THE HIGH COURT

[2023] IEHC 50

[2019 No. 58 M]

[2021 No. 114 M]

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996, AS AMENDED

BETWEEN

A

APPLICANT

– AND –

A (No. 2)

RESPONDENT

JUDGMENT of Mr Justice Max Barrett delivered on 25th January 2023.

SUMMARY

This is a supplementary judgment concerning certain additional matters raised since my initial judgment issued and before final orders are made.

1. I gave judgment in this matter on 2nd June 2022 ([2022] IEHC 340). That judgment was delayed for the reasons given in para.46 of that judgment. After I reserved my judgment and before I delivered the judgment of 2nd June, the Russian invasion of Ukraine took place and the

markets took quite a battering as a consequence. I was, therefore, concerned that the stock and share valuations that I had been given (and related pension fund values, given that they too were, at least in part, share value-dependent) would have changed to such an extent that it would not be sensible to proceed by reference to the values advised in the course of the hearing. So I indicated as follows in para.46:

> "*It may therefore be that exceptional circumstances call for an exceptional re-visitation of the share/pension values at play in these proceedings. If Mr A wishes to make this contention, I will hear the parties on whether I can/should proceed in this exceptional manner before I make my final orders.*"

2. Mr A did wish to make such a contention. However, almost immediately after my judgment, Ms A's then legal team ceased to act for her for reasons unknown to me. Ms A then made a couple of appearances in her own right, handing in material and making some argument, but essentially asking me to hold off on doing anything further until she got new legal representation. She now has a new legal team. But all this took some time. So matters only properly got a further hearing last Friday.

3. Ms A now makes various claims that would in effect require a fresh re-hearing of aspects of the divorce application. So, having opened a 'small window' to make sure that I did the fullest justice in terms of making proper provision between the parties I now find myself greeted with a bid to go much further. I make no criticism that this should be so, I simply note that it is so, and I also understand why it is so. In divorce proceedings where a wife has largely worked as a homemaker and suffered consequential detriment to her future earning potential it seems to me to be *very* important to make sure that one gets things right in terms of making proper provision for the soon-to-be-divorced wife. Of course it is always important to get things as right as one can. However, in 'externally working spouse v. homemaker spouse' cases this need seems, if anything, enhanced by the fact that in the years to come the externally working spouse (here Mr A) will continue to enjoy the earning potential that he acquired during the marriage (and hence a potential to meet any shortfall in income which may accrue to him) whereas the homemaker spouse (here the largely homemaker spouse, Ms A) will continue to suffer the detriment to her future earning potential that she has suffered by virtue of her years as a homemaker (and hence is not well placed to meet any shortfall in future income which

may accrue to her). So I can see, understand, and respect why Ms A is concerned to get matters as right as she can.

4. The principal concerns that Ms A has arising at this time are essentially threefold:

(1) Mr A contended that he would be subject to an effective tax rate of 50% on his stock options whereas Ms A maintains that the true effective tax rate is 32-35%.
(2) Mr A has failed to provide certain pension fund values to Ms A since my judgment.
(3) Mr A has misled the court as to the true nature of his employment with his company.

5. I consider below whether, and when, and to what extent I can consider matters afresh after handing down judgment. However, it seems to me that these three points can swiftly be dealt with:

(a) as to (1), to a large extent the tax treatment of the parties (including Mr A's effective tax rate of 50.4 per cent) was agreed at the trial by their respective, highly competent forensic accountants. To the extent that there was dispute, this has been adjudicated upon. So, as regards the effective tax rate I see no cause for dispute. And if there is some concern as to how I decided matters (and nothing has been drawn to my attention in this regard, nor does it need to be) that is a matter for any, if any, appeal that may now follow. Ms A, understandably, may wish to argue her case on a fresh basis because she considers that it might advantage her to do so. But that does not offer a basis for opening matters afresh or re-adjudicating what has already been adjudicated.
(b) as to (2) the said value has now been provided. I note that it was simply handed up to me at last Friday's hearing and I would ask that a supplementary affidavit be filed, exhibiting the requisite detail. The court order will reflect whatever figure is exhibited. My judgment (and the figures in the Appendix) proceed on the basis (which I am confident will prove true) that I was told the truth in this regard at last Friday's hearing.
(c) as to (3), Mr A occupies a position of such seniority with his employer that he is required to file details of his dealings in his employer's shares with a particular market regulator when he engages in such dealings. At the principal hearing, the nature of Mr A's employment, his future employment prospects with his existing

