues that by breaching the agreement she entered into, the applicant is guilty of abuse of process and that on the facts of the case, the respondent is not in contempt of court. The respondent argues that contempt of court only arises if the breach is wilful in the sense of voluntary, deliberate, knowing and continuing breach by a person well able to comply with the order if he or she chose to do so, and such breach did not occur here. Even if the respondent is guilty of contempt of court, he submits that it has not been demonstrated that his actions have impeded the course of justice. Finally, the respondent submits that even if there is a jurisdiction of this nature, which the respondent does not think there is, it is clear from the English cases that an application of this nature will be granted only in unusual circumstances and where it is justified by grave considerations of public policy. The respondent submits that this case is similar to other cases and that it is hard to see how the parties profit by agitating on this motion the very issues whose resolution is required in order to determine the s. 22 application.

Conclusions
Dismissal in Limine

1. The courts have declared that there is a constitutional right of access for a litigant to the court. However, this constitutional right of access must be viewed in the light of the inherent power of courts established under the Constitution and under Statute to prevent the abuse of the court's own process. Without relying on any English authorities, as opened to the court, it is possible to deduce a power of the court to dismiss an application such as that being made by the ex-husband in this case for a review of maintenance pursuant to s. 22 of the 1996 Act, by reason of his conduct which could be regarded as a contempt of court insofar as he has flagrantly breached the order which he now seeks to be reviewed.

2. From an examination of the right of the High Court under the Family Law Practice Direction to decline a claimant's right to proceed in separation or divorce, as an undefended action in the event of the egregious non-compliance by a party with the Family Law Practice Direction, it is clear that Irish courts can and do protect themselves from abuse of process. This practice direction is also to be viewed in relation to the underlying jurisdiction of the court provided by O. 19, r. 28 of the Rules of the Superior Courts to strike out pleadings which disclose "no reasonable cause of action or answer for being frivolous or vexatious". Against this background the English authorities cited on behalf of the ex-wife are particularly helpful and clarify the circumstances in which the inherent power to dismiss *in limine* ought to be used. As appears from all the Irish cases in relation to this subject, for instance, *O'Riordan v. Ireland (No. 5)* (O'Caoimh J.) [2001] 4 I.R. 463 and *D.K. v. A.K.* (Costello J.) [1993] ILRM 710, the exercise of this type of inherent power will be extremely rare. While the constitutional imperative requiring the court to make provision in divorce cases for the parties to a marriage is (as Mr. McCullough, Senior Counsel, submitted) an added factor to be considered in this context, it is my opinion that this imperative does not take from or limit the obligation of the court to protect its own process. The constitutional imperative to make provision in family law cases does, in my view, have a practical effect insofar as experience in dealing with cases ordered to proceed as undefended cases has often shown that the court may have to modify the exclusionary effects of such order for the purpose of ensuring that the party seeking provision who is dependent of the defaulting party has an opportunity through the court to identify the assets of the defaulting party. To exclude the defaulting party entirely from participation in the proceedings very often results in the dependent party being at a loss to ascertain the assets which may be used, charged or attached to make provision for them by reason of the absence from the proceedings of the provider and the information he/she may have. While the summoning of outside witnesses and third party discovery procedures may obviate the necessity to reengage with the defaulting party, in most cases, the courts find that the defaulting party may be given leave to participate in the proceedings at least to a limited extent if only for the purposes of identifying and eliminating assets and sources of income.

3. The reality in applications such as that being brought by the ex-husband in this case for a review under s. 22, in circumstances where he is seriously in default and in arrears as regards payment, indicates that the case relates to a judgment in the course of execution – or executory judgment - and is a case to which the judgment of this Court in *A.K. v. J.K.* [2008] IEHC 341, relates. That means that the ex-wife at least is at large in accordance with the criteria set out in *A.K. v. J.K.* to have alternative full provision made in substitution for the maintenance which the ex-husband either a cannot or will not pay or at least in partial substitution therefor if the changed circumstances and justice of the case would so dictate. In exercising this jurisdiction in relation to executory orders, the court should be mindful that it does not slip into providing a rogues' charter or be destructively laden with moral hazard. There are two factors to prevent against this outcome which are as follows:-

> I. First, the legislation itself enabling a providing spouse to apply for a simple (fine tuning) review of periodical payments (maintenance) under s. 22 provides the simple option of preventing the court launching on a wholesale review of the case in accordance with *A.K. v. J.K.* by simply paying the periodical payments up to date, and;
>
> II. Secondly, by consideration of the outcome of the consideration of the latter set of criteria set out in *A.K. v. J.K.* for the alteration or improvement of provision for the provider, or the reduction of his/her obligations.

