THE HIGH COURT

FAMILY LAW

RECORD NO. 2010 No. 4M

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

IN THE MATTER OF THE FAMILY LAW ACT, 1995

BETWEEN

K.C.

APPLICANT

AND

T. C.

RESPONDENT

JUDGMENT of Mr. Justice Binchy delivered on the 15th day of March, 2019

1. The applicant originally issued proceedings in 2010 seeking a decree of judicial separation and ancillary relief. Judgment was handed down on 30th July, 2014, and the respondent appealed that judgment to the Court of Appeal, which court delivered its judgment on 10th February, 2016. That Court allowed the appeal, but found it necessary to direct a retrial on all of the financial issues in the case. The proceedings then came back before this Court (Reynolds J.) on 14th March, 2017, when the parties entered into terms of settlement that were made an order of the court. Difficulties arose in the implementation of the settlement, arising out of which the applicant issued a motion dated 10th May, 2018 seeking the following reliefs:-

> "1. An order directing that this matter be re-entered before this Honourable Court.
>
> 2. An order that the terms of settlement as ruled by this Honourable Court on 14th March, 2017 be set aside as they no longer represent proper provision for the applicant.
>
> 3. An order seeking the reliefs set out in the special summons.
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> 4. Further or in the alternative such reliefs as may be appropriate pursuant to section 18 of the above entitled 1995 Act.
>
> 5. Such orders and/or directions as may be appropriate regarding the Bank of Ireland whose various proceedings are listed with the within proceedings.
>
> 6. Such further or other relief as this Honourable Court deems fit."

2. The reference to the proceedings issued by Bank of Ireland in para. 5 of the notice of motion related to proceedings issued by that bank in connection with monies due to it and secured over the former family home of the parties. During the course of the hearing of this motion, counsel on behalf of Bank of Ireland informed the Court that all issues in relation to that bank had been resolved and that the bank was no longer pursuing any proceedings against either of the parties.

3. The respondent issued a motion on 6th June, 2018 seeking an order directing the applicant to execute all such documentation as is required of her to give effect to para. 2 of the terms of settlement of 14th March, 2017. Paragraph 2 of the terms of settlement, which is of course already the subject of the court order made by Reynolds J., by consent, required the applicant to transfer her entire beneficial interest in a property in Chicago to the respondent. In effect therefore, the respondent's motion seeks an order that has already been made by the Court, save in so far as it specifically refers to the document required to be executed by the respondent (a "Quit Deed") to transfer the property to the respondent, and further seeks an order authorising an officer of this Court to sign any documentation required to execute the transfer, should the applicant fail to do so.

4. The difficulties in the implementation of the settlement arose out of the sale of the former family home of the parties in Co. Dublin. This premises was subject to a mortgage in favour of the Bank of Ireland which as of the date of the settlement secured borrowings in the approximate sum of €1,666,000. The terms of settlement required the family home to be sold, subject to a reserve price of not less than €2 million, or such higher reserve as the auctioneers retained by the parties might agree. The relevant part of the terms of settlement further provided as follows:-

> "(1) (e) After the payment of the mortgage/loan attaching to the family home which stands at circa €1,666,000.00 and costs of sale and any taxes due to include all auctioneering and legal fees, the parties agree the following:-
>
> (i) Up to €2,000,000.00, [of] any net proceeds shall be divided 80% to the applicant wife and 20% to the respondent husband;
>
> (ii) After €2,000,000.00 sale price, any net proceeds shall be divided 50%/50% between the parties."

5. The terms of settlement also provided that the respondent was to pay to the applicant in the sum of €1,400 per month for her sole use and benefit. It was also agreed and ordered that the applicant should be the sole legal and beneficial owner of another house in Dublin, which always belonged to the applicant, and which was and remains unencumbered. The applicant had previously acquired this house from her own family, and she gave evidence that she had purchased it for one third of its market value at the time. Orders were also made pursuant to s. 14 of the Family Law Act 1995 (the "Act of 1995") extinguishing succession rights of each of the parties in the estate of the other, but the terms of settlement expressly provided that no order was made pursuant to s. 15 of the Act of 1995 preventing either party from making a claim in the estate of the other.

6. The applicant is currently residing in the premises referred to in the last paragraph with two sons of the parties, one of whom is suffering from a disability which prevents him from taking up employment. On the evidence, this is likely to continue indefinitely. He receives disability benefit in the sum of €973.00 per month, which the applicant has included as income receivable by her in her

statement of means. The other son residing with the applicant is contributing the modest sum of €150.00 per month to her. Having had difficulties of his own in the past, the applicant anticipates that his position is likely to improve, but it has to be said that he is unlikely to reside with her indefinitely.

