

## THE HIGH COURT

Record No. 2008 175M

## IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN/

SF

APPLICANT

AND

MF

RESPONDENT

**JUDGEMENT delivered this 17th day of May, 2013 by White Michael J.**

1. This is an application for divorce and ancillary relief by the applicant. Proceedings were issued on the 7th August, 2008. The applicant filed her original grounding affidavit on the 10th July, 2008. The respondent did not file his replying affidavit until the 9th May, 2009. There were a number of different orders of the court directing the respondent to deal with queries. An order of discovery was made on the 16th day of July, 2010. The respondent filed an affidavit of discovery on the 19th November, 2010. The applicant filed an affidavit of discovery on the 26th November, 2010.
2. The applicant's solicitors came off record by order of the Court on the 15th April, 2011. There were no further pleadings until the matter came before the Court again on the 27th April, 2012, when the Court directed both parties to file an up to date vouched affidavit of means by the 8th June, 2012. The applicant filed an affidavit of means on the 7th June, 2012, and the respondent filed an affidavit of means on the 28th June, 2012. Vouching remained outstanding in respect of the respondent's affidavit of means.
3. The applicant issued a motion on the 22nd August, 2012, returnable for the 1st October, 2012, seeking maintenance pending suit and lump sum payments and restoration of voluntary maintenance payments that had been made of €500 but which had been varied from the 1st February, 2011, to €300 a week. That motion was grounded on the affidavit of the applicant of the 23rd August, 2012.
4. On the 8th October, 2012, the "A" Law Centre came on record for the applicant and brought a motion to strike out the respondent's defence of the 8th October, 2012. Unfortunately the Law Centre withdrew from the case in December 2012.
5. Further affidavits of means were sworn by the applicant on the 4th December, 2012, and the respondent on the 15th January, 2013. The respondent did not fully vouch his affidavit of means until the 23rd January, 2013. These documents were not updated by the respondent until the date of commencement of the substantive hearing.
6. The substantive hearing took place on the 30th and 31st January, 2013, the 19th March, and 20th March, 2013, when judgement was reserved.
7. The case has been unfortunately complicated by the fact that the applicant has remained unrepresented except for a short period of time since the 5th April, 2011, and while the respondent did make some discovery, the substantial discovery was not finalised until days before the substantive hearing concerned. Accordingly the Court reserved its position as to whether it required any further documentation or not.

**HISTORY OF THE MARRIAGE**

8. The parties were married to each other in 1967. The applicant is aged 64 and the respondent is 65. The parties have four children JF who is now 44, DF now aged 40 and twins SF and LF aged 32. The applicant was a homemaker during her marriage and also looked after the mother of the respondent.
9. As well as regular employment the respondent was a part time musician playing with various different bands. In 1980 he began playing music with a third party and became successful. From that time on the respondent became a full time musician. Difficulties emerged in the marriage, mainly due to the infidelity of the respondent and they separated in September, 1988.
10. A separation agreement was concluded on the 10th February, 1989, between the parties. The applicant alleges this agreement was completed under duress and without legal advice, and the respondent strenuously disputes this alleging that both parties had independent legal advice and there was detailed correspondence between solicitors before the agreement was signed.
11. The essential elements of the separation agreement were that the respondent would pay to the applicant the sum of £400 Irish Pounds per week maintenance net of income tax, the sum to be increased in accordance with the consumer price index on an annual basis and in addition pay half the royalties he received from all sources from any copyright owned by the respondent worldwide. It was stated in the separation agreement that, as there was no tax due on the royalties, the payments were to be made without any deduction of tax.
12. In addition the respondent agreed to transfer the family home to the respondent without consideration. The family home at that point in time was not subject to any mortgage.
13. The respondent retained agricultural lands
14. The respondent duly complied with his responsibilities under the separation agreement. The maintenance was never increased in accordance with the consumer price index and was converted to €500 per week which was paid at all times by the respondent up to

the 1st February, 2011.

