Neutral Citation Number 2005 IEHC 154

THE HIGH COURT
FAMILY LAW

[2002 No. 83 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

B.D.

APPLICANT

AND
J.D.

RESPONDENT

Judgment delivered by Mr. Justice William M. McKechnie on the 4th day of May, 2005.

1. On the11th December, 2003 this court delivered judgment in these family law proceedings between the applicant wife and the respondent husband. Having granted a decree of judicial separation and having placed a valuation of €10 million on what I might term, purely for descriptive purposes, as the family business, the court, when endeavouring to make "proper provision" for the parties under s. 16 of the Family Law Act, 1995 *inter alia*:-

(1) directed the respondent to pay to the applicant:-

(a) the sum of €2 million net on or before the 28th February, 2004;

(b) the sum of €1 million net on or before the 28th February, 2005 and;

(c) the sum of €1 million net on or before the 28th April, 2006,

with the 2005 and 2006 payments carrying simple interest at the rate of 4% from the 1st March, 2004 until the dates of payment.

(2) Granted the respondent an option of acquiring his wife's interest in the family home, in respect of which a valuation of €1 million had been placed, which option, if exercised carried the financial obligation of paying a further sum of €500,000 on or before the 30th April, 2004.

(3) Directed the respondent, in the event of his defaulting on or declining to exercise this said option, to transfer his interest in the family home to the applicant and in that event the above payment which fell due on the 28th April, 2006 was to be reduced by, and to a sum of €500,000, and;

(4) directed the respondent to make a contribution of €100,000 to the applicant wife in respect of her costs.

These provisions were contained in paragraphs (ii) and (viii) of the court's order, which apparently was perfected on the 5th April, 2004.

2. By Notices of Appeal dated the 20th April, 2004 the husband appealed against the aforesaid judgment and the resulting said order.

3. On the 8th December, 2004 the Supreme Court gave judgment in this case and having allowed the appeal in part, set aside the aforesaid paragraphs (ii) and (viii) of the High Court's order and remitted the proceedings back to this court for the purposes specified in that judgment, which purposes were reaffirmed in the court's order of the same date.

4. The applicant wife has now issued a Notice of Motion seeking *inter alia* directions as to the mode and manner in which this court should conduct the hearing as directed by the Supreme Court. She also seeks other orders relative to that re-hearing including an order appointing a single tax expert for the purposes of advising on the most tax efficient and tax neutral consequences of complying with s. 16 of the Family Law Act, 1995. Affidavits were sworn by both parties and submissions made on their respective behalf. This court now gives a ruling on the issues raised in that Notice of Motion.

5. In his arguments addressed to the Supreme Court, Mr. Durcan S.C., who appeared on behalf of the husband, submitted that the trial judge should have, but failed, to make appropriate findings on the following matters:-

"(a) Whether it was possible to remove the sums of money in question from the company over a two year period;

(b) what mechanism could be used for extracting such funds,

(c) what would (be) the commercial effects of the extraction of the funds on the viability and future of the business and

(d) what would be the tax effects of the extraction of the funds".

Mr. Justice Hardiman, who gave the unanimous opinion of that court upheld these submissions insofar as paragraphs (b) and (d) were concerned but came to the conclusion that the High Court's judgment must be regarded as having resolved the position which underlined both paragraphs (a) and (c). The case was thus remitted back so that this court "may consider and make such findings as it considers appropriate in the issues of:

(1) what mechanisms could be used for the extraction from this company of any funds ordered to be paid to the applicant;

(2) the tax effects on the companies or on the respondent of the extraction of the relevant funds". See the order of the 8th December, 2004.

That court also set aside the contribution for costs as provided for by the High Court and made no order as to the costs of the appeal.

