THE HIGH COURT

[2011 No. 952 JR]

BETWEEN/

D.X.

APPLICANT

AND

HER HONOUR JUDGE OLIVE BUTTIMER

RESPONDENT

AND

M.Y.

NOTICE PARTY

JUDGMENT of Mr. Justice Hogan delivered on the 25th April, 2012

1. In these judicial review proceedings the applicant (whom I shall describe as "Mr. X.") moves the Court for an order of certiorari to quash a decree of judicial separation in respect of the applicant's marriage to the notice party (whom I shall describe as Ms. Y.) on 12th April, 1991, granted by the respondent, Her Honour Judge Buttimer, on the 8th June, 2011, pursuant to s. 3 of the Judicial Separation and Family Law Reform Act 1989 ("the Act of 1989"). The decree was granted pursuant to s. 2(1)(f) of the Act of 1989, namely, that the Court satisfied that in all the circumstances "a normal marital relationship has not existed between the spouses for a period of at least one year immediately preceding the date of the application". I should say that the applicant has appealed Judge Buttimer's decision to the High Court, but that that appeal has been stayed pending the outcome of these judicial review proceedings,

2. The order made by Judge Buttimer also provided for the sale of the parties' family home (which I will describe as "Z House"), along with an immediately adjacent property (which I will describe as "Y Lodge'). That House is quite substantial and the parties live apart - albeit with some difficulty - under the same roof. The notice party's sister, Ms. T., lives in Y Lodge. This property was entirely rebuilt and refurbished over a decade ago and since then the property has been used by Ms. T. and, prior to her death in 2006, by her mother, Ms. I. Ms. Y and Ms. T. are the registered owners of Y Lodge. Both Mr. X and Ms. Y. represented themselves in person, save that Mr. X. was also assisted by his friend, Ms. S. While the Court would, of course, have jurisdiction to direct the sale of property (other than the family home) such as the Lodge where "either of the spouses has a beneficial interest", this is contingent on the court having first made a secured periodical payments order, a lump sum order or a property adjustment order: see s. 15(1) of the Family Law Act 1995. Judged by the terms of the order actually made, it is not clear to me that the judge had, in fact, made an order of the kind (such as, for example, a lump sum order) which is deemed by the sub-section to be an essential prerequisite to the exercise of that jurisdiction to direct sale of property not comprising the family home.

3. Mr. X. contends that the order is *ultra vires* in three separate respects. First, he maintains that Judge Buttimer acted contrary to fair procedures and in breach of s. 40(5) of the Civil Liability and Courts Act 2004 ("the Act of 2004") in failing to permit him to be attended in court by a friend of his, Ms. S., even though he was legally represented in those proceedings. Second, he says that Judge Buttimer wrongly permitted Ms. T. to be present for part of the judicial separation proceedings. Third, he contends that the order should not have directed the sale of both the lodge together with the house. We can now proceed to a consideration of these arguments in turn

First issue: Whether Judge Buttimer acted ultra vires in refusing to permit Mr. X. to be assisted by a friend

4. Mr. X. was treated for cancer of the larynx in 1997 and, as a result, suffered a largnectomy. He can speak, but with considerable difficulty and he tires easily as a result. Furthermore, his speech cannot always be easily understood by those who are not familiar with his condition. Mr. X. sought to have Ms. S. admitted to the family law proceedings Circuit Court, but this was refused by the respondent following an objection in that behalf by counsel for the notice party, Ms. Y. In the present proceedings, as I have already noted, both Mr. X and Ms. Y appeared in person, with Mr. X. assisted by Ms. S.

5. Article 34.1 of the Constitution provides that justice is to be administered in public, save "in such special and limited cases as may be prescribed by law." If the proceedings were in open court, then there could be no possible justification for the exclusion of Ms. S. It is true, however, that s. 34 of the Act of 1989 provides that judicial separation proceedings "shall be heard otherwise than in public" and this section must be taken to constitute such a special and limited case for the purposes of Article 34.1.

6. The language of Article 34.1 nevertheless reflects the Constitution's preference for the open administration of justice and derogations from that rule must truly be confined to "special and limited cases prescribed by law" in the relatively narrow sense of that term. In the present case, the exception prescribed by s. 34 of the Act of 1989 must be taken as reflecting a desire by the Oireachtas to protect other constitutional values in the context of family law proceedings such as the right to privacy (Article 40.3.1), the authority of the family (Article 41) and the protection of the constitutional rights of children (Article 42.5). It is in that context that s. 34 of the Act of 1989 falls to be interpreted.

