Neutral Citation Number: [2010] IEHC 417

THE HIGH COURT

2010 14 CAF

2010 34 CAF

BETWEEN

P. K.

APPLICANT

AND

J. K.

RESPONDENT

RULING of Mr. Justice John MacMenamin delivered on the 20th day of October, 2010

Introduction

1. On 20th October, 2010, I delivered an *ex tempore* ruling in a number of matters still in issue in these proceedings. These included:-

(a) An application by Mrs. K. (the wife) to attach and commit Mr. K. (the husband) for failure to pay maintenance in accordance with the order of the court directing Mr. K. to pay interim maintenance of €66 per week. I dismissed this application for the reasons given herein.

(b) The issue of maintenance payable to Mr. K., including whether an identified form of taximeter be fitted to Mr. K's tax to verify his income. In light of the wife's refusal to testify on the issue of her income, I ordered the previous order of maintenance of €50 should stand, but should the wife wish to testify in the future, she could do so on application to the Circuit Court.

(c) The status of the McKenzie Friend in the proceedings. I decided to reverse the order of the Circuit Court appointing P.K. as a McKenzie Friend to the wife on the grounds of the vexatious conduct of the litigation.

(d) Whether the papers in the proceedings should be referred to the Director of Public Prosecution. I adjourned this application.

(e) Whether any issue arose by virtue of an order of a Circuit Court order on 14th February, 2010, refusing the wife further discovery. I concluded no issue arose on this question.

(f) A summary of the decisions made on the various issues.

(g) An application by the wife for legal expenses. This application was also dismissed.

The following was the ex tempore ruling of the court delivered on 20th October 2010. Headings have been added to assist the reader. The word 'attached' at paragraph (20) should of course read 'detached'.

(a) The motion to commit the husband for contempt of court

2. The situation which has emerged in relation to this clearly was as a result of a discrepancy which was admitted to have taken place between the order and the sum actually paid to Mrs K. This continued over a period of some weeks, and there was therefore a non-compliance with the order which had been granted by this Court. Clearly, it is the duty of a court to ensure that orders which are granted by a court are observed, and a court must be zealous in order to ensure that orders which are made are complied with to the letter, as Mrs K. has said.

3. However, this is a case where one must look not only to the form, but to the substance. The situation which has emerged is not only was there an explanation given as to why the sum had not been paid, but also remedial steps were taken. First, the explanation. The explanation given was that in fact there had been a misunderstanding between the applicant, P. K., and his solicitor. His solicitor took responsibility for this as it has now been indicated to me he took it on himself to send Mrs K. the difference between the two sums, that is, the total difference, the total sum of the differences between the payment that should have been made at €66 and the payment actually made at €62.50. As I understand it, the sum was in the region of €21. One would have thought that in reasonable circumstances that would've been the end of the matter. It apparently was not the end of the matter. Instead, Mrs K. returned the money, indicating that she was refusing to accept it. This seems to me to have been unreasonable conduct on the part of Mrs K. There are other aspects of this case upon which I will comment later, but to refuse money which is paid seems to me to indicate that there is at the heart of this case an unfortunate tendency to confuse form with substance and substance with form. One would have thought that in any normal circumstance, the reasonable course of action would be to accept the money. Instead, this was not done. Insofar as there was a breach of the court order, it is true that there was a non-payment. Steps were taken to remedy it, but it appears as if here there has been a desire to maintain a grievance rather than to remedy the situation or to accept any remediation. I have no hesitation whatever in dismissing this application.

(b) The issue of maintenance

4. The primary purpose of the adjournment which I granted before the long vacation was, as I recollect it and was reflected in the record, to allow Mr K. to return to work so that any maintenance order which would be made would be based on a typical average week's earnings. Mr K. has provided accounts indicating an average gross income of approximately €300 per week. Thus, the figures adduced would not be a substantial variation on many of the previous figures. I have not been given any submissions from the respondent to the contrary. My intention, therefore, on today's date, was to arrive at a final figure for maintenance, which I would fix

on the basis of the criteria which were established under the legislation and, in particular, the income, the expenditure, the assets and the liabilities of each of the parties. But in doing this, I had a concern regarding procedural fairness, and that concern arose from the fact that Ms. N., who is the former wife of Mr K., refused to testify at the previous substantive hearing.