employer, and his likely pension arrangements were covered in extensive detail. Mr A consistently struck me throughout his evidence as a truth-telling gentleman who was satisfied to answer honestly all the questions that were put to him, getting a little vexed only once, after there was persistent questioning of him as to his death-in-service benefit as he did not like all the talk of his dying. So what is the problem that presents in this regard? It turns out that when Mr A uses the drop-box to indicate his title on the market regulator's website (when he deals in his employer's shares) he has latterly clicked the box showing himself to be a 'Deputy CEO/MD' rather than an 'Other senior executive' or 'Business area president'. Ms A maintains that this indicates Mr A to have changed status in his company. It has been put to me in submission by counsel for Mr A that Mr A's job status has not changed and that Mr A clicked the box he did because he clicked the box he did, *i.e.* there is no significance to his having clicked the box he did (and, specifically, he has not been promoted or seen his salary increase since I originally heard matters). I can readily understand that use of a particular job description in a particular form may have no especial significance: Mr A needs to show that he is a senior employee and has done so. If Mr A could include in the affidavit that I have mentioned above an averment to the effect of the submissions made by his counsel (that he used the title he did because he used the title he did and that there has been no promotion and no change in salary) I will proceed on that basis.

6. As the parties (at my request) kindly made submissions concerning whether (and to what extent) I can consider matters afresh after reserving judgment, it seems appropriate and courteous that I should address the applicable law in this regard. By way of starter, however, I have to mention the decision of the Supreme Court in *D.T. v. C.T.* [2002] 3 I.R. 334 which indicates that assets in proceedings such as the within should be assessed as at the date of trial/appeal (see the judgment of Denham J. – always a fount of good sense – at p.383). *D.T.* is a binding decision of the Supreme Court. That is why I was careful to state in my initial judgment that "*It may therefore be that exceptional circumstances call for an exceptional re-visitation of the share/pension values at play in these proceedings.*" I used the word "*exceptional*" twice because I knew what *D.T.* provides but was concerned that the Russian invasion of Ukraine and the knock-on effect which this had on global markets for a time offered an exceptional circumstance (a) that could not have been in the contemplation of the Supreme Court in *D.T.* and (b) in light of which it would be appropriate to check the asset values in play

so that I would be making proper provision between the parties by reference to the potentially significantly depleted asset values which presented post-invasion and not some artificial value. As it happened I was right: the asset values had taken a very real tumble. However, it has taken so long for this matter to come on for hearing that matters have largely righted themselves again. The pension fund has increased in value (thanks to additional contributions but also thanks to growth) and the share values have depreciated by about six per cent (so a fall but nothing outside the ordinary situation in which shares go up and down over a shorter timeframe and usually, but not always, increase over a longer timeframe). It follows that the exceptional circumstances which presented at the time I issued my previous judgment no longer present. I must admit to being impressed by the generosity of spirit that Mr A has nonetheless manifested in these changed circumstances. He has indicated that:

(i) he is satisfied for me to proceed on the increased pension value, even though the pension increase is thanks in part to additional contributions by him, so Ms A will be the beneficiary of that prudence and the related increase in pension value; and
(ii) he will abide by whatever decision I make as regards the decrease in share values (be that to allow the decrease against any balancing payment that he falls to pay, or not to allow that decrease). In fact because the decrease is no more than what one might expect in a one-year period, I do not consider that any exceptional circumstance presents, so I will, with respect, not allow for any decrease in the other share values.

7. The net effect of the foregoing is that Ms A stands to benefit in terms of the proper provision now to be made.

8. Anyhow, *D.T. v. C.T.* aside, the key decision on when a court may review its own judgment/order following the hearing of a trial is the decision of the UK Supreme Court in *Re L and Anor* [2013] 1 W.L.R. 634. However, when one looks to the facts of that case it has no relevance when it comes to these proceedings. There, the trial judge honoured her judicial oath by correcting a fundamental error on her part at an early stage of the proceedings and where the welfare of a child was at stake (which welfare would be a matter of paramount importance in this jurisdiction). Here, nothing of the sort presents. Ms A makes the complaints that I have mentioned and addressed above. There is no profound error that, consistent with the requirement that I do justice between the parties and make proper provision for them, I just could not leave unaddressed.

9. I have also been referred to the decision of the Irish High Court in *Lavery v. DPP (No 3)* [2018] IEHC 185. In that case the trial judge held that *Re L* was not applicable on the facts before him (just as I do not see it to be relevant on the facts before me). He identified a number of further circumstances in which application could be made to set aside an order but none of these present here, *viz*. (a) correction of material errors of fact after an order has been perfected (here there is no perfected order and there are not in any event any material errors of fact), (b) correction of immaterial errors via the slip rule (here there are no errors to be corrected and this is not in any event a 'slip rule' case), (c) situations in which there has been procurement of a judgment by fraud (no fraud and nothing of the like has been established here), (d) amendment where a judgment/order does not reflect what a court intended (my judgment reflects what I intended, no order has yet been made, and if either of the parties do not like any aspect of my judgment or order the proper course of action is to appeal, not for me to 'fiddle about' with what I have adjudged and/or will now order), (e) instances of bias (this has not been alleged and does not present), (f) exceptionally, where necessary in the interests of constitutional justice and/or constitutional rights (nothing of the sort has been alleged and does not in any event present), (g) variation of an order that was not intended to be final in any event, *i.e.* it was always an order of a type that could/would require variation (this is not the case that presents here).

10. As to *Shao v. Minister for Justice (No.2)* [2020] IEHC 68, this to some extent is '*Lavery* – Part 2' with much of what had been stated in that earlier case being echoed or amplified upon by the same judge. As with *Re L*, when one looks to the facts of *Shao* it involves facts that do not bear any resemblance to the present case. In *Shao*, the trial judge considered that not only had information been withheld from the court but that it was the State (of all parties) that had done the withholding. Here, I do not see that any information has been withheld and the State is not involved in these proceedings. (Various of the cases referred to in *Shao* also involve extreme-end behaviour that does not present here).

11. How then will I proceed in this matter? To maintain the confidentiality of the parties' financial affairs, I indicate in Appendix A (which will not be made public) how I will proceed. As to the further matters mentioned at last Friday's hearing: (i) it seems to me that what was being sought by Ms A regarding the property in [EU Member State 1] is precisely what I had indicated that I was going to do; (ii) the same applies as regards the boundary dispute; and (iii)

I understood from the oral exchange between counsel concerning ss.14 and 15A(10) of the Family Law Act 1995 that they both now understand and are satisfied as to the intended arrangements being made in this regard. Subject to the necessary changes (following on this judgment) being made to the draft order kindly prepared by counsel for Mr A, it seems to me that that draft order well-captures what is now to be ordered.

12. I will hear the parties on the issue of costs and any last comments that they may have to make as to the detail of the order that is now to issue. This, I respectfully note, is not an invitation to traverse ground that has already been covered and adjudicated upon and should take less (probably much less) than an hour to hear. Counsel might kindly liaise with the registrar and/or my judicial assistant to arrange a suitable time to hear them out. Ideally, subject to the availability of counsel, I would like to get matters completed before the end of this month.

13. Defined terms in this judgment bear the same meaning as is given to them in my previous judgment.

TO MR A/MS A:

WHAT DOES THIS JUDGMENT MEAN FOR YOU?

Dear Ms A, Mr A

I have just written a detailed judgment concerning the application heard last Friday. The judgment contains legal language which can be hard (even boring) to read. In a bid to make my judgments easier to understand by those who receive them I often now attach a note in 'plain English' briefly summarising what I have decided. I thought it might assist for me to add such a note in this case.

In a bid to ensure that people do not know who you are, I refer to you in my judgment and in this note as Mr A and Ms A. This may seem a bit artificial. However, I think it is for the best.

This note is a part of my judgment. However, it does not replace the text in the rest of my judgment. It is written to help you understand what I have decided. Any lawyers that you have engaged or may engage will explain the rest of my judgment in more detail.

Before I make my final orders in this matter, I will require Mr A to swear an affidavit (i) indicating why he completed the online regulatory form using a changed title and (ii) as to the correctness of the pension fund valuation that was handed up to me on Friday.

If Mr A's to-be-sworn affidavit accords with what I was told last Friday (and I expect it will) I will proceed on the basis that (a) there is no significance to his use of a changed title, and (b) the pension fund valuation was correct. In calculating the balancing payment I will use the increased pension value and I will not make separate allowance for the depreciation in share values. The net effect of the foregoing is that Ms A stands to benefit in terms of the proper provision now to be made.

I will hear your counsel on whether there should be an order as to costs. I will also hear them on any last comments that they may have to make as to the detail of the order. This, I respectfully note, is <u>not</u> an invitation to traverse ground that has already been covered and adjudicated

upon and should take less (probably much less) than an hour to hear. Subject to your counsel being available, I would like to get matters completed before the end of this month.

In the unlikely event that there is a conflict between the text of this letter and the text of the main body of my judgment, the text of the main body of my judgment shall prevail.

Yours sincerely

Max Barrett (Judge)

Date: 25th January 2023.