

THE HIGH COURT

FAMILY LAW

[2009 No. 32 M]

**IN THE MATTER OF THE FAMILY LAW ACT 1995,
AND IN THE MATTER OF THE FAMILY LAW DIVORCE ACT 1996,
AND IN THE MATTER OF THE DOMESTIC VIOLENCE ACT 1996,
AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964**

BETWEEN

J.D.F.

APPLICANT

AND

C.F.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 24th day of September, 2013.

1. This judgment relates to the finalisation of an interim pension adjustment order directed to be made by the Supreme Court, as part of the conditions for a stay on the order of this Court granting a divorce to the applicant which was made on 25th January, 2013.

2. The interim pension adjustment order suggested to the Court by the respondent, who has had carriage of its preparation, follows the normal format of a pension adjustment order, which relates in this case to the retirement benefits, excluding the voluntary contribution fund, claimed by the applicant. The paragraphs, as drafted by the respondent, in dispute by the applicant are as follows:-

"3. Pursuant to s. 17(2)(a) of the Family Law (Divorce) Act 1996, the Court also makes an order directing that a contribution to the costs incurred by the trustees in the amount of €40,000.00 in total, in complying with these orders and all orders previously made under subs (18) and (25) of the Act, and under the Family Law Act 1995, shall be borne proportionately by the parties with the applicant paying 50% of the full amount (€20,000) and the respondent paying the remaining 50% (being also €20,000) to the trustees, which amounts shall be paid within a period of five days from the date of this order, and

4. Pursuant to the provisions of s. 17(22)(b) of the Family Law (Divorce) Act 1996, the Court also makes an order where the member or respondent beneficiary fails to pay the relevant amount within that time, that the contribution to costs outlined in clause 3 above, shall be deducted by the trustees from the amount of any benefit payable to the respondent, whilst reserving the rights of the respondent to claim a refund of half the relevant amount during the appeal. The Court orders that any tax arising on payment of a contribution to costs by the member spouse and/or the non-member from the scheme assets shall be for the account of the member spouse or the non-member spouse respectively and on no account shall any tax be chargeable to the scheme or to the trustees."

3. The finalisation of the interim pension adjustment order came before this Court on 21st June, 2013, and 25th July, 2013. This Court heard the applicant in person and counsel and solicitor for the respondent on each occasion. In addition to the orders of the Supreme Court and this Court, the Court considered the litigation history of the case and, in particular, the recently filed affidavits of the applicant sworn on 19th July, 2013, and replying affidavit of the applicant sworn on 25th July, 2013, replying to the affidavit of the solicitor for the respondent, sworn on 22nd July, 2013. The Court also, on a further consideration of the matter before the summer vacation, was furnished with a letter dated 30th July, 2013, from the solicitors for the pension trustees in which they made suggestions in relation to previous drafts furnished to them. This Court approved the pension adjustment order containing the paragraphs as quoted for the following reasons:-

(1) The pension adjustment order complies with the exact terms of the order of the Supreme Court directing that 40% of the defined benefit fund be the subject of the interim pension adjustment order.

(2) The 50/50 liability for costs agreed between the solicitors for the respondent and the pension trustees in the face of a bill or claim for €60,000 is in accordance with the ultimate decision of this Court during the course of several hearings of discussions, and the arguments made by the applicant regarding his share of the pension adjustment order as envisaged by order of this Court of 25th January, 2013. Although his analysis may be mathematically correct, it does not reflect the fact that the applicant took the benefit of the involvement of the trustees in this Court and in the Supreme Court prior to the order of this Court on the divorce proceedings dated 25th January, 2013, when the applicant faced the prospect of imprisonment by reason of his failure to pay maintenance in accordance with the order of McKechnie J. on appeal from the Circuit Court in the judicial separation proceedings, which proceedings had previously been heard by O'Sullivan J. in the High Court and were the subject of an appeal to the Supreme Court. While the respondent potentially might have benefited from the substitution by this Court of an immediate pension benefit enabling her to encash same, the applicant himself potentially stood to benefit greatly by reason of avoiding the prospect of imprisonment for failure to pay

maintenance in respect of the respondent and the parties' dependent children. In the circumstances this Court is of the opinion that the 50/50 division of liability of €20,000 for each of the parties is appropriate, fair and equitable.

(3) While the applicant argued that neither he, the respondent nor the Court requested the trustees solicitors to appear in court, in the High Court, and that neither of the parties requested such an appearance with the attendance of witnesses in the Supreme Court and that such attendance was on the motion of the Supreme Court only. This Court rejects the applicant's contention that the running up of costs of the claimed €60,000 level should not be visited on either of the parties, on the basis that having heard the discussions and differences which gave rise to the appearance of the solicitors for the trustees before the High Court and the Supreme Court, the incurring of such costs is not a matter to be made the responsibility of the trustees but rather was due to the vigorously litigious (if not punctilious) attitude of the applicant.

(4) During the course of submissions and discussions in relation to the costs aspect of the case, it was indicated that this Court would be willing to measure costs in the sum of €40,000 for the purpose of avoiding further incurring of costs on behalf of the trustees and the avoidance of a possible log jam in terms of the obligation of the applicant to engage cost accountants in relation to extremely complex matters and eventually engage in a taxation process. The taxation process itself carried the hazard of further dissipation and attrition of the already modest pension funds available to the parties. This Court noted that the measuring of such costs was without prejudice to any further reduction which the applicant might obtain in relation to such costs: These costs might be obtained through his own efforts, or engaging in the services of the Pensions Ombudsman, or some other mediator, to effect such a result. However, such an addendum was meant to enable the applicant to get the benefit of any ex gratia benefit obtained by any further negotiation, which this Court would be powerless to prevent. It is entirely a different matter for the Court to incorporate such a nuanced view into a pension adjustment order, and the Court accepts the submissions of the solicitors for the pension trustees in their letter of the 30th July, 2013, that the interim pension adjustment order should not incorporate reference to such matters which they regard as having the potential to raise further unnecessary complications on costs.

(5) While the applicant in his submissions raised what he considered to be an unjust anomaly in regard to the deduction of tax by the trustees from the benefit to which the parties were entitled under the pension adjustment order, insofar as it appeared that the respondent would obtain immediate benefit to her 40% share of her option to transfer the funds to another fund or to encash the share by taking her 25% tax free cash payment on requesting the transfer of the balance to an A.M.F., while (on the other hand) it was not his intention to retire, but rather to take the benefit of any growth or improvement in the fund until such time as he would decided to retire. He stated that his view was that, under the terms of the legislation relating thereto, he was not, therefore, taking a benefit within the meaning of the legislation. This Court does not agree with his view. For the Court to agree with this view it would introduce an unacceptable degree of inconsistency in the manner in which the pension scheme is to be administered. Whereas such an outcome would not necessarily make the trustees themselves formally liable for his tax on a personal basis, their admitted obligation to act as accountable persons in respect of tax on cash benefits generally taken by parties would mean that they would have to pay the estimate of tax concern to the Revenue having deducted it from the general defined benefit fund. This outcome would be manifestly unfair and unconscionable towards the other members potential beneficiaries of the fund and totally inconsistent with the proper administration of these pensions funds. In the circumstances, the Court is satisfied, that the values of the fund to which the parties are ultimately entitled (even though interim and in circumstances where there may not be a synchronised retirement by the parties) represent the "benefit" in statutory terms to which they are entitled and the applicant's arguments do not succeed in that regard.