4. Having concluded that the jurisdiction to dismiss *in limine* for conduct amounting to contempt (as, for instance, in wholesale non-payment of provision, as has occurred in relation to the periodical payments in this case), it is appropriate to consider whether the jurisdiction ought to be invoked to provide an intermediate solution in the interest of the parties and have the dismissal made only if there is further failure on the part of the ex-husband to respect the process of court. I consider that notwithstanding the default of the ex-husband to fully disclose his resources to this Court in the several phases of the proceeding before this Court, new circumstances have arisen which encourage the court to give him one last chance to proceed with his application for a review on the basis that he has triggered the case into one to which an executory judgment now exists by reason of his non-payment of periodical

payments, and by reason of the need of the ex-wife in justice to have the opportunity to argue for compensation of provision in accordance with the 1996 Act in the event of the continued failure/inability of the ex-husband to pay the periodical payments. These circumstances are as follows:-

> I. Since the judgment of this Court given by Irvine J., the situation in the economy has worsened dramatically, by not only the threatened entry of NAMA into the business lives of persons such as the ex-husband, but also the economic outlook has crystallised into a worsened state by reason of the necessity for the government to have recourse of IMF and EU funds due to its inability to raise funds on the international markets and all the related adverse affects on the economy arising from this development, including the continual floundering of the banking system.
>
> II. The specific allegation that the ex-husband's financial circumstances have worsened considerably in circumstances where it might be argued that such a change might be of such a fundamental nature as it would be unjust to ignore it.
>
> III. It would be in the ex-wife's interest to have a speedy adjustment to protect her position notwithstanding all the wrongdoings she alleges against the ex-husband in relation to his conduct of the proceedings and compliance with orders of the court.
>
> IV. The ex-husband has engaged an eminent and experienced senior counsel to come into court to represent him and the court must assume that he will have the benefit of that senior counsel to guide him through appropriate responses to the demands of the litigation which he has triggered off by his application for a variation coupled with non-payment in the face of obvious availability of funds for other purposes not associated with the order.

5. I consider that the application to dismiss the ex-husband's application *in limine* should be adjourned generally with liberty to re-enter and that, in the event of it being re-entered again, an application should be made in tandem with it to have the proceedings proceed as undefended as between the ex-wife and the ex-husband so that the process of the court may be protected against any further abuse by the ex-husband, while ensuring that the court may comply with its statutory and constitutional duty to ensure provision to be made for the ex-spouses.

6. Accordingly, having regard to the fact that the ex-husband's application and conduct have triggered off a widespread inquiry in relation to how provision ought to be provided in changed circumstances, I reject Mr. McCullough's submissions which sought to narrow down the disclosure and vouching sought on behalf of the ex-wife as follows:-

> 1. The ex-husband is to provide the ex-wife with updated mortgage accounts in relation to the Family home.
>
> 2. The ex-husband is to provide the ex-wife with updated statements on the bank of Scotland account.
>
> 3. An Order requiring the ex-husband to produce documentation relating to the U court proceedings.
>
> 4. An Order that the ex-husband disclose all information he has on the N partnership.
>
> 5. An Order requiring that the ex-husband disclose whatever information he has relating to the three American assets, namely; O WUC NNE;643 HR; 510 DC, I,E ;and any other American assets it may be involved with.
>
> 6. The ex-husband to disclose whatever information he may have in relation to Ms M's financial position.
>
> 7. The ex-husband to disclose the details of all transfers of assets to IF, or bought in her name, or bought in the name of his children, or companies in which they either act as a nominee or in which he has a beneficial interest or either IF or the children have a beneficial interest in. These details are to go back for a period of five years.
>
> 8. The ex-husband to disclose details of where he got the funds to pay back a loan of €60,000 to U.
>
> 9. The ex-husband to disclose the NAMA business plan.
>
> 10. The ex-husband is to make full disclosure in relation to F6J business.
>
> 11. The ex-wife is to disclose all details in relation to payments made to NM U.
>
> 12. In relation to the properties referred to in these proceedings as properties A-G, no order will be made with regard to them until the appeal taken by the ex-husband is determined in the Supreme Court or until such time as the ex-husband decides as to whether he wishes to proceed entirely in this Court by abandoning the Supreme Court Appeal.
>
> 13. Liberty to the parties to apply to Court in relation to any of the above and in relation to such steps as may be necessary to prevent overlap between these applications and the appeal to the Supreme Court.