

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

B

Petitioner;

and

C

Respondent.

(Consequential Directions to a Consent Order)

Master Bell

Introduction

[1] On 10 January 2011 the petitioner (to whom I shall refer, for ease of reference, as “the husband”) and the respondent (to whom I shall refer, for ease of reference, as “the wife”) entered into a written agreement regarding their ancillary relief proceedings. On 11 January 2011 the parties invited me to grant a Consent Order, making that agreement a Rule of Court, and I did so. In this application the wife, pursuant to a summons dated 2 May 2014, now seeks :

- (i) An order endorsed with a penal notice compelling the husband to comply in full with the terms of the Consent Order;
- (ii) An order compelling the husband to give full disclosure of his assets and income since the making of the Consent Order;
- (iii) Any further order that the court deems fit; and
- (iv) Costs.

[2] The conflict between the parties centres around the issue of the husband's pension. The husband has a pension which is paid by Schlumberger in US dollars from an account in Dubai.

[3] Paragraph 5 of the Consent Order reads as follows :

“The Petitioner husband shall make periodical payments by telegraphic transfer in pounds sterling from Bradford and Bingley to the Respondent wife to her Ulster bank account number XXXXXXXX for life in the sum of 50% of his pension payable to him by Schlumberger, first payment to be 15th January 2011 and the first day of each quarter thereafter because his pension is paid to him every three months. The payment must be made by 15th of each specified month. The petitioner husband shall meet the costs of the telegraphic transfer. For the purposes of clarity, the Respondent shall be responsible for payment of her own rent from that date and the monthly payment she has been receiving of one thousand six hundred and fifty pounds shall cease forthwith as it has been replaced by the terms of this clause. The Petitioner husband shall provide documentary proof of his quarterly pension to the Respondent wife twice annually.”

[4] The wife's grounding affidavit states that the husband's solicitors wrote to her on 13 November 2013 explaining that from September 2012 the husband was resident in the Isle of Man and as a result was liable to pay tax there on his income. They wrote :

“In consequence of this our client will have to reduce the amount of maintenance payable to you but will always ensure that he continues to comply with his obligations to pay you 50% of his income.”

On 20 December 2013 the husband's solicitors wrote to the wife stating :

“Clearly the terms of the Consent Order were that [the husband] was to pay you 50% of his pension income received net of tax. Our client further instructs us that the exact amount of tax is not known to him at the present time but he has deducted the sum of £600 from your quarterly pension payment on the basis of an estimate. The final figure will not be known until after October 2014. Our client has previously sent you a reconciliation in January 2013, he informs us, and

proposes from now on to make those appropriate reconciliations at the end of each year.”

[5] However the husband has not always held this view about what he was obliged to pay the wife under the Consent Order. In a letter dated 5 April 2013 the husband wrote to the Income Tax Division of the Isle of Man Treasury :

“All aspects of the order are unequivocally clear The order does state that ‘*The petitioner husband shall make periodical payments by telegraphic transfer in pounds sterling from Bradford and Bingley to the Respondent wife to her Ulster bank account number XXXXXXXXX for life in the sum of 50% of his pension payable to him by Schlumbergerand both the petitioner and the respondent shall be liable for his or her personal tax liabilities hereinafter, to include such tax liabilities as arise consequent to the implementation of the terms of this agreement. Any tax liabilities on the husband’s income up until this date shall be the sole responsibility of the husband.*’ This language is very clear to me, namely ;

- I am ordered to pay my ex-wife 50% of the pension (gross) payable to me who in turn ‘is liable for her tax liabilities.’”

The Interpretation of the Consent Order

[6] In my view the interpretation of the Consent Order is indeed very clear. Paragraph 5 requires the husband to pay to the wife “50% of his pension payable to him by Schlumberger”. There is nothing in the Consent Order which allows him to deduct any tax liabilities he might have in respect of the pension and then pay 50% of the balance to the wife. In addition, there is nothing in the Consent Order which allows me to change the amount which the husband must pay so as to take account of his tax liabilities. Even if there had been a discretion allowing me to do so I would not have exercised that discretion for two reasons.

[7] Firstly, paragraph 26 of the Consent Order states :

“Both the petitioner and the respondent shall each be liable for his or her personal tax liabilities hereinafter, to include such tax liabilities as arise consequent on implementation of the terms of this agreement. Any tax liabilities due on the husband’s income up until this date shall be the sole responsibility of the husband.”

The issue over the husband having to pay tax in the Isle of Man therefore cannot amount to a change of circumstances such as would allow me to exercise any discretion.

[8] Secondly, in a letter to the husband dated 15 May 2013, the Deputy Assessor of Income Tax in the Isle of Man wrote :

“I have reviewed all of the documentation and correspondence on your file and it does appear to me that the tax position created by the order is not what you understood it to be at the time that you signed the order. It is likely that the actual tax position was not apparent to you when you signed the order, because what would have been an almost identical tax position in Northern Ireland could have been masked by your non-domicile tax status whilst you lived there.”