6. On the hearing of the aforesaid motion Mr. David Hegarty S.C. made a number of submissions on behalf of the wife. His principal argument was that in determining what a "new lump sum" should be, the trial judge must approach that task on the basis of making "proper provision" for the applicant as well as the respondent. In order to so do it is necessary to carry out a further full valuation of the entire assets available to the parties and to conduct that exercise by reference to the date of re-hearing. No other approach would be meaningful. He said that to try and endeavour to make "proper provision" on historical figures "that included estimates of management accounts which subsequently transpired to be grossly inaccurate" (see paragraph 10 of the applicant's grounding affidavit) would be, in his opinion to burden his client with a great injustice. He believes therefore that the respondent husband should not be permitted to "pick and choose" from those parts of the High Court judgment and order which he favours and yet at the same time to insist upon a rigid curtailment of the re-hearing. Accordingly he submits that the family business should be re-valued as of the date of the re-hearing. He also makes a similar submission with regard to the family home, notwithstanding the fact that the respondent has exercised the option given to him by the High Court order. As a result he asserts that both of these assets, each with an up to date valuation, should be available for the purposes of making "proper provision" under s. 16 of the 1995 Act. Finally, he also submits that the setting aside of this court's contribution of €100,000 towards the wife's costs was not in anyway indicative of an intention by the Supreme Court to lay down a general rule as to how costs should be dealt with in family law matters. Rather it was a decision peculiar to the facts of the instant case.

7. Mr. Durcan S.C. appears on behalf of the respondent. In his submission he argues that the approach suggested by the wife is fundamentally at variance with the Supreme Court order and that in any re-hearing this court is strictly confined to consider such matters only as are necessary to "make such findings as it considers appropriate" on the two issues referred back to it. It has no jurisdiction to go further. In particular, he submits that the valuation of €10 million on the family business was not interfered with on appeal and has not been referred back. Moreover, he says that the applicant did not appeal the provision dealing with the family home and likewise the Supreme Court has not asked the High Court to further enquire into this matter. Therefore there can be no question of this court either revaluing the business or of taking the family home into account, when, having made such findings as directed, it should come to apply s. 16 to the facts as so found. Consequently the re-hearing should be restricted in the manner submitted. Finally I also think counsel agreed with the previously stated position about costs.

8. Strongly implicit in both the submissions of and the affidavit sworn by the applicant, is an allegation that the financial position of the group of companies, which own and control the family business, is in a far stronger position today than what was "estimated" for it at the date of the original hearing, namely July 2003. If that is correct it would seem to follow that on any current re-assessment of its financial worth, the business would be valued at a figure higher, perhaps substantially higher than that placed on it by this court originally. On that assumption, which of course may be entirely incorrect, it is quite simple to see how aggrieved the applicant might feel unless an up to date valuation exercise is carried out. Unfortunately however from her point of view such a feeling cannot determine the scope of the re-hearing. That task must be approached by considering what is the proper interpretation of the Supreme Court's intention as found in and gathered from a reading of the judgment as a whole. It is only in this way that its directions can be properly complied with.

9. Having concluded that the trial judge made an error of law in failing to make findings of fact on the two issues above identified, the Supreme Court then had to consider the consequences which flowed from that error. From the judgment we know that it was requested to but declined an invitation to substitute its own view as to what the "appropriate lump sum" should be. Instead it remitted the proceedings back for the purposes of this court rectifying the omission complained of in respect of the above said matters. It did not however by any express words direct a complete re-hearing on all matters which would be germane to a de novo consideration of what might constitute "proper provision". It could have, but did not choose this option. So unless from an examination of the judgment as a whole one could impute to the court such an intention, it would not in my view be permissible for this court to embark upon a full re-hearing in the manner suggested by the wife. Having carefully looked at the judgment I cannot see any basis for inferring the existence of such an implied direction. In this regard I do not see how *D.T. v. C.T.* [2002] 3 I.R. 334 can be of any assistance to the applicant. Whilst it is true to say that, *D.T. v. C.T.* determined that the correct date of assessment should be the hearing date, nevertheless it is quite evident that that general rule was intended to apply to an original hearing at first instance, and not to a partial re-trial on limited issues. In such a situation the parameters must be ascertained from the judgment referring the case back. I must therefore reject the principal submission made on behalf of the applicant. That means that I must proceed on the basis that the family business is valued at €10 million and that the family home is valued at €1 million.