7. The family home was placed on the market for sale. However, delays were encountered and by the time of the issue of the applicant's motion, the property had still not been sold. It was eventually sold (I was not informed as to precisely when during the course of the proceedings) for the sum of €1,750,000. However, by the time the costs associated with the sale of the property were deducted, and the Bank of Ireland mortgage discharged, there was no surplus at all remaining, even though Bank of Ireland accepted a discount on the amount then due to it. While the property had not been sold at the time the applicant issued her motion, it is clear from her grounding affidavit that she feared precisely this outcome, and that it was for this reason that the applicant issued her motion. At the time that she entered into the terms of settlement, the applicant had anticipated that the sale of the family home would yield a return to her, and it is her case that, since that did not transpire, the terms of settlement no longer represent proper provision for her needs, now or in the future. In her affidavit grounding her application, the applicant avers:-

> "I say and believe that the whole consent was premised on the value ascribed to the Family Home but in light of what has happened I believe and am advised that different and/or further orders have to be made to ensure proper provision is made for your deponent".

8. Both motions came in for hearing before me on 12th March, 2019. At the outset of the hearing, counsel on behalf of the applicant said that the relief now sought on her behalf is a lump sum.

9. In the course of her evidence, the applicant said that, at the time the terms of settlement were concluded, she considered the reserve price for the family home in the sum of €2 million to be too high. She said she did not think the property would achieve a sale price of that order. It was put to her that she had previously been provided with a valuation prepared on behalf of the respondent which placed a value on the property of €1.65 million. This was later updated, and the updated valuation indicated no change in that valuation. The applicant did not recall being provided with these valuations, but she did recall that her own valuer had valued the property at €1.8 million. The applicant confirmed that she knew there was a large mortgage on the property, and of course the amount secured to the bank was reflected in the terms of settlement. She also agreed that she had had benefit of experienced legal and valuation advisors.

10. It is apparent from her own evidence that, even assuming the amount due to the bank did not increase between the date of settlement and date of sale, and assuming a sale price of €1.8 million, the applicant could not have expected a surplus in the transaction of anything more than €134,000. This of course would have been subject to sale costs, which it appears were of the order of €111,042. I only mention these figures to give an indication as to the range of expectations that the applicant might have had at the time that she entered in the terms of settlement.

11. While the applicant may not have known the exact costs of sale at the date of the terms of settlement, it was clear that the costs of sale had to be deducted before there could be any surplus available for distribution. She could certainly have been given a reasonably accurate estimate of these costs had she asked, and she made no suggestion that she was taken by surprise by the same. In any event, the sale costs appear to be within a range that might be expected for a property of this value. All of that being the case, even on her own figures, the applicant could not reasonably have expected that the sale of the family home was likely to give rise to a distribution between the parties of anything greater than €50,000. Moreover, within such tight margins, she must have been aware of the possibility that there might be no surplus at all to distribute. The provisions of the terms of the settlement in this regard, therefore, must be regarded as representing more of a hope than an expectation on the part of the applicant.

12. The applicant expressed two main concerns in bringing forward this application. The first is that the home in which she is residing requires work to bring it up to a reasonable standard and to address potential safety issues. However, no report was presented to the Court as regards the works required or the likely cost of the same. It has to be acknowledged, however, that this was almost certainly due to the cost associated with obtaining such a report. The applicant's second concern is a fear she may not have sufficient income in the future, in particular should anything happen to the respondent, resulting in the cessation of his maintenance payments to the applicant.

13. A review of the affidavits of means sworn by each of the parties in February, 2017, prior to the conclusion of the terms of settlement, and earlier this month, prior to the hearing of these motions indicates that the financial position of the parties, or either of them, at these two points in time has not altered very significantly. It was not asserted on behalf of the applicant that there has been a material change in the financial situation of the parties between these two points in time.

14. As to the respondent, it is clear from a review of his affidavit of means that overall, his liabilities exceed his assets. By how much depends upon how certain contingencies resolve in the future, in particular depending upon whether or not any call is made upon him in respect of a guarantee given to AIB Bank in respect the liabilities of a company, to which he has also advanced €2 million by way of a loan, and also whether or not he ever receives a return of that loan from the company. The respondent is 73 years of age and continues to work in his capacity as an engineer. In his affidavit of means, he avers that his total monthly income is €11,113.00 and his total monthly outgoings amount to €12,025.00. These outgoings include his monthly maintenance obligations to the applicant of €1,400.00.

