Neutral Citation: [2013] IEHC 645

THE HIGH COURT

FAMILY LAW

[2010 No. 68 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

F. H.

APPLICANT

AND

D. H.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 13th day of December, 2013

1. This matter came on for hearing on the 26th October, 2012, and related to an application by the respondent to have the costs awarded against the applicant in respect of the proceedings which she had discontinued. The litigation history of the discontinued proceedings is set out in summary form in a note prepared by me after directing that the discontinued proceedings continued as a full judicial separation proceeding without any stay in respect of a preliminary issue in relation to a "fault" allegation in respect of which the wife claimed to have proof through documentation arising from a computer and USB stick associated therewith. The note is appended herewith. That appeal continues in the Supreme Court. The discontinued judicial separation proceedings were initiated at a time before which any "no fault" grounds for judicial separation proceedings could be advanced. The applicant has now initiated further judicial review proceedings which may be determined on a "no fault" basis according to claims made by her counsel, Mr. Durcan.

2. In relation to the discontinued proceedings, the respondent has at all times made the case that the documentation alleged to be on the computer and USB stick did not relate to him. Thus, in the discontinued proceedings, the wife asserting the documentation and the husband denying same, have raised very serious points of principle which in any litigation and, - even in family law litigation,- might easily give rise to an order for costs against the party against whom the decision on the issues had gone.

3. The difficulty posed by the continued Supreme Court appeal and certain difficulties in relation to the obtaining of hardware material from which the authenticity of the documents could be tested, probably has led the wife to opt for the more certain and easier course to initiate proceedings to take the benefit of a potentially "no fault" outcome.

4. Ms. Clissmann on behalf of the respondent submitted that the provisions of O. 26, r. 1 of the Rules of the Superior Court was mandatory insofar as the words "shall be paid" related to the costs claimed by the respondent in respect of the discontinuance.

5. Mr. Durcan relying on the judgment of Henry J. in the case *Barretts & Baird Wholesale Limited* referred to in the judgment of Laffoy J. in the *Shell* case where he says:-

> "Now in most cases of discontinuance that may well be the general rule because in most cases of discontinuance, the discontinuance is effectively a defeat or an acknowledgement of a defeat, or a likely defeat. But it is equally possible, and the plaintiffs assert it to be the situation in this case, that discontinuance reflects not defeat so much as that the matter has now become academic save for the question of costs. In those circumstances where the matter is effectively academic, the court should then look at the matter to see whether the general rule applies because I am satisfied that the general rule should only apply when the discontinuance can safely be equated with defeat or an acknowledgment of likely defeat."

Mr. Durcan submitted that this situation described by Henry J. happens occasionally in litigation where parties start litigation and that an issue in that litigation becomes academic or, in other terms, moot and that it is not necessary to determine the issue. Mr. Durcan did not suggest to the court that costs might not be awarded against the applicant in the end of the day, but submitted that the issue of costs should be adjourned for the determination at the end of the second set of judicial separation proceedings now issued in the context of the overall matrimonial jurisdiction under the Family Law Act 1995.

6. Ms. Clissmann submitted that the authorities put forward by Mr. Durcan did not detract from the mandatory nature of the provisions of O. 26 in the case of a discontinuance of an action by a plaintiff prior to delivery of defence such as occurred in this case. I made the following ruling subject to further reasons being given in this judgment, and I refer to same as it occurred in the transcript *verbatim*:-

> "Firstly, this is a family law court and it is in the business of dealing with applications for separation and divorce which are validly brought. There is some doubt over the validity or the capacity of the jurisdiction of the court to deal with the first set of proceedings. That question is being litigated on appeal in the Supreme Court. There is also an unresolved difference in relation to whether the IT material is true or false. There is not, plainly, enough evidence for the court to decide the IT issue on the merits. But there can be no argument about the right of the applicant to pursue the second set of proceedings. These I have described would be "no fault" type proceedings. Therefore, I have come to the conclusion that these proceedings should continue on notwithstanding that there is an appeal in the Supreme Court (in respect of the first set of proceedings now discontinued). That is entirely without prejudice to what the Supreme Court might do in relation to costs. I am going to direct Mr. Durcan to go to the Supreme Court and inform them at the earliest possible

course that he has discontinued the proceedings on foot of which the appeal in the Supreme Court is based. He will be putting his hand into the lion's mouth again in relation to an application for costs against him in the Supreme Court. In relation to that, I express no view whatsoever in relation to what the Supreme Court might do or, indeed, what Ms. Clissmann might submit in the Supreme Court in terms of an application for costs in that court. This is none of this Court's business at all. However, what this Court would be very emphatic about is that Mr. Durcan would proceed into the Supreme Court with all due haste lest the Supreme Court are now trying to manage this case or working or research it in any way whatsoever so that he may withdraw the appeal on this basis."