15. In addition the respondent paid the applicant royalties averaging €20,000 a year up to the end of December, 2003, when he spoke to the applicant and informed her that he could no longer afford to pay the royalties. The respondent continued to pay weekly maintenance of €500 per week but varied that from the 1st February, 2011, to €300 per week which is still being paid by him.
16. In addition there were some other financial transactions between the parties.
17. In 1990 the respondent transferred a portion of the agricultural lands containing 16 acres to the applicant. The reasons for that transfer are in dispute, the applicant alleging that initially this was a transfer on the understanding that she would transfer it back to him but that royalty payments of €18,000 built up and there was an agreement between the parties that the applicant would retain the 16 acres and waive the €18,000 of royalties due. The respondent disputes this and says that there was an outright transfer to her of the 16 acres.
18. In 2003 the applicant retransferred to the respondent 7 of those acres in consideration of the sum of €125,000. The applicant alleges this was to discharge debts that she had built up in a boutique business and the respondent said that it was a straightforward commercial transaction where he purchased the 7 acres for the sum of €125,000.
19. The applicant also alleges, there was a property acquired by the respondent at a third location but the respondent disputes this.
20. The respondent did acquire a semi detached property in Town A for €57,000 and transferred this property to his daughter DF for no consideration except that his daughter would take over the outstanding mortgage on the property.
21. The applicant sold the family home and purchased another property at Town A. The respondent built a dwelling house and some stables and out-offices on the 7 acres transferred back to him and this was placed into the joint names of himself and his present partner. The applicant's residence is valued at the sum of €250,000. The respondent's residence is valued at €300,000 with a value of €150,000 attributed to his half share.
22. The applicant also owns a holiday home in Spain, the value of which is uncertain, due to certain alleged defects in the property.
23. The parties daughter SF lives with the applicant and the applicant has stated that SF became ill and although she is not legally a dependant she has been supporting her. The applicant also alleges that the respondent was to pay extra to the applicant for school uniforms and books and also pay voluntary health insurance. She accepted that the respondent did give her some monies for extras, but this ceased at an early date. The separation agreement itself does not contain any such clause.
24. The essence of the applicant's case is she is seeking compliance with the original separation agreement, by having the maintenance in the separation agreement indexed linked from 1989 up to date and also payment of half the royalties reinstated from the date these payments ceased in December 2003. The applicant calculates that the present maintenance payment should be €918.38c per week with arrears of €270,923.76c. The applicant is uncertain of the royalty payments between 2003 and 2007 but is claiming €77,212.67c since that date.
25. She is also claiming arrears of maintenance from the 1st February, 2011, to date; being the weekly sum of €200, the difference between €500 per week and €300 per week.
26. The applicant alleges that the respondent is hiding income and has not disclosed his assets to the Court and is frustrated about his delay in complying with requests for discovery and orders to vouch the affidavit of means.
27. The respondent since the parties' separation in September 1988, has made substantial financial provision for the applicant. He transferred a share in the family home. He subsequently transferred 16 acres of agricultural land to the applicant. He bought back a portion of this land and paid the respondent €125,000 for same. He has faithfully discharged the maintenance payment albeit without increasing it in accordance with the consumer price index. He ceased the royalty payment in December 2003 having paid same for a period of 15 years.
28. The applicant had not taken any steps to enforce the clause in the separation agreement about the increase in the consumer price index. Since the cessation of the royalty payments at the end of December 2003 she did not seek to restore the royalty payments until the commencement of these proceedings on the 7th August, 2008.
29. It would be inappropriate for this Court at this remove to enforce those conditions of the separation agreement of the 10th February, 1989. The applicant has acquiesced in the non-payment of any increase pursuant to the consumer price index, and the cessation of the royalty payments.
30. The applicant has not acquiesced in the decrease of maintenance to €300 per week.
31. Insofar as this Court can, it has examined the documentation furnished by the respondent, which is now extensive although supplied very late. There is no evidence to suggest that the respondent is withholding vital financial information or that he has substantial assets which are not disclosed.
32. The Court has to deal with proper provision for the applicant in the context of the up to date affidavit of means of the respondent which the Court accepts based on the income tax returns and accounts prepared by Chartered Accountants on behalf of the respondent, and also the statement of royalties furnished to the Court.
33. The respondent has a continuing duty to pay periodic maintenance to the applicant.
34. The respondent was not entitled during the proceedings to reduce the maintenance payment to €300 per week and accordingly the applicant is entitled to those arrears.
35. Taking the last four years in which full figures are available 2008, 2009, 2010 and 2011 including income and royalties, the respondent's gross income has been €76,405 per year.
36. The respondent based on those figures has the financial capacity to pay the applicant maintenance of €400 per week gross until the respondent is eligible to draw the non contributory old age pension, when the maintenance will have to be substantially reduced.

The respondent is 65 and cannot be expected to continue long term that amount of maintenance.

37. The maintenance should be reviewed by agreement between the parties on that date or in default by the Court.

38. The respondent is responsible for the arrears of maintenance of €200 per week from the 1st February, 2011, to date which the Court calculates at 119 weeks at €200 per week being a total of €23,800.

39. The Court will direct the respondent to pay the sum of €23,800 by lump sum payment to the applicant and a periodic maintenance payment of €400 per week to commence as and from today's date. This payment is not subject to any increase pursuant to the consumer price index.

40. This sum will have to be reviewed substantially downwards on the date that the applicant is entitled to the non contributory old age pension which is the 13th day of April 2015.

41. That review should be conducted by agreement between the parties or in default by the Court.

42. The Court will grant a Decree of Divorce and an order pursuant to section 18 (10) of the Family Law (Divorce) Act 1996 and any other ancillary orders that are appropriate.