10. This view however does not conclude matters. It is in my opinion abundantly clear, that within these confines as outlined, this court is constitutionally and legally obliged to make proper provision for the parties having regard to s. 16 of the 1995 Act. Guidance as to what matters the Supreme Court felt were relevant to this court's performance of that function, can I feel, be obtained from the judgment itself. At p. 12 of the record, Hardiman J. said "The valuation and the lump sum award, together with the cost of buying the wife out of the family home, transaction costs and tax liability, is such that the costs to the husband of making the provision ordered substantially exceeds one half of the value of the company. Whether this is appropriate in the circumstances, and if not what sum would be appropriate, can only be addressed after a view has been taken on two of the four points mentioned in a previous section of this judgment".

11. In that passage the learned judge has identified the valuation placed on the business and the family home, the lump sum provision made, the option granted in respect of the family home and the transaction costs and tax liability involved in the implementing provisions of the High Court order, as being matters highly relevant to the making of proper provision for the parties. As I have previously stated, it is clear in my view from other parts of this judgment that I am bound by the valuations on the business and the family home and that I must take into account the realisation costs, (identified at page 11 of the judgment as meaning in this case tax liability) involved in any financial provisions which might be made. However, I cannot see any express restriction on this court which would prohibit it from having available for its consideration the second most valuable asset of the entire marriage, namely the family home. On the contrary I believe that the passage above quoted can be read as allowing this court, to have regard to the family home in the discharge of its proper function under the 1995 Act.

12. In addition to this interpretation of the judgment, it will be recalled that the trial court did not deal with the family home by directing the respondent to acquire the wife's interest in it, at a cost of €500,000. Instead it granted him an option. Without in anyway attempting to explain my earlier decision it is I think reasonable to infer that in so approaching the family home in that way, the court was facilitating the husband in allowing him to take an overall view of his financial obligations under the High Court order. By not exercising this option he would have available to him an extra €500,000 though of course he would have to find accommodation for himself. If therefore there was for example, on the financial provisions made, a tax liability of say €0.8 million that sum could have been reduced, perhaps very significantly reduced, if the alternative choice within the option was followed by him. That was to have the wife acquire the husband's interest in the home. In such a case, there would have been no question of any discretion once the husband declined the offer which the court granted him. It was therefore a decision in his gift. Consequently this particular aspect of the financial provisions which the court made, differed in this material respect from the other provisions it so ordered.

13. In addition it would I feel be grossly unfair if knowing as he did, what the High Court order entailed, the husband could still, by his own action, effectively put a sum of €500,000 out of the reach of this court even in the limited manner in which its re-engagement is required in this case. Such a consequence would seriously hinder the performance of the court's duty in making "proper provision" as of course it must do. Needless to say in arriving at this conclusion, which I do even in the absence of any appeal taken by the wife, I am merely indicating that this asset should be available for the court's consideration and I am not of course in anyway either

pre-empting or speculating on how the court might actually deal with the asset when making "proper provision".

Accordingly by virtue of the judgment itself and in particular that section thereof which is quoted at paragraph 10 above and by reason of the circumstances just mentioned, I believe that I am entitled to have regard to the family home; though of course I fully realise that I cannot interfere with the valuation of €1 million already placed thereon.

14. The second matter of considerable difficulty relates to the financial position of the companies which own and control the family business. It is quite clear from the Supreme Court's judgment and order that the lump sum payments, as provided for by the High Court, have been set aside and that a further comparable exercise must again be undertaken in order to arrive at "proper provision". This time, of course making the findings specified by the Supreme Court. The question which thus arises is whether this court, in embarking upon that task should be restricted to the profile of the companies as it existed in July 2003 or whether it would be permissible to consider that position as of the re-hearing date. Depending on the individual components of its finances, it may for example be that on the extraction of a capital sum from the companies there would be no difference in the tax consequences between the historical position of two years ago and today's date. On the other hand it is conceivable that the tax liability on the same sum could be greater or smaller today than it would be if the assessment date were that of the original trial. The companies may have more or less debt, more or less cash, more or less investments or perhaps quite different financial structures. They may be able to avail of perfectly legitimate tax schemes which on the realisation of funds would considerably reduce their liability. Or they may not. One simply does not know.

Similar considerations would also apply to the personal circumstances of the respondent.