7. My reasons for the decision above which is incorporated into a formal order appended hereto, are as follows:-

1. It is not necessary for this Court to determine whether the provisions of O. 26 are mandatory in this case or in family law proceedings generally, as to reserve the costs until the determination of the judicial separation proceedings now before the court, will not prevent such arguments to be made a later date.

2. The court following the *dictum* of Hardiman J. is always reluctant at an early interlocutory stage of proceedings to make an order against a party litigating a judicial separation as the making of such order could engender bitterness which would be inimical to the prospects of settlement and foster unnecessary tensions and divisions between the parties which would be harmful to children.

3. On a general basis, the practice of this Court, certainly in recent years, is to put a stay on any order for costs made against a party in judicial proceedings at an interlocutory stage, as it is considered that the making of such costs order could prejudice the capacity to raise funds for the resolution of the judicial separation proceedings or divorce proceedings. While Ms. Clissmann suggested as a fallback position that the court could determine the costs issue now and put a stay on the order for costs, I cannot see any benefit through the court taking up time dealing with the costs issue in this application when the order for costs, if made, would be most likely to be stayed.

4. If, ultimately, the court were to decide costs not on a mandatory basis but on a discretionary basis as was urged by Ms. Clissmann as an alternative basis for a claim, the making of such a discretionary order would necessarily fall into the area of consideration of the assets available to the applicant which assessment could be best made after the determination of the judicial separation proceedings under the 1995 Act, as suggested by Mr. Durcan. Indeed, the respondent does not invite the sympathy of the court in this regard by asserting through his counsel that the applicant is a woman of substantial means and that the court should proceed on a summary basis on foot of this assertion to decide the issue of costs when, in fact (as appears from the note appended hereto for the purpose of the Supreme Court appeal), that the respondent has sought the route of a jurisdictional challenge in the discontinued proceedings to enjoy the benefit of not having to deliver an affidavit of means in his own case.

APPENDIX hereinbefore referred to

NOTE RE: Hearings leading up to Order of the 10th November, 2011

8. This case first came to my attention in the second last week of term in July, 2010. counsel for the parties had informed the court that in this application for judicial separation the parties were agreeable to have preliminary issues heard first in relation to whether there existed a normal marital relationship between the parties for in excess of one year prior to the institution of proceedings, and similar issues and for that reason, no affidavits of means were required to be filed. I acceded to making the order only upon being assured by counsel for both parties that the welfare of the children would not be affected by the risk of harm arising from a delay in a split hearing if the respondent was not successful on the issues and the full judicial separation hearing would have to proceed. I indicated that I had in mind the results of a judgment on such a preliminary issue (although involving preliminary issue on Brussels II *bis* applicability) in *RS v. PS*, in respect of which the judgment on the issues was delivered by me on the 27th July, 2009. I indicated that in directing that issue, or issues, I was similarly given an assurance that the welfare of the children was not being affected, only to find that when the issues were held against the claim of the husband respondent in that case, that they had for a prolonged period involving delay of custody issues, been the subject matter of what I ultimately found in a subsequent written judgment to be alienated to a greater or lesser extent, thus leaving provision of custody and access arrangements more difficult and damage impossible to reverse as was shown by a subsequent written judgment delivered by me.

9. When the matter came before me this term, I learned that a week later on the last day of term the matter came before Clark J. when the respondent sought injunctive relief against the applicant in respect of his allegations pursued under a recently issued special summons under the Guardianship of Infants Act, prohibiting the applicant wife from taking the children for a summer holiday so as to prevent him from seeing them for a month.

10. When the matter came me on the 10th November, 2011, I indicated that I considered that the court had been misled by the assertion in July that the welfare of the children would not be affected, and I was satisfied that to allow a preliminary issue to proceed in this case would be extremely damaging to the children where circumstances existed of co-habitation of applicant and respondent with the children right through to the hearing of the so-called preliminary applications or preliminary issues unless the parties could agree for appropriate care arrangements pending the hearing of the preliminary issues.

11. On hearing that no such agreed provision could be made, I refused to allow the matter to proceed on the basis of prior hearing of preliminary issues and instead directed that affidavits of means and welfare would be exchanged by the parties with an undertaking by the court to fix an early date for the full hearing of the judicial separation proceedings as is normal in these cases.