The wife's refusal to testify on the maintenance issue
5. Today, during the course of submissions, I felt it appropriate to ascertain whether she intended to testify on this occasion. Again, I reiterate that the issue of maintenance could only be determined by reference to the assets, means, outgoings and liabilities of both parties, not one.

6. When I inquired from Ms N., in the course of her making submissions on other matters as to whether she intended to give evidence on in the maintenance issue, I did not receive a clear answer. I considered it appropriate, therefore, in those circumstances, in the interests of expedition to call her to testify specifically on that issue. When I did so, Ms N. refused to answer questions on the grounds that she might "incriminate" herself. As the transcript will show, the clear intent of my questioning was not only a matter that could possibly relate to self-incrimination but as to whether she was going to give evidence on the maintenance issue and be subject to cross-examination.

7. The right to give evidence and be cross-examined are both fundamental facets of fair procedure. Ms N. refused to assist the court in any meaningful way on this question, and I drew the very clear inference - indeed, it was borne out by Ms N.'s own evidence - that she did not intend to testify and indeed, she confirmed this conclusion.

8. Her failure to answer questions legitimately put to her by a court might well constitute contempt of court. However, I see little purpose in citing her for contempt as this would only add to the very many levels of litigation which have already accrued in this case.

Some observations on the conduct of this litigation
9. As I indicated earlier, this is a case where there is strong evidence that the manner of conducting the litigation has been vexatious so far as Ms N. is concerned. There have been an extraordinary number of affidavits, far more than was necessary. There have been manifold unnecessary applications to court. The manner of the conduct of the proceedings has been grossly disproportionate. It is fair to say that witnesses, and in particular one witness, was the subject of what can only be described as watching and besetting.

10. The latest incident of disproportionality and unreasonableness was today, when Ms N. persisted in an application to commit her husband for contempt of court owing to deficiency in the interim maintenance. That deficit was in the order of €4 per week. The deficiency was attributable to the husband's solicitor. He inaccurately conveyed the sum which was ordered by the Court to be conveyed to the husband on an interim basis. The difference was between €66 approximately and €62, approximately. The husband was not to blame. The solicitor proffered the deficiency, a total of some €24, to Ms N. out of his own pocket. She refused to accept the money and instead persisted in the application for contempt.

11. A court can only conclude that this was profoundly unreasonable behaviour, and it reflects instances of other unreasonable conduct also recorded in the substantive judgment furnished herein prior to the vacation. The court has been subjected to a vast quantity of irrelevant affidavit material, much of it irrelevant. The same issues have been revisited again and again in different guises.

12. I have already indicated that I consider Mr. K.'s conduct in the marriage to have been reprehensible. I repeat that finding. His conduct was deeply flawed, but that fact, and it is a fact, does not justify litigation being used as a vehicle for some form of vendetta. A court has the duty and a right to protect its own procedures, a court must make a stand against vexatious litigation.

(c) Affixing a meter to Mr. K's taxi
13. I was invited today to make an order that a specified form of meter be affixed to Mr K.'s taxi to independently verify his income. I had indicated that there must be an independent method of verifying his income. That was my intention in making the suggestion. It was in the interest of fairness and verification of earnings of his income and turnover. But now, the court is yet again faced with a situation where Ms N., the wife, simply refuses to testify at all on the grounds apparently that she considers there may be some basis that she might incriminate herself. How she feels she might do so can only be a matter of speculation. I do not intend to engage in that speculation here. I refrain from making any finding on whether she has been obtaining any earnings while receiving any form of social welfare benefit. I specifically refrain from making any finding or observation on that issue because there is no evidence on it.

14. More seriously, the situation which has arisen is not only one where there are unfairness in the procedure. Not only has the litigation been conducted in a vexatious manner, but there is now plainly *prima facie* evidence of abuse of court process.

15. I wish to pause here to specifically point out that what I am referring to is not the issue between the parties. The parties are entitled as of right to have access to the court to regulate affairs regarding their obligations under their marriage, but that can only be done in a manner which is constant with the proper regulation of court procedure, is in accordance with proper procedure as laid down in case law regarding fair procedures, and in accordance with proper fair procedures as laid down under the Constitution and the Convention on Human Rights. Effectively, what Ms N. has done is debar herself from participating in this process by dint of her desire not to give evidence.