15. It seems to me that it would be utterly unreal to have to rely on historical data which may display a totally different picture than that prevailing today. Take the following situation as an example. This court could come to a conclusion that, as matters stood in 2003, the tax cost of extracting "Y" funds would be "X" and accordingly proceed on the basis that X plus Y equated with "proper provision". If however on today's figures the cost of Y funds was not X but a multiple or a fraction of it then the total sum of Y plus X may be entirely inappropriate as "proper provision". Again, if in today's figures the tax liability should be, say one third of X, it would be imprudent, indeed almost irresponsible for the respondent husband not to utilise an extraction method which would yield the lesser liability. In this example therefore either the court could insist upon a route which would demand the expenditure of the higher figure or alternatively, it would allow flexibility and be oblivious to the gain or benefit to the husband. Both situations would be highly unsatisfactory. The example given is of course but one. There are a number of other analysis which could easily produce several different variations. In my view in any of these circumstances I doubt strongly if this court could comply with s. 16(5) of the 1995 Act which prohibits it from making any order under that section "unless it would be in the interests of justice to so do". It therefore seems to me that whilst sticking strictly to a valuation of €10 million this court should be able to look at the existing components of the companies finances, (but only insofar as these are relevant), in order to determine what sum would satisfy the "proper provision" standard and in the context of that process, to make all necessary and required findings.

16. Finally, when applying s. 16 of the Family Law Act, 1995, this court is not in my view restricted by the Supreme Court's judgment from making an order for the payment of maintenance as well as providing for a lump sum if, in its overall judgment a combination of both are necessary to make "proper provision".

17. The last point that requires consideration is to comment on the question of costs. Could I immediately say in this regard that I respectfully agree with the views of both counsel in this case. It seems to me that the principal rationale for the decision of the Supreme Court in setting aside the contribution of €100,000 towards the applicant's costs, was based on the fact that she had been unsuccessful in her primary claim, namely an assertion that she was entitled to a 50% equitable interest in the companies. Its decision therefore, can be considered as one made on the facts of this case.

18. To view it otherwise would be in my opinion to convert it into a major decision of significant importance in family law matters and one which could have far reaching consequences for litigation in this area of the law. In the first place there are statutory provisions which are directly applicable to this issue. In any proceedings under the Judicial Separation and Family Law Reform Act, 1989, the court's discretion on the question of costs is specifically covered by s. 35 thereof, which read as follows:-

> "S. 35 – The costs of any proceedings under this Act shall be at the discretion of the court".

That provision also applies to the Family Law Act, 1995 and to all proceedings taken under the Family Law (Divorce) Act ,1996. See s. 38(6) and 38(5) respectively of these Acts. These provisions are probably doing no more than re-affirming what the position was at least as far back as the Matrimonial Causes and Marriage Law (Ireland) Act, 1870. See s. 27 thereof. Therefore it would seem, that when dealing with family law proceedings covered by these Acts, the court has a discretion on the issue of costs, which presumably it should exercise in accordance with Order 99 of the Rules of the Superior Courts, the relevant case law and of course the facts of that particular case.

19. Secondly it must be realised that family law proceedings today are in many respects fundamentally different in nature than such cases previously were, even as recent as 25 or 30 years ago. At that time and indeed for decades before, there was a strong view that, save in exceptional circumstances, a husband should be responsible for his wife's costs, perhaps even if she was unsuccessful. This approach stemmed from a period in time when a married woman was not entitled to hold property in her own right and when as a matter of strong probability she had no assets of her own. It was thus considered unjust to deprive her of access to the courts simply because of these facts. (See *F. v. L.* [1991] 1 I.R. 40). Nowadays however as a result of legislative intervention, judicial activity in establishing equality and eliminating discrimination, and in an era of major societal change, these considerations no longer in my view have the same application. Circumstances quite literally have changed.