This is not therefore, to use the language of Baroness Hale in *Miller v Miller, McFarland v McFarlane* [2006] UKHL 24, a situation where the paying party has fallen on hard times. It appears on the husband’s submissions that he wishes me to allow him to reduce his payments to the wife simply because he did not understand his tax position at the time he signed the Consent Order. In effect he wishes me to save him from his own mistake.

[9] As is well recognised it is no part of a court’s duty to upset agreements fairly and freely entered into by individuals possessing the requisite degree of competence. Provided there has been independent legal advice and the parties have acted at arm’s length and provided of course that there has been proper financial disclosure, the courts will rarely intervene. As Oliver J said in *Edgar v Edgar* [1980] 1 WLR 1410 at 1420H :

“Men and women of full age, education, and understanding, acting with competent advice available to them, must be assumed to know and appreciate what they are doing...”

And as Butler-Sloss LJ said in *N v N (Consent Order : Variation)* [1993] 2 FLR 868 :

“I respectfully agree ... that other than in unusual circumstances, courts will uphold agreements freely entered into at arm’s length by parties who are properly advised.”

Accordingly, the husband must pay 50% of whatever amount is paid to him by Schlumberger.

The Issue of Information

[10] The wife also made submissions that the husband has failed to comply with the final sentence of paragraph 5 of the Consent Order :

“The Petitioner husband shall provide documentary proof of his quarterly pension to the Respondent wife twice annually.”

No reasonable excuse for non-compliance was presented to me at the hearing. The husband, however, does not contest that the information should be being provided. At the end of this ruling I shall therefore give consequential directions as to the timescale for the husband rectifying the position. Failure to comply on an ongoing basis leaves the husband open to the wife seeking a committal hearing for contempt before the Family Judge.

The Issue of Registration and Variation

[11] Both parties spent a significant portion of the hearing on the issue of whether the Consent Order was capable of registration before the Domestic Proceedings Court, giving rise to the possibility of a variation application in respect of paragraph 5. Essentially the argument revolved over whether the Consent Order provision in respect of the husband’s pension was a provision dealing with spousal maintenance (in which case the order might be capable of such registration and possible variation) or whether it dealt with capital (and therefore was not capable of such registration and variation).

[12] Both parties explained to me that there had been a difficulty with drafting the Consent Order. This difficulty was caused by the fact that the pension was in payment and was being paid from an offshore jurisdiction in US currency. Had it simply been a pension in this jurisdiction then a Pension Sharing Order, earmarking, or set-off would have been considered. Miss Kerr submitted to me that, because it was an offshore pension, it could not be treated as a capital asset and had to be treated as an income stream. The parties therefore reached a compromise, namely that the wife would receive periodical payments for life.

[13] There are a number of aspects of the Consent Order which were referred to during the hearing as relevant on the issue of whether the periodical payments amounted to capital or income. These are as follows :

- (i) The introduction to the Consent Order states : “The arrangements and agreements hereinafter appearing are made expressly with the intention that the same shall be in full and final satisfaction of all claims that the petitioner and the respondent may have to apply to a court of competent jurisdiction for orders of financial or ancillary relief *of a capital nature only* and whether arising now or at any time in the future in the context of the breakdown or dissolution of their marriage or otherwise howsoever and whether under the Partition Acts, the Married Woman’s Property Act 1882, the Administration of Estates (NI)

Order 1955 as amended, the Matrimonial Causes (NI) Order 1978 as amended by the Pensions (NI) Order and the Welfare Reform and Pensions (NI) Order 1999, the Matrimonial and Family Proceedings (NI) Order 1989 or any equivalent legislation or otherwise at Common Law or in equity or any other statutory provisions.”

- (ii) Paragraph 5 of the Consent Order (which I set out again for ease of reference) “The Petitioner husband shall make *periodical payments* by telegraphic transfer in pounds sterling from Bradford and Bingley to the Respondent wife to her Ulster bank account number XXXXXXXX for life in the sum of 50% of his pension payable to him by Schlumberger, first payment to be 15th January 2011 and the first day of each quarter thereafter because his pension is paid to him every three months. The payment must be made by 15th of each specified month. The petitioner husband shall meet the costs of the telegraphic transfer. For the purposes of clarity, the Respondent shall be responsible for payment of her own rent from that date and the monthly payment she has been receiving of one thousand six hundred and fifty pounds shall cease forthwith as it has been replaced by the terms of this clause. The Petitioner husband shall provide documentary proof of his quarterly pension to the Respondent wife twice annually.”
- (iii) Paragraph 6 of the Consent Order : “The *said spousal maintenance payment* shall be registered at Petty Sessions under the terms of the Domestic Proceedings (NI) Order 1980 so that any variation in the future shall be adjudicated upon at that forum. As a result it is accepted by both parties that the terms of this agreement are not in full and final settlement of income claims and therefore, for the purposes of clarity, this agreement constitutes a clean break in respect of capital provision only. Income provision remains subject to variation and discharge.”
- (iv) Paragraph 7 of the Consent Order : “The Petitioner husband agrees that the Respondent wife shall continue to be the assigned beneficiary of his pension benefits in the event of his death.”
- (v) Paragraph 13 of the Consent Order : “Both parties accept the terms of this agreement in full and final satisfaction of all their claims against one another for property

