Neutral Citation: [2012] IEHC 617

THE HIGH COURT

FAMILY LAW

[2010 No. 44M]

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

BETWEEN

E.L.

PETITIONER

AND

S.K.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 13th day of July, 2012

1. This judgment relates to an application by the respondent in these proceedings for costs to be awarded to her on a solicitor and client basis in respect of the costs of the above entitled nullity proceedings brought by the petitioner in respect of the marriage of the parties.

2. The background of the case is as follows. The respondent initiated judicial separation proceedings against the petitioner. In response the petitioner initiated nullity proceedings and brought an application before this Court to have the judicial separation proceedings stayed until such time as his petition for a decree of nullity had been determined. Such petition was grounded not on the affidavit of the petitioner but on the affidavit of the petitioner's solicitor. In that affidavit the petitioner's solicitor deposed (among other averments) that she said and believed "that in his substantive replying affidavit, which was sworn on the 19th June, 2009, my client articulated a concern that the ceremony of marriage which he underwent did not give rise to a true marriage having regard to certain factors which he enumerated therein" and continued that she said and believed that since "swearing that affidavit my client has sought professional medical advice concerning the psychological and emotional circumstances which prevailed when he agreed to and underwent the ceremony of marriage with the applicant. In the course of those investigations it emerged that in addition to the issues relating to consent and the ability of the parties to enter into performance sustained a normal marital relationship of one another, the parties have not had sexual intercourse with one another at any time, since they went through the ceremony of marriage. Accordingly, an issue of non-consummation also arose".

3. These allegations summarise the case of the petitioner in relation to the nullity of the marriage and they were denied and analysed fulsomely by the respondent in her affidavits. On foot of the petitioner's application the judicial separation proceedings were stayed, notwithstanding rigorous opposition by the respondent. The respondent subsequently, by notice of motion dated the 10th November, 2010, sought an order pursuant to O.70, r. 75 of the Rules of the Superior Courts directing the petitioner to pay the respondent her costs de die in diem or alternatively an order for costs pursuant to O. 29 of the Rules of the Superior Courts providing for security of the respondent's costs in the above entitled proceedings. The application for security for costs was refused under both headings.

4. The nullity petition then proceeded and a medical expert was appointed to examine the parties in accordance with the usual procedure to report to the court in relation to the capacity of the parties to contract a valid marriage.

5. The expert reported and the petition came on for hearing on the 21st March, 2011. Having called the case as going on, the senior counsel for the petitioner informed the court some minutes later that, having had an opportunity to discuss the overall situation with his client and in the light of the reports of the medical expert which had only become available on the previous Friday, his client (the petitioner) would withdraw his petition.

6. Senior counsel for the respondent expressed dismay and applied for costs to be awarded to the respondent not on a party and party basis but on the higher standard of solicitor and client.

The Arguments

7. Senior counsel for the respondent had a richness of material from which to base his argument that he was entitled to claim his costs on a higher basis essentially because the petitioner's intervention into the judicial separation proceedings, with his application for a stay pending the disposal of the nullity proceedings, was an unjustifiable interference by the petitioner in the separation proceedings before the court which greatly impinged on the rights of the respondent and which sought to create a record of untruth which were gravely offensive to her. He sought to rely on the wealth of affidavits but also additionally sought leave of the court to call his client in evidence. The court ruled that he should not call the respondent in evidence as there was a sufficient body of evidence before the court in the affidavits.

Findings

1. I find that the expert's report referred to by the petitioner's solicitors (which was produced to the court with waiver of any privilege in the course of argument) stated an opinion that the petitioner did not have the capacity to enter into and sustain a marriage.

2. This expert's opinion was obtained, inter alia, by the petitioner misleading the expert by the following incorrect statements:-

(a) By informing the expert that no sexual intercourse or any real cohabitation or marital relationship occurred after the wedding when, in fact, the petitioner had a registry office wedding months before the faith wedding.

(b) That the petitioner had one wedding ceremony when, in fact, he had two.

(c) That the petitioner was an unwilling participant in the faith ceremony.

(d) That the respondent had forced herself into cohabitation with the petitioner prior to the marriage and that his cohabitation was only slight.

3. The petition regarding mullity and the application to stay the judicial separation proceedings were not initiated by the petitioner until matters relating to financial disclosure by him in the judicial separation proceedings had reached a crucial and challenging stage for him.

4. There existed a period between the civil ceremony in the registry office and the faith ceremony some months later when the petitioner enthusiastically pursued arrangements for the lavish faith wedding and reception, he also having had to overcome doctrinal obstacles placed by the pastor originally approached to perform the faith ceremony by engaging in negotiations with another pastor who was found to be so willing.

5. The findings of the court appointed *ex parte* examiner were such that the petitioner could not establish lack of capacity to enter into or sustain a marital relationship and highlighted glaring inconsistencies with statements made by or on behalf of the petitioner to the court and to the expert consulted by him prior to the initiation of the petition.

8. In these circumstances the court finds that there was no reasonable chance for the petitioner to succeed in his petition and rejects his counsel's arguments that, in view of his consultant's opinion that he could so succeed, he was entitled to proceed with his action until he saw the court appointed expert examiner's report and consulted on same with his solicitor and counsel. I reject this view by reason of the fact that the petitioner should have known that he had given his own expert incorrect information in relation to the surrounding facts of the marriage and, in particular, to the timing of crucial events relating to same and the total failure to disclose the fact that there were two ceremonies.