The status of the McKenzie Friend
16. I want to turn to the question of the status of the McKenzie friend. While there has not been submissions on this issue, a question has arisen which it is simply a matter for the Court to deal with. In saying that, no submissions have been made; I do not make any criticism of Ms. Lucey-Neale. Her stance in the matter is that she has been appearing on a *pro bono* basis in circumstances where her solicitor and herself considered they have a sense of obligation to their client.

17. The circumstance in which a McKenzie friend may be appointed has been considered by Macken J. in the High Court in a case called R*.D. v. McGuiness* [1999] 2 I.R. 411. There, an applicant lay litigant appeared before the respondent in the District Court regarding an application for a barring order being sought by his wife, and these proceedings were of an *in camera* nature. He sought liberty to be assisted by another person who might take notes on his behalf and assist him generally during the hearing, but the respondent judge concluded that he would not allow this person to remain in court during what was an *in camera* hearing. The applicant then instituted proceedings seeking a declaration that, when acting in person, he is entitled to be accompanied by a friend who might take notes on his behalf, quietly makes suggestions and assist him generally during the hearing. He relied on an order made by the Supreme Court in *Quinn v. Bank of Ireland*.

18. On the general issue of a party's entitlement to the assistance of a McKenzie friend, Macken J. stated: "I am satisfied that, insofar as this jurisdiction is concerned, all other things being equal and in relation to matters other than matters of matrimonial

nature or of a nature which the law prescribes should be heard *in camera*, the Supreme Court is satisfied and has decreed that a party who prosecutes proceedings in person is entitled to be accompanied in court by a friend who may make notes on his behalf, quietly makes suggestions and assist him generally during the hearing, but who may not act as advocate".

19. However, as is pointed out in chapter 6 of *'Civil Procedure in the Superior Courts'*, Delaney and McGrath, which I am quoting: "Mrs. Justice Macken said that she would be reluctant to find that the longstanding view of the legislature that all matters of matrimonial nature were to be heard otherwise in public ought to be set aside or modified in favour of an attendance in court from a member of the public as a McKenzie friend, unless there was overwhelming evidence that a fair hearing could not be secured by the application. In the circumstances of that case, having regard to the fact that the applicant was, in the view of the respondent, that is the respondent judge, a very articulate person and the Court itself had experienced protecting persons who appeared before it on family law matters without legal representation, Mrs Justice Macken concluded that there was no evidence to suggest that by appearing in person without a McKenzie friend the applicant would be deprived of a fair hearing".

20. I emphasised some of the words in the quoted portion of the judgment. First of all, these proceedings are in camera. Second, Macken J. observed that a situation might arise where the jurisdiction could be exercised, all other things being equal. I consider the issue of all other things being equal is to be related strongly and closely to the conduct of reasonableness in litigation. Third, I have regard to the fact that the McKenzie friend who was appointed in this case in the Circuit Court was not a stranger but is, in fact, Ms N.'s son, who gave evidence, strong evidence, in relation to circumstances surrounding the marriage during the course of the previous hearing. I permitted that to occur because I considered that it was the better course of action. But what occurred demonstrates precisely the risk in appointment of McKenzie friends who are not attached or objective when in family law the qualities of detachment and objectivity must be paramount. It is essential that family law cases can be conducted in a manner which allows for each party to present their cases with clarity and allows for the court to identify the issues in a cogent fashion.

21. That situation did not exist here. Not only am I satisfied that the litigation has been conducted in a vexatious manner, but I consider that there is evidence before me of abuse of court.

22. In those circumstances, I am taking it upon myself, without submissions having been made by the husband's solicitor, to reverse the order made by Judge N. appointing the McKenzie friend. I am satisfied that Ms N. is well capable of conducting any litigation which she wants herself. She is free to appoint another McKenzie friend, if she wishes, but I do not think the interests of justice or fair procedure have been served by the manner in which this litigation has been conducted. The reason why I am making the order is that I am satisfied that the manner of conduct of the litigation has been as a result of the advice which she has received from her son. I have no doubt that this advice has been tendered because of the love which the son has for his mother, but I want to make it absolutely clear that this is misguided advice. It has been ill-advised, it has not served the interests of justice and it has not served the interest of the parties, any party. In particular, there has been an inordinate focus on form over substance, an inordinate focus on some legal written submissions which were put in on every known issue but the substantive one, and a focus which I can only describe as being misguided. A McKenzie friend should be a friend and not someone who, as in this case, unfortunately acts in a way which does not assist either the Court or the party relying on the McKenzie friend. I am therefore reversing the order of the Circuit Court appointing the McKenzie friend.