15. In bringing this application, the applicant relies mainly upon s. 18 of the Act of 1995. Section 18(2) thereof provides:-

> "Subject to the provisions of this section and section 16 and any restriction pursuant to section 9(2) and without prejudice to section 11(2)(d), the court may, on application to it in that behalf by either of the spouses concerned or, in the case of the death of either of the spouses, by any other person who, in the opinion of the court, has a sufficient interest in the matter or by a person on behalf of a dependent member of the family concerned, if it considers it proper to do so having regard to any change in the circumstances of the case and to any new evidence, by order vary or discharge an order to which this section applies, suspend any provision of such an order or any provision of such an order temporarily, revive the operation of such an order or provision so suspended, further vary an order previously varied under this section or further suspend or revive the operation of an order or provision previously suspended or revived under this section; and, without prejudice to the generality of the foregoing, an order under this section may require the divesting of any property vested in a person under or by virtue of an order to which this section applies."

16. The jurisdiction vested in the court by s. 18 and the corresponding section in the Family Law Divorce Act 1996 (s. 22) has been considered in many cases over the years. In these cases, the courts have wrestled with the circumstances in which it is appropriate to vary orders already made by the court, whether or not made on consent. The courts have considered the desirability of finality in

litigation, but against the background where there are express statutory powers to vary existing orders where circumstances have changed. One thing that is clear is that it is a prerequisite to the exercise of this statutory power that there must either be new evidence as to the circumstances of the parties that was not available at the time of the original trial (or settlement) or a change in their circumstances. Otherwise, orders already made by the court must be taken to have made proper provision for the needs of the parties, as best possible, having regard to their means.

17. It is submitted on behalf of the applicant in this case that both parties envisaged that the applicant would receive a lump sum out of the proceeds of sale of the family home, even if the amount of that lump sum was uncertain. The fact that such a surplus did not materialise has had a greater impact upon the applicant than the respondent, firstly because she stood to gain more from any surplus, and secondly, because (it is submitted) her circumstances are poorer than those of the respondent. Moreover, it is submitted that the respondent got more benefit out of the terms of settlement than did the respondent. It is also submitted that there was no provision in the terms of settlement stating that they were "in full and final settlement" of all disputes between the parties. It is submitted that proper provision for the applicant requires the Court to exercise its jurisdiction under s. 18 of the Act of 1995 and to direct the respondent to make payment of a lump sum to the applicant, in whatever sum the Court considers appropriate.

18. On behalf of the respondent, it is submitted that the parties entered into the terms of settlement of their own volition. That the entry into a settlement involves an analysis of risk by both parties, and that the delivery of a settlement involves some element of risk where sales are involved. Of its very nature, what the parties will receive is always imprecise in such circumstances.

19. It is submitted that the applicant secured, through the settlement, a house in Dublin that is free from encumbrance. She obtained an order for maintenance in the sum of €1,400.00 per month; she obtained the possibility of a lump sum from the sale of the family home and she has also reserved her right to apply for further relief in the future in the estate of the respondent. The respondent obtained the possibility of realising the sale proceeds from the property in Chicago, having a value of €140,000.00 and a property in Kildare, (which he did actually realise and reinvested in another property in Leitrim), having a value of the order of €57,000.00. All the other assets taken by the respondent were substantially encumbered.

20. It is submitted that the applicant agreed that she knew there was a risk associated with the terms of settlement insofar as the sale of the family home is concerned, and that the effect of this application is to ask the respondent to insure that risk. It is submitted that the settlement was not in any way contingent on the family home achieving a specific price.

21. It is further submitted that while this was a settlement, the settlement was made an order of the court and it is implicitly acknowledged that such orders make proper provision for the parties at the time.

Decision

22. The first matter that I must consider is whether or not there has been any change in the circumstances of the parties since they entered into the terms of settlement. The only change in circumstances put forward on behalf of the applicant in support of her application is that it was anticipated she would receive a distribution from whatever surplus would result from the sale of the family home. This obviously did not occur, as there was no surplus available for distribution between the parties. Under cross-examination, the applicant said that she had no specific expectations as to how much she might receive, but she was very clear that she considered the reserve price of €2 million to be too high, and that she considered the valuation obtained on her own behalf at the time, in the amount of €1.8 million to be more realistic. The applicant confirmed that she herself read the terms of settlement and fully understood the same at the time that it was concluded. In the event, the house sold for a price remarkably close to the applicant's own valuation, but did not yield her any payment.