The Law

9. Order 99, r. 10.3 of the Rules of the Superior Courts provides as follows:-

> "The court in awarding costs to which this rule applies, may, in any case which it thinks fit to do so, order or direct that the costs shall be taxed on the solicitor and client basis."

10. The judgment of Laffoy J. in the case *Shell E & P Ireland Ltd v. McGrath (No.3)* [2007] IEHC 144 is helpful where at paras. 55 and 56 of her judgment she states as follows:-

> "As to the amount of costs for which the plaintiff is liable, the contention of the second and fifth defendants that the costs should be quantified on the basis of what would be allowable on taxation as between a solicitor and client under O. 99, r. 11 of the Rules, rather than on taxation on a party and party basis under O. 99, r. 10(2), in my view, is wholly unmeritorious. It is true that subrule (3) of O. 99, r. 10 confers on the court a discretion, where it thinks fit, to direct that costs to be paid by a party to proceedings by another party should be taxed on a solicitor and client basis. It is also true that the court may exercise that discretion where it considers that the conduct of the paying party merits such a mark of disapproval, as happened in the only Irish authority to which the court was referred: *Geaney v. Elan Corporation plc* [2005] IEHC 111..In that case, having heard an application brought by the plaintiff to have the defendants' defence and counterclaim struck out on the ground of failure to comply with an order for discovery, Kelly J. ordered that the defendant make further and better discovery, although he was dissatisfied with the way in which the discovery obligations of the defendant had been met and found that the approach adopted had been seriously substandard. However, in order to indicate the court's displeasure at the way in which the defendant had met his obligations, he awarded the plaintiff the costs of the application to be taxed on a solicitor and client basis."
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> "The basis on which it was contended on behalf of the second and fifth defendants that the plaintiff should be made liable for costs taxed on a solicitor and client basis may be summarised as follows: the plaintiff, a powerful corporation, has used this litigation to do what it wishes for its own commercial purposes, as exemplified by initiating the proceedings to enforce the legal right it claims, obtaining the interlocutory injunction, then abandoning the injunction, then re-routing the pipeline and finally abandoning its claim. In my view it would not be proper to draw any inference from the manner in which the plaintiff's claim in these proceedings has been prosecuted to date or to infer any conduct on the part of the plaintiff which merits the disapproval of the court, when the substantive issues on the plaintiff's claim have not been determined and the plaintiff's motivation has not been explored at a trial on oral evidence."

11. From the foregoing judgments as applied to the family law situation the following principles would seem to apply.

1. The Rules of the Superior Courts giving a judge discretion to award costs on a solicitor and client basis may be used as a penalty to express the disapproval of litigation misconduct by a party.

2. The disapproval of the court of misconduct in this way shall be tempered by the interest in the court's encouraging for reasons of public policy and efficiency of court operation, the early settlement of cases without each settlement carrying the risk of a subsidiary inquiry taking up much time in relation to whether the party withdrawing proceedings should be penalised by an order for solicitor and client costs over and above the usually expected costs order on a party and party basis.

3. The courts should, as in the case of the *Shell* case, [2007] IEHC 144 decided by Laffoy J. above, be reluctant to exercise this jurisdiction at an interlocutory stage of the proceedings. While the withdrawal of the nullity petition itself may not be at the interlocutory stage of the proceedings of the nullity petition itself, but is a final withdrawal, it nevertheless must be regarded in this type of a situation as being part of an interlocutory context of a separation proceeding where the eventual financial position of the parties will not be known until the final determination of the judicial separation application.

4. The courts have traditionally been cautioned from making costs orders which would have the effect of engendering excessive bitterness between the parties, having regard to the fact that there would be adverse effects on further relations between the parties even after separation. In this case the further disposal of the judicial separation proceedings would be greatly helped by goodwill or at least the absence of bitterness. The making of a punitive order would, in a case like this, have the effect of increasing bitterness, engendering lack of co-operation which in itself would cost the parties costs in the litigation and waste of resources. In any event, where there is a withdrawal of a petition in respect of which judicial separation or divorce proceedings have been stayed there is always a chance to indirectly compensate for a party's solicitor and client costs on the basis of the final financial provision in the event of the person claiming the solicitor and client costs being a dependent in financial terms.

12. The foregoing principles are in the final analysis a guide only in relation to how a discretion provided by the Rules of the Superior Courts is to be exercised and, in extreme cases, they should be subject to the proviso that where a person, whether at interlocutory or other stages of a case, persists in a hearing using multiple applications and affidavits or oral evidence to the extent that it is unjustly time wasting and oppressive financially and/or emotionally to the other party against whom there is no prospect of success, the sanction of making a costs order on a solicitor and client basis should be available as a preventative measure.

Conclusion

13. While the conclusion of this Court in relation to the facts do not bear out senior counsel's contention on the part of the petitioner that until he received the report of the court expert appointed as examiner in the case, he was entitled to run his petition up to the oral hearing stage, nevertheless this distinction is relevant. By reason of the fact that he did not pursue his petition in an oral hearing meant that he did not reach a threshold of misconduct which was high enough to outweigh the normal public policy interests of the courts to encourage settlement and/or withdrawal of unmeritorious claims on penalty only of solicitor and client costs.

14. It would be otherwise if the petitioner had actually embarked on his claim to any significant extent by way of oral hearing. The court decides that the respondent in the nullity petition be awarded her costs on a party and party basis, such costs to include such reserved or discovery costs which may have occurred and, in default of agreement, to be taxed.