(d) Referral of papers to the Director of Public Prosecutions

23. I turn then to another issue. That is whether the papers should be referred to the Director of Public Prosecutions. I do not wish to express any view in relation to whether there is evidence on the transcript of *prima facie* offences having been committed. Furthermore, it seems to me that, in any case, even were there evidence, the application which is made is one which should be strictly construed and interpreted. I do not think the DPP would be the appropriate agency for reference of this matter. Insofar as any question of a social welfare or taxation issue is concerned, there are other authorities to deal with those questions.

24. But the question of whether reference should be made to any Government agency of matters which arise in Family Law proceedings is a profound one. Many matters arise in proceedings of this type. The interest of the court is in doing justice between the parties. There is also an overarching paramount interest which the court must always observe in ensuring that the rule of law is observed and that obligations which citizens hold towards the state are fulfilled. I would therefore want a specific application with all or any relevant authorities on this issue. The parties may well wish to reflect deeply before pursuing such a course.

25. Other than that one issue, this matter does not stand and will not stand before this court. Insofar as the parties may wish to pursue this question, I will adjourn the matter for a period of two months in which case the matter will be in for mention on a Friday, if it is desired to pursue it.

(e) The order of the Circuit Court of 14th February, 2010, refusing to further discovery

26. I turn to Judge Heneghan's order. Frankly, I do not consider any issue arises there. The substantive case proceeded; no question was raised regarding the propriety or otherwise of Judge Heneghan's order. It will be recollected that, before and during the substantive hearing, I intervened on a number of occasions in order to assist Ms N. with a view to obtaining evidence regarding the question of income and also regarding any other issue which arose such as the ownership of the milk round. That arose both before and after I became aware of Ms N.'s stance regarding evidence.

27. Now that she has yet again adopted this stance, it does not appear to me that a court should lend itself to any other complaint. I can therefore make no other order on the maintenance. The fault for this lies with Ms N. If she wishes to revisit her stance on this question, and if she wishes to give evidence on this and therefore subject herself to cross-examination by whosoever might appear on behalf of her husband, she may do so in the Circuit Court.

(f) Summary of the findings

28. I will direct that this substantive judgment which I have furnished herein and a transcript of this judgment be placed on the file for the convenience of any Circuit Court judge who must deal with the matter in the future. I will reverse the order appointing the McKenzie friend. In my view, the misconceived and ill-advised steps which have been taken in this case, and the conduct of the litigation which constitutes an abuse of court, arose as a result of the ill-advised stance taken by the McKenzie friend. I will dismiss the application regarding the taximeter. I dismiss the application for contempt. I will direct that, with the exception of the above one matter, all future applications will be made to the Circuit Court. I refuse Ms N.'s application for expenses. I would be strongly minded, other than the fact that no application been made, to make orders for costs against Ms N.

(g) The issue of costs or expenses

29. I wish to make clear what those orders for costs could be or could have been.

30. Firstly, I note that, quite unnecessarily, there are two stenographers here when it is quite clear that there is one transcript which

may be available to both parties. The second stenographer is as a result of the request of Ms N. or her son. This is pure surplusage. As I understand it, that costs something in the region of €1,000 per day. This was grossly disproportionate.

31. Second, the conduct of the ligation as a whole, in the manner in which I have outlined it, would give rise to circumstances where, not only could costs have been awarded, extensive costs, but costs on a solicitor and own client basis, that is to say, sums running into tens of thousands of euro, not thousands of euro, but tens of thousands of euro.

32. I am not going to make those orders because I think that would only add to the difficulties which have arisen between the parties. I am not going to make the order because I think it would be disproportionate and because I think Ms N. is not in a financial situation where she could withstand any such order of this type. But the facts of this case, with the background to it, is an illustration of the fact that courts simply cannot countenance their use by litigants as a vehicle for vendettas or as a vehicle for revenge. I am not going to lend myself to it, the courts cannot lend themselves to it, and for those reasons, I am dismissing the applications with the exception of the one other point, which I will adjourn to the second Friday before Christmas. If it is wished to be pursued, and if the parties wish to do so, I will process the matter further. That concludes the judgment.