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(subject to editorial corrections)

Ancillary relief application – property adjustment order – appeal from Master's decision – weight to be given to Master's decision – relationship between ancillary relief application and wife's property claims – property adjustment order and ECHR – role of court on Convention issues not pursued by parties

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

BARBARA ELLEN MARY MacRANDALL

Petitioner

and

DERMOT JAMES MacRANDALL

Respondent

JUDGMENT

GIRVAN J

Introduction

This matter comes before the court as an appeal from orders made by Master Kennedy in an ancillary relief application brought by the petitioner Barbara Ellen Mary MacRandall ("the wife") in divorce proceedings instituted by her against the respondent Dermot James MacRandall ("the husband").

The parties were married on 25 August 1984. The wife issued a divorce petition against the husband on 25 April 1996 alleging that he had behaved in such a manner that it would be unreasonable to expect the wife to continue living with him. The particulars

alleged verbal and physical abuse and financial irresponsibility on the part of the husband. The husband denies the act of unreasonable behaviour but he did not defend the proceedings and asserted that he concluded that there would be no advantage in contesting those proceedings. He had proposed a divorce on the grounds of a two year separation with consent but the wife insisted on proceeding on the grounds of unreasonable behaviour.

In her petition the wife claimed the full range of matrimonial ancillary relief comprising maintenance pending suit, a periodical payments order, a secured provision, a lump sum order and a property adjustment order in relation to 9 Stranmillis Street, Belfast, the former matrimonial home ("the relevant premises").

A decree nisi was granted on 25 September 1996. The wife delayed in seeking to have the decree nisi made absolute and the husband subsequently applied for and obtained a decree absolute on 26 October 1998, the petitioner being condemned in the costs of the application for that purpose.

By a summons issued on 23 December 1996 the wife applied for a property adjustment order in relation to the relevant premises, a lump sum order, a periodical payment order and a secured provision order. The proceedings relating to ancillary relief were protracted and contentious. Delay appears to have been caused at least in part by the wife's desire to await the outcome of proceedings which had been instituted by her husband against his former solicitors claiming damages for negligence and breach of contract in respect of legal services connected with the husband's involvement in a venture to develop a site of land at Deramore Park South, Belfast ("the Deramore site"), a business venture which failed badly.

Eventually the application was peremptorily adjourned to 13 April 1999 and on that date Master Kennedy made an order whereby it was ordered that:-

(i) the relevant premises were to be placed on the market for sale forthwith with an agent to be agreed by the parties and if not of agreement as specified by the Master;

(ii) the net proceeds of sale were to be divided equally after payment of estate agency and legal fees and the redemption of two mortgages;

(iii) the husband's solicitors were to have carriage of sale and were to account for one third of the fee;

(iv) the contents of the relevant premises should be divided by agreement between the parties and in default of agreement as decided by the Master.

The order recorded that it was in full and final settlement of all claims that either party might have against the other for ancillary relief or against the estate of the other under the Inheritance Provision for Family and Dependants (Northern Ireland) Order 1979. The Master's order further required the husband to pay the sum of £3,375 towards the costs of the wife, the costs to be paid out of the net proceeds of sale. The wife has appealed all three orders.

The weight to be attached to the Master's Orders

On an appeal to the Judge from the Master the matter comes before the court de novo. Nevertheless the Judge must give due weight to the Master's decision. Particularly in a case of an appeal in matrimonial ancillary relief applications proper weight should attach to the experience of the masters who are dealing day and daily with such matters and are able to call on a reserve of expertise not available to a judge who does not regularly hear such cases. In such ancillary relief applications there is rarely a straightforward right or wrong solution to the financial problems posed by the breakdown in the marriage. Those problems raise deep emotions which call for the exercise of a balanced assessment of what is fair and proper in all the circumstances. It will rarely be the case that greater justice will be done by trailing a second time over the same factual scenario (which may be surcharged with deep emotional

upset on both sides). Such appeals necessarily are lengthy and expensive. This appeal fortifies me in my view that the court should be slow to upset a Master's balanced judgment in such cases.

The key facts

The parties met when the wife was seventeen years of age and at school and the husband was at the time a twenty-one year old architectural student. The wife went to university for a year but left after a period to work for Belfast City Council for whom she still works. The parties married when she was twenty-four. They purchased the relevant premises in March 1984 before their marriage with a view to restoring the premises which at that time were in a derelict condition. It appears that the premises cost £18,000 with £2,000 being provided as a gift by the husband's parents and the balance of £16,000 was borrowed from National & Provincial Building Society (now Abbey National).