7. Experience had shown, however, that the mandatory nature of s. 34 of the Act of 1989 as originally enacted was capable of having unintended effects which were not altogether satisfactory. Thus, in *Tesco (Ire.) Ltd. v. McGrath*, High Court, 14th June 1999, Morris P. held that the effect of the prohibition was to preclude the release of court orders concerning the sale of property, even in those cases where these orders might well be critical so far as the title of third parties was concerned. Likewise, in *RM v. DM* [2000] IEHC 140, [2000] 3 I.R. 373 Murphy J. held that the section precluded the disclosure of pleadings captured by the *in camera* rule to professional disciplinary body which was examining a complaint against a legal representative.

8. Conscious of the fact that the wording of this statutory prohibition had consequences which were not merely unintended, but went further than was reasonably necessary to achieve the original statutory objectives, the Oireachtas concluded that the (apparently)

unqualified nature of the prohibition should be diluted. Thus, for example, s. 40(4) of the Civil Liability and Courts Act 2004 ("the Act of 2004") now provides that the statutory prohibition should not permit the disclosure of the extracts from courts orders in family law proceedings to relevant third parties.

9. Section 40(5) of the Act of 2004 is in the same vein in that it provides:-

> "(5) Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from being accompanied, in such proceedings, in court by another person subject to the approval of the court and any directions it may give in that behalf."

10. Legal proceedings are, of course, stressful occasions for the parties and this is especially true of family law proceedings. While it is true that the interests of most litigants are represented by legal professionals, many litigants nonetheless find the entire experience so daunting that they would wish to have the company of a friend to provide support and reassurance quite independently of legal advisers. This, in effect, is what s. 40(5) seeks to achieve. This provision complements s. 33(1) of the Act of 1989 which provides that:-

> "Circuit Family Court proceedings shall be as informal as is practicable and consistent with the administration of justice."

11. The background to s. 40(5) can be traced to the important decision of Macken J. in *RD v. McGuinness* [1999] 2 I.R. 411. Here the applicant sought to have the assistance of a lay friend in proceedings arising under the Domestic Violence Act 1996. Likes. 34 of the Act of 1989, s. 16 of the Act of 1996 provides that such proceedings shall be held "otherwise than in public". Macken J. acknowledged that a litigant in person generally enjoys the right to have such assistance ([1999] 2 I.R. 411 at 421):-

> "..a person who prosecutes proceedings in person is entitled to be accompanies in a court by a friend who may take notes on his behalf and quietly make suggestions and assist him generally during the hearing but who may not act as advocate."

12. Macken J. went on to hold, however, that this common law principle was tacitly overridden by the statutory prohibition. The presence of the lay friend would render the proceedings "otherwise than in public", since that friend would be in attendance "in that friend's capacity as a member of the public and not otherwise." Absent evidence that to hold otherwise would have deprived the appellant of his right to a fair trial in the circumstances of the case, Macken J. held that she "could not justify setting aside or ignoring the clear mandatory words of s. 16 of the Act of 1996." Section 40(5) of the Act of 2004 takes cognisance of the decision in *R.D.* and acknowledges the general right to have a friend present in court, subject to the approval of the court and the right of the court to impose conditions. These conditions could, for example, include an undertaking to respect the confidentiality of the proceedings or, that matter, an undertaking that, in the words of Macken J. in *R.D.*, the friend would simply "take notes on his behalf and quietly make suggestions and assist him generally during the hearing."

13. So far as the present case is concerned, it would appear that the respondent decided to exclude Ms. S. because Mr. X. was already legally represented. That *in itself*, however, is not a good reason for excluding Ms. S, since the legislative policy informing s. 40(5) clearly presumptively favours the right of a litigant to choose a friend to accompany them in court, irrespective of whether that litigant is already legally represented. No other reason was advanced in respect of the admission of Ms. S. to the proceedings and in these circumstances I am constrained to hold that the respondent thereby erred in law in directing her exclusion having regard to the provisions of s. 40(5). As I have already noted, had Ms. S. been admitted to the proceedings, it would have been open to the respondent to prescribe conditions regarding such admission- ass. 40(5) expressly so provides- but this is not an issue which I am now required to consider.

14. There was, moreover, a further particular reason why the respondent could not properly have excluded Ms. S. in the circumstances. Mr X.'s largnectomy considerably affected his capacity to speak and he was hugely dependent on Ms. S. for all types of practical assistance. Furthermore, she was familiar with his manner of speaking and she could probably have directly conveyed his instructions to his legal team better than anyone else. Article 40.1 of the Constitution obliges the judicial branch of government to ensure that all persons are "held equal before the law." In practical terms, this means that the courts must see to it that, where this is practical and feasible in the circumstances, litigants suffering a physical disability (such as Mr. X.) are not placed at a disadvantage as compared with their able-bodied opponents by reason of that disability, so that all litigants are truly held equal before the law in the real sense which the Constitution enjoins. As Denham C.J. pointed out in *MD v. Ireland* [2012] IESC 12, "applying the same treatment to all human persons is not always desirable because it could lead to indirect inequality because of the different circumstances in which people find themselves."

15. Yet absent the presence of Ms. S., Mr. X. was placed at such a disadvantage, since her presence was vital to assist him in view of his particular disability in giving effective instructions to his legal team.

16. In these particular and unusual circumstances, the failure of the respondent to permit Mr. X. to have Ms. S. present to give the kind of practical assistance which the able-bodied litigant takes for granted also amounted to a breach of Article 40.1.

Conclusions on the exclusion of Ms. S.

17. For the reasons just stated, it is plain that the respondent acted unlawfully in refusing to admit Ms. S. to the proceedings. The applicant has fairly conceded in argument that this decision did not *in itself* affect the fairness of the hearing or the legality of the judicial separation order. In these circumstances I propose merely to grant a declaration that this exclusion of Ms. S. from the hearing before the respondent was *ultra vires* s. 40(5) of the Act of 2004. This will not in itself otherwise affect the validity of the Circuit Court order.

Second issue: The presence of Ms. T. during part of the hearing

18. The applicant next objects to the fact that Ms. Y's sister, Ms. T., was also allowed be present in court for at least part of the hearing (albeit very briefly) and to participate in the proceedings insofar as the proceedings concerned her interests. But in my view this was essential if Ms. T.'s legitimate interests- not least joint her joint ownership of the Lodge with Ms. Y.- were to be protected and the principle of fair procedures vouchsafed. This is especially so given that the Lodge is immediately adjacent to Z House and given further that Ms. Y. herself is registered as a joint owner of that property.

19. In my judgment, this case falls squarely within one of the specific exceptions to the *in camera* rule provided for ins. 40(8) of the Act of 2004:-

> "(8) A court hearing proceedings under a relevant enactment shall, on its own motion or on the application of one of the parties to the proceedings, have discretion to order disclosure of documents, information or evidence connected with or

> arising in the course of the proceedings to third parties if such disclosure is required to protect the legitimate interests of a party or other person affected by the proceedings."

20. While this sub-section is designed to deal with the release of information (such as court orders) to third parties - and thereby deals with the issue which arose in *Tesco* -it is also broad enough to permit the presence of third parties (such as Ms. T.) whose interests might otherwise be affected.

Conclusions with regard to the presence of Ms. T. during the proceedings

21. In that respect, therefore, such disclosure of documents, information and evidence as was necessary to protect the legitimate interests of Ms. T. was sanctioned by s. 40(8). It follows that Judge Buttimer was fully entitled- indeed, obliged- to permit Ms. T. to be present for those parts of the hearing as concerned her own property rights in the Lodge were concerned.

22. Perhaps the real objection on this score on the part of the applicant was that the respondent had ordered the sale of the Lodge in circumstances where it was not the family home, so that if the Lodge was not to have been sold as part of this process, then there would have been no need for Ms. T. (or her representatives) to have been present. This brings squarely into play the question of whether the Court had such a jurisdiction to direct the sale of this property in circumstances where the statutory prerequisites to jurisdiction were not (or, at least, do not appear to have been) satisfied. This is the third issue to which we can now turn.

Third issue: The sale of the lodge as well as the house

23. The order of the Circuit Court of 8th June 2011 provided for:-

> "...the sale of the family home of the parties being the property situate and known as [Z House][address given] together with the property adjacent thereto situate and known as [Y Lodge][address give] and being in the ownership of [Ms. Y. and Ms. T.], in one or two lots."

24. The order recited further that the respective auctioneers for Mr. X and Ms. Y. were appointed to conduct the sale of the two properties "on a joint agency basis with provision for one professional fee to be divided between both of the auctioneers." The order continued by providing that:-

> "[Mr. X and Ms. Y] will provide a sum of €1,500 each to the said auctioneers as soon as possible by way of payment on account for the costs of advertising and other charges to be in incurred in the marketing of the properties.
>
> That the proceeds of sale of both or either of the said properties be placed on joint deposit receipt, in the names of the solicitors for the parties."

25. The applicant objects to the fact that the order provides for the sale of the Lodge as well as the family home and that he fears that he may be fixed with some of the auctioneering and other fees associated with the sale of the Lodge. He considers that the judge was wrong to take the view that both properties needed to be sold at the same time to realise the maximum value and that it was perfectly possible to contemplate the separate sale of the properties. He further (implicitly) contends that the judge had no jurisdiction to direct such a sale if the statutory preconditions specified in s. 15 of the Act of 1995 had not been satisfied.

26. The question of whether Judge Buttimer ought to have exercised her jurisdiction in relation to both the sale (and ancillary matters such as the auctioneering fees) is a one which, absent exceptional circumstances, is best left for the pending appeal to this Court, rather than being determined in separate judicial review proceedings. Certainly, assuming that there was such a jurisdiction, questions as to how it *ought* to have been exercised are quite plainly matters that go to the heart of the appeal.

27. The foregoing assumes, however, that the Court's s. 15(1) jurisdiction was properly invoked by the prior making of a secured periodical payments order, a lump sum order or a property adjustment order. This does not appear to have occurred in the present case. If this is correct, then Judge Buttimer made an order in circumstances where she (technically) had no jurisdiction to do so, although she presumably contemplated making a secured periodical payments order, a lump sum order or a property adjustment order at a later stage when the proceeds of the sale had been realised. Put another way, Judge Buttimer could have directed the sale of the Lodge in the exercise of her s. 15(1) powers given that Ms. Y. is a joint owner of the property, but only where she had *already* made a secured periodical payments order, a lump sum order or a property adjustment order.

28. While this point strictly goes to jurisdiction and *vires*, nevertheless I consider that in the exercise of my discretion it would be premature to quash the order pending the outcome of the appeal which the applicant has lodged. The judge of this Court who hears the appeal will be at large- subject, of course, to the applicable legislation -with regard to the merits of any such order. He or she will be well placed to examine the auctioneering and valuation evidence which may be tendered and, specifically, that judge will be in a position to evaluate the pivotal question of whether it would be feasible or desirable to endeavour to effect a sale of the properties separately.

29. It is true that, as a matter of jurisdiction, this Court could only made such an order in circumstances where the jurisdictional stipulates of s. 15(1) had been satisfied. This is, presumably, a matter of which the judge will be fully conscious when the appeal is heard. But it is equally true to say that insofar as this had occurred in the Circuit Court, this was a largely technical breach of the s. 15 requirements which caused no caused particular substantive unfairness to the applicant and it is precisely the type of error which can be rectified on appeal. The error in question is a far cry from cases such as *Gill v. Connellan* [1987] I.R. 541, where the breaches of fair procedures where so profound that the applicant's right to a fair and proper hearing at first instance was substantially compromised. The case at hand thus presents an issue which, while perhaps technically jurisdictional, definitely falls at the opposite end of the spectrum: see, *e.g.*, my own judgment in *E. v. Minister for Justice and Equality* [2012] IEHC 3.

30. *E.* was an asylum case where the applicant had sought to quash a decision of the Office of the Refugee Applications Commissioner where (it was argued) the Commissioner had breached fair procedures in not putting certain up-dated country of origin information to her. I took the view that any such error could best be addressed on appeal to the Refugee Appeals Tribunal, saying:-

> "In the context of asylum matters, it is decidedly preferable that an applicant should exhaust his or her right of appeal to the Tribunal unless there are compelling reasons for suggesting that this would otherwise be unjust or that the error could not be satisfactorily corrected on appeal: see, *e.g.*, the comments of Hedigan J. in *B.N.N. v. Minister for Justice, Equality and Law Reform* [2009] 1 I.R. 719 at 732-735. It is, after all, the function of the Tribunal to address the errors (if such there be) disclosed by the first instance decision. Of course, many of these errors can be characterised as jurisdictional, but in truth they often register in the middle of a spectrum which ranges from a pure appeal point on the one hand to that to which goes to the very essence of the jurisdiction on the other. Save where the error registers at the upper end

> of this spectrum or where the facts disclose a clear injustice, the judicial preference for exhaustion of administrative remedies tends to prevail, again for all the reasons set out by Hedigan J. in *B.N.N* and the extensive authorities quoted therein."

31. The same can be said in the present case, not least given that the applicant will have the benefit of a full *de novo* appeal to the High Court where the case will be completely re-heard.

32. A further, related consideration here is that this Court on appeal may well take a different view on the merits with regard to the sale of the properties. It is quite possible- and I am here expressing no view at all on the merits - that the underlying order will be varied in some way, so that this precise issue will not arise. If there were to occur, then, of course, it would have been quite otiose and unnecessary to quash a part of an order of the Circuit Court which would, in that event, have been completely superseded by an order of this Court delivered in its appellate capacity. It is sufficient perhaps to say that the making of such an order is not inevitable or necessarily predetermined in advance by the underlying facts of the case. But all of this underlines the fact that the arguments advanced are quintessentially matters for the appeal, rather than for judicial review.

Conclusions on the third question

33. Conscious, therefore, that the third issue involves precisely the type of error which can be rectified on appeal, I would accordingly refuse in the exercise of my discretion to quash the Circuit Court order on the ground that it involved a breach of s. 15(1) of the Act of 1995, as this is an issue which caused no particular substantive unfairness to the applicant. In the event that the issue arises on the *de novo* appeal to this Court, it one which can then be best addressed by the judge of this Court nominated to hear the appeal.