20. It might be somewhat surprising to realise that the specialist practitioners in the field of family law are virtually unanimous in their view that a case with an asset base of €5 million or under does not qualify as a "big money case". In addition and perhaps equally surprising is the fact that in about 90% of cases that come before this Court, the monetary threshold which applies to a case in the Commercial List would be most easily satisfied. And here I am not simply referring to the value of the family home. Moreover in cases which fight, the chase for documentary material, the pursuit of interlocutory gain and the intensity of court battle would comfortably rival the most contentious parties in any area of litigation. All of this relates to ancillary orders, as there is rarely, if ever, a contest

on the evidential basis grounding the application for the decree itself. As a result it has now become necessary for this court, from a very early stage, to actively manage the progress of such cases, and do so right up to the date of trial. Indeed in this regard a comprehensive document will shortly issue under the hand of the President of the High Court, either by way of a Practice Direction or as a Trial Protocol, which will set out mandatory requirements so that all such cases can be dealt with expeditiously, efficiently and in the most cost effective way.

21. In this branch of the law there is of course no tendering process similar to that which exists elsewhere and the availability and use of the Calderbank procedure (see *Calderbank v. Calderbank* [1975] 3 All E.R. 333 C.A.) is undeveloped. Whilst it is true that "open offers" can be made by either party this facility is not commonly availed off. There is therefore no method by which the unreasonableness of one or other of the parties can be dealt with by the court, save for demonstrable conduct during the currency of a trial which rarely is that evident. Given the obligation to make proper provision under the 1995 and 1996 Acts, many parties believe that as a result of this requirement they are in effect financially immune from participating in litigation no matter how lengthy the process may be or how unreasonably they may act. For this to be the situation or even perceived to be the situation, is not in my view in the public interest or in the interest of the administration of justice.

22. A great number of parties involved in this type of litigation have physically, psychologically and emotionally exited from their former partners and all that remains for them is to have apportioned, in whatever percentage or form, what money or assets remain. For those who, for whatever reason, have not reached that stage they know that, in the guise of seeking financial relief, they can use the court as a forum in order to ventilate their hurt, anger, sense of betrayal or other deeply felt conviction. Whilst on a personal and human level I have every sympathy and understanding for the requirement of such an emotional outlet, nevertheless one might legitimately query whether this is a function of the court's system let alone for those persons its primary function. The responsibility in this regard must surely lie elsewhere.

23. Lest the above should be taken as portraying my view of all family law cases, I should immediately say that this is not so. A reasonably good number of such cases are compromised and some others do not have the intensity which I have endeavoured to describe. I should also say that the family bar is very conscious of its responsibilities to the court. However, notwithstanding the very many positive aspects of family law procedure, the fact remains that the availability and utilisation of a cost order, either as a litigation benefit or deterrent, must be considered in a much more overall way.

24. In my view I do not believe that any category of family law case should as a matter of principle be exempt from these cost provisions. It cannot be right that litigation can be open ended without even the risk of any type of cost order. Whilst I appreciate that the available assets are most frequently accumulated within marriage and that decrees of judicial separation and divorce are available without establishing fault, nonetheless I cannot accept that a court should be powerless to award costs even where the case, or the parties to it or their conduct within the proceedings, merit the making of such an order. If that were so I firmly believe that both justice and the public would be ill served.

25. In particular I cannot identify any reasons why these provisions would be anything other than highly relevant to "big money cases" when clearly by definition there should remain, even after an award for costs has been made, substantial funds out of which the parties can very comfortably thrive. My most major concern would be with the smaller type of case where the assets, in whatever form, are quiet limited. In such instances there may be great difficulty even in providing shelter, clothing and food for the parties and their dependents. It is in that type of situation rather than in a big money case where the court will have most difficulty. Whilst I do not have any concluded view as to how best the issue can be dealt with, nevertheless even in the most trying circumstances I believe that a cost award should always be available as a matter of discretion to the trial court.

I therefore propose to apply these principles to the forthcoming hearing between the parties in this action.

26. In consequence I would intend to proceed on the basis that I am bound by the valuations placed on the business and the family home but that within these limits I am entitled to have regard to both, in the restricted and limited manner which I have indicated. As a result therefore, I will after hearing the parties make such orders as may be appropriate so as to facilitate this re-hearing. In that context I wish to say that I regret the decision of the respondent husband to decline an invitation to have a single tax expert appointed who in that capacity would be the sole witness on taxation issues.