A considerable amount of money and work was expended and carried out in the improvement and development of the premises. The husband alleged that the wife contributed little to the work and complained about the inconvenience involved. The wife for her part claimed that she provided physical and financial assistance in the work. I am satisfied that this was a joint venture, that the husband did the bulk of the planning and physical work in connect with the rebuilding of the house but that they both contributed time and monies directly and indirectly. It does not serve any beneficial purpose to try and arrive at a detailed quantification of the value of physical and financial contributions since it was intended to be and was a joint venture. An additional home improvement loan of £12,000 was borrowed from the National & Provincial and this thus increased the effective mortgage of the National & Provincial. It is thus realistic to regard the National & Provincial (Abbey National) debt as giving rise to one mortgage in respect of the premises. I am satisfied that

the husband funded the mortgage instalments out of his current account throughout the marriage and since. I am also satisfied that he incurred additional expenses in paying for material and work in the house. The wife also made financial contribution to the matrimonial finances and her income was used as part of the matrimonial resources meeting expenses such as food, clothes and holidays. I accept the husband's evidence that he made a greater financial contribution to the mortgage of the premises, the rates, insurance, central heating and telephone costs. These were met out of his current account which went into increasing overdraft.

Some time in 1992 the husband became involved in a speculative venture involving the site at Deramore. This venture was carried on with the wife's brother Mr Mulqueen who had a degree in project management. The wife's father was the manager of a branch of the First Trust Bank and he offered a bank facility to assist the acquisition of the site. A company called Derbar Developments Ltd was formed to develop the site but the site appears to have been actually acquired in the husband's name. The purchase price was £250,000 of which £180,000 was funded by mortgage from Halifax Building Society, a debt taken out by the husband. The balance of £70,000 had to be found from other sources. The Mooney brothers put in £60,000 and the balance was advanced by AIB which provided Derbar with a facility out of which interest payments were made.

The project was a financial disaster. Delay in obtaining planning permission and heavy interest charges rendered the project unviable and in due course the premises had to be resold at a loss leaving the respondent with substantial liabilities. It appears likely though not certain that a substantial part of the liabilities are now statute barred. For reasons which will become apparent it is not necessary to resolve the financial questions which hang over the failed business project. What is relevant is the circumstances surrounding the execution by the wife of a guarantee of the husband's personal overdraft at the bank and of a second mortgage in favour of the bank to secure that guarantee.

While the Derbar development was ongoing the bank became increasingly concerned about the financial situation and both the husband and Mr Mulqueen felt under severe financial pressure as a result of the failing venture. They had justifiable fears that it could lead to their bankruptcy. The bank was exerting pressure on the husband to provide collateral security for his own personal indebtedness to the bank though it does not appear that it was demanding collateral security in the form of guarantees or mortgage security from third parties in respect of the Derbar development although the husband and Mr Mulqueen had personally guaranteed the Derbar Development Limited debt. The husband put considerable pressure on his wife to sign a guarantee of his personal indebtedness to the bank and to sign a mortgage to secure that guarantee. The wife alleges that the husband physically abused her in an effort to get her to sign up and threatened her with death. She claims that he dragged her upstairs by the hair and threatened to push her over the banister. No such incident was alleged in her affidavit and her petition alleged an incident such as that but in June 1994 a year after the signing of the guarantee and around the time of their ultimate separation. I am not satisfied that the husband subjected the wife to the physical violence alleged in order to induce her to sign the guarantee or mortgage.

What is clear is that when the wife was taken to the husband's solicitors to sign the documentation she told her husband's solicitor that she was not happy about signing the documentation and she was advised to take separate legal advice. This she did and saw an independent solicitor on two occasions. Having received separate advice she agreed to sign the guarantee and mortgage. Under the guarantee she agreed to act as surety for her husband's personal indebtedness up to the sum of £10,000 together with interest and the guarantee provided security for that liability.

I am satisfied that she was subjected to considerable emotional pressure to sign the documentation and that that pressure came not only from her husband but also from her brother. Following the breakdown in the marriage with the wife leaving the relevant

premises in June 1994 the husband remained in the premises and continued to meet the mortgage outgoings in respect of the premises. His financial position was not good since he had lost his job in his father's architectural firm after his financial position became insecure and threats of bankruptcy were looming. He subsequently began to teach at the Belfast Institute at a salary of around £20,000 per annum. The husband was able to let out rooms in the relevant premises and estimates that the rental income upon the property was about £1,700 per annum which fell considerable short of the mortgage repayments due. In 1998 the husband went back into private practice earning £4,000 in his first year and £18,000 in his second year. He must make his own pension provisions. While he was able to discharge the mortgage to Abbey National he was not in a position to pay off the bank debt secured by the second mortgage and the debt continued to build up so that at the point when the premises were sold it amounted to £15,000.

Following the making of the Master's order the premises were sold for £180,000. The parties failed to agree on how the proceeds should be divided. The real point of disagreement between the husband and wife is that the wife contends that the husband should discharge the whole bank debt out of his own share of the proceeds of the sale whereas the husband contends that the debt should be shared equally. The Master's second order made clear that it was her decision that the mortgage debt of both Abbey National and the bank should be paid out of the proceeds of sale and the balance then divided equally between the parties.

The Art Works Issue

The husband and wife during their marriage had built up a collection of art works comprising a marble sculpture by Sockholov, paintings by Brian Ballard ("Still Life Vase and Flowers" and Still Life Fruitbowl"), paintings by Shawcross ("Basket of Fruit", "Fireplace", "Chair", "Vase and Flowers"), prints by David Evans ("Harbour" and "the Palm House"), two works by John Breaky, a print by Michael Scott and individual works by Cecil King, Ross Wilson, Rita Duffy, Bill Penny and Killen.