adjustment order, lump sum, or any order or orders of a capital financial nature whatsoever but not in respect of income.”

- (vi) Paragraph 19 of the Consent Order : “For the purposes of clarity, in the event that the petitioner husband continues to pay maintenance to the respondent wife at the time of his death, the Respondent wife maintains her claims against the petitioner husband under the Inheritance (Provision for family and Dependents) (Northern Ireland) Order 1979 restricted to capitalisation of any ongoing maintenance as a dependent.”
- (vii) Paragraph 26 of the Consent Order : “Both the petitioner and the respondent shall each be liable for his or her personal tax liabilities hereinafter, to include such tax liabilities as arise consequent on implementation of the terms of this agreement. Any tax liabilities due on the husband’s income up until this date shall be the sole responsibility of the husband.”

[14] Miss Kerr emphasised that the Consent Order used the term “periodical payments” and that this meant it was clearly referring to income not capital. In my view the use of this term is, however, by no means conclusive. In *Miller v Miller, McFarlane v McFarlane* [2006] UKHL 24 Lord Nicholls said at paragraph 31 :

“There is nothing in the statutory ancillary relief provisions to suggest Parliament intended periodical payments orders to be limited to payments needed for maintenance. Section 23(1)(a) empowers the court, in quite general language, to order one party to the marriage to make to the other 'such periodical payments, for such term, as may be specified in the order'. In deciding whether, and how, to exercise this power the statute requires the court to have regard to all the circumstances of the case: section 25(1). The court is required to have particular regard to the familiar wide-ranging check list set out in section 25(2). These provisions, far from suggesting an intention to restrict periodical payments to the one particular purpose of maintenance, suggest that the financial provision orders in section 23 were intended to be flexible in their application.”

[15] The final wording of any matrimonial agreement will reflect a number of forces involved in the process. These will include the wishes of the clients; the compromises made by each; the wisdom of counsel in perceiving issues that ought to be addressed; the time constraints the parties and their

representatives are under; and the drafting skills of counsel. It is clear that in this case at least one of the minds at work in formulating the agreement wished to provide for the possibility that payments made by the husband to the wife were capable of being varied downwards in the event that appropriate circumstances arose. This is the only conclusion that can be drawn from the use of the term “the said spousal maintenance payment” in paragraph 6. However there are imperfections in the drafting. Despite the use of the word “said”, the term “spousal maintenance” does not previously appear in the Consent Order. Nevertheless it can, in my view, only refer to the periodical payments in paragraph 5.

[16] It may well be, however, regardless of what counsel drafted in paragraph 6 of the Consent Order, and regardless of the fact that the parties signed it, that the agreement is not capable of being registered under the terms of the Domestic Proceedings (Northern Ireland) Order 1980 and is therefore not capable of being varied by the Domestic Proceedings Court. Mr Barbour suggested one reason in particular why this might be so. The court’s powers to register and vary can only be given by legislation. If an applicant cannot meet the statutory criteria under the 1980 Order then the agreement cannot be registered. Additional powers to register an agreement do not flow from the fact that the agreement was made a Rule of Court by this court. Nevertheless whether it can be registered and varied is not a decision for me. Whether a Consent Order made in the High Court is capable of being registered, and either varied or discharged, in the Domestic Proceedings Court is a decision for the Domestic Proceedings Court alone to make and that decision is then subject to the usual appeal processes. I understand from the parties that the husband has filed an application before the Domestic Proceedings Court and it is for that court to adjudicate upon it.

Conclusion

[17] I therefore make the following consequential directions under Article 25(6) of the Matrimonial Causes (Northern Ireland) Order 1978:

- (i) The periodical payments made by the husband to the wife shall be 50% of the gross amount received by him from Schlumberger. In respect of any payments made by the husband which do not amount to 50% of the gross amount received by him from Schlumberger, the husband shall, within four weeks of the handing down of this judgment, pay to the wife whatever sum of money is necessary to rectify the position.
- (ii) If he has not already done so, the husband shall, within two weeks of the handing down of this judgment, provide to the wife documentary proof of all pension payments made by Schlumberger to him since 10 January 2010.

- (iii) The costs of this application shall be borne by the husband and I certify for counsel.