23. It is very difficult to see how any of this could be described as a change in circumstances. The terms of settlement contained an inherent risk (as do all settlements involving a sale of property) that there would be no surplus at all available for distribution between the parties. The terms of settlement were in no way conditional or contingent upon the property achieving a specific price. The property achieved a sale price that was just €50,000 less than that which the applicant considered to be the true value of the property. While this is a significant sum, the fact that the sale did not achieve a sale price exactly equivalent to the value that the applicant placed on the property could hardly be considered to be a change in circumstances, and certainly not within the margins concerned. There is a significant difference between a change of circumstances and a shortfall in hopes or expectations, even though the financial impact upon a person may be just the same.

24. It was not even argued that the circumstances of the parties have otherwise changed since the conclusion of the settlement. All of that being the case, I do not consider that the fact that the family home did not quite achieve the sale price expected or hoped for by the applicant represents a change in circumstances within the meaning of s. 18 of the Act of 1995.

25. While I was referred to a number of authorities by counsel for the parties in respect of applications of this kind, it is fair to say that none of these authorities dealt with the kind of issue that has given rise to this application. I am not aware of any authority whereby the courts have set aside or varied terms of settlement where there has been no change in the circumstances of the parties since the date of the settlement. In the case of *Y.G. v. N.G.* [2011] 3 I.R. 717, a decision of the Supreme Court of 19th October, 2011, Denham C.J. in discussing the general principles applicable where there has been a prior separation agreement, followed by a subsequent application by a party to court, stated, *inter alia*, at paras. 22(v) and (vi), that:-

> "(v) If the circumstances are the same as when the separation agreement was signed then *prima facie* the provision made by the court would be the same, as long as it was considered to be proper provision.
>
> (vi) If the circumstances of the spouses, one or both, have changed significantly then the court is required to consider all the circumstances carefully. However, the requirement is to make proper provision and it is not a requirement for the redistribution of wealth."

26. In the case of *O'C. v. O'C.* [2009] IEHC 248, a decision of Dunne J. (in this Court) dated 14th May, 2009, she declined relief to an applicant because she did not think that he met the criteria as to the occurrence of new events that had occurred since the making of the original order, which would invalidate the basis of that order. While accepting that the applicant's financial position had deteriorated since the making of the order, she found that at the time the applicant entered into the consent order in that case, his finances were already fully stretched.

27. In the case of *A.K. v. J.K.* [2009] 1 I.R. 814, a decision of Abbot J. of 31st October, 2008, he stated at para. 14:-

> "Hence, I conclude that the test as to whether a change, or changes, in circumstances ought to ground a strategic application going outside the limited circumstances envisaged by s. 18 should be that, ('other things' being equal) if they

were of such a fundamental nature that it would be unfair and unjust to ignore such change or changes."

28. It is submitted on behalf of the respondent that since the terms of settlement were freely entered into between the parties, with the benefit of legal advice, and were then made an order of the court on consent, that it is implicitly acknowledged that these orders make proper provision for the parties in the circumstances. I accept this submission, because the Court does not usually in such cases embark on an inquiry as to what is proper provision, since the parties have already, following negotiations, decided this for themselves, and they are better positioned than the Court to arrive at such a decision. Accordingly, if it is the case that the terms of settlement made proper provision for the parties at the time they were entered into and made an order of the court, and if the circumstances of the parties have not changed in the intervening period, then if follows that they must still constitute proper provision for the parties. That being the case, there is no need to address, *seriatim*, the criteria set forth in s. 16 of the Act of 1995, as the Court would otherwise be required to do if it was satisfied that a change in circumstances had occurred since the terms of settlement were concluded. Moreover, the plain reality of this case is that the means of the parties are stretched to the limit and the respondent in his evidence candidly acknowledged and expressed sympathy for the plight of the applicant. But the fact is that he does not have the means at his disposal, at least at the moment, to make a lump sum payment to the applicant, as she now seeks. For all of these reasons, the application of the applicant must be dismissed.

29. As to the application brought forward by the respondent, there is no doubt that the applicant was prevaricating from completing the documentation required to transfer the Chicago property into the name of the respondent, as required by the court order made pursuant to the terms of settlement. As a result of this delay, the evidence established that the respondent was put to additional expense in the form of local property taxes. However, that delay transpired to be somewhat academic because the respondent only recently established the precise legal requirements to give effect to this transfer and as a result only recently requested the applicant to address the same. However, having regard to the earlier prevarication on the part of the applicant in attending to these matters, I will discuss with counsel the appropriate form of order to secure compliance by the applicant with her obligations in this regard.