The parties gave evidence as to the circumstances in which the art works were acquired. Approximate values were ascribed to the works but no detailed valuation had been carried out. In the absence of a proper valuation of the works the Master had to decide on a division of the works in a balanced way. Suffise it to say that I heard nothing in the evidence to show that the Master's approach or decision was erroneous in principle.

The issues raised in the appeal

The approach adopted by the Master was that the present case called for no periodic payments, no lump sum order and that the husband and wife were able to financially provide for themselves and that there should be a clean break. She concluded that in the exercise of her property adjustment power she could direct a division of the proceeds of the sale of the premises and divide up the disputed art works. As I have already indicated in relation to the art works there is nothing in the Master's approach that calls her decision into question.

Mr Coyle on behalf of the wife did not seek to re-open all issues in respect of the relevant premises in the appeal but rather focused on the decision in respect of the bank's mortgage. He contended firstly that the wife in the exercise of her ordinary property rights should be entitled to throw the bank's mortgage debt onto the husband in its entirety. As a surety in respect of the husband's debt to the bank she was entitled to seek an indemnity from the husband as the principal debtor if she was required to pay off or contribute to the payment of the debt or any part of it. Since the mortgage was merely a security for the liability on foot of the guarantee when the proceeds of sale of the premises were divided her entitlement to be reimbursed in respect of the liability on foot of the guarantee should this be taken into account. In the result the husband should meet the full liability on foot of the debt. Mr Coyle secondly and in the alternative contended that the court should have full regard to the factual situation surrounding the execution of the guarantee and mortgage. The undue and unfair pressure exerted on her to sign the guarantee and the fact that the debt was the personal debt

of the husband should lead to the conclusion that the husband should discharge the debt entirely out of his share of the proceeds of sale.

Mr Malcolm on behalf of the husband argued that the court should have regard to all the circumstances of the case, in particular to the fact that the bank debt was built up as a result of the husband paying for the outgoings of the home and for the improvement and repair of the premises. He contended that the debt was thus in effect a debt incurred for the joint purposes of husband and wife. The husband's actual and potential financial liabilities in respect of the failed business should be taken into account. He argued that deciding the case on narrow property law grounds would be wrong in principle since in an ancillary relief application the court is called under exercise a more flexible jurisdiction designed to do broad justice to the parties having regard to the statutory factors. Since the wife had brought a claim for ancillary relief the court should decide the case according to those broad principles.

The relationship between the ancillary relief application and the wife's property claims

Disputes between spouses in divorce proceedings will often raise issues as to the property rights of the parties and issues as to how their financial and proprietary interests should be determined for the future. In property disputes the question for the court is "Whose is this?" and not "To whom should this be given" which is the question raised in an ancillary relief application.

In Button v Button [1968] 1 All ER 1064 at 1067 Lord Denning stated:-

> "I think it would be an advantage if all financial questions between husband and wife could be settled at one and the same time. Maintenance is linked with the property. If the wife stays in the house, her maintenance may be reduced on that account. If she gets a substantial capital sum out of the house, it may affect her maintenance. So it would be a good thing if applications as to maintenance and property were heard together."

In Kowalczuk v Kowalczuk [1973] 2 All ER 1042 Lord Denning pointed out that:-

> "After there has been a divorce the property rights to the party should be adjusted by means of an application for ancillary relief; it is unnecessary to decide the exact property rights under section 17 of the Married Women's Property Act when all appropriate orders can be made under the 1970 Act."

In Brown v Brown (1874) 119 Solicitors Journal 166 the Court of Appeal pointed out that it is undesirable to make an application only under section 17 of the Married Women's Property Act 1882 and such an application should be heard with an application under the Matrimonial Causes legislation for financial provision and property adjustment orders.

In this case the wife has brought her claim as one for ancillary relief seeking inter alia a property adjustment order. Within such an application the court must have regard to the property rights of the parties as among the relevant circumstances. Its ultimate decision will determine property rights and give rise to a res judicata on such issues. The factors to which regard must be had under article 27 are much wider than merely the property rights of the parties and include the income earning capacity, financial resources of the parties, the financial needs obligations and responsibilities, the standard of living enjoyed by the family before the breakdown in the marriage, the age of the parties to the marriage and the duration of the marriage, the contributions made by each party to the welfare of the family including contributions made by looking after the home or caring for the family and in the case of proceedings for divorce the value to either of the parties of the marriage of any benefit, for example, a pension which by reason of the dissolution of the marriage that party will lose the chance of acquiring. In an application under the Married Women's Property Act or in an action determining the strict property rights of the parties the court is called on to apply the rules of property law established by the principles of common law and equity. The determination of a spouse's rights in such proceedings can pose difficult questions and introduce a high degree of artificiality which fails to take account of the reality of married life and the way in which the spouses have adjusted their financial relationship over the years. The application of the principles of equitable accounting as stated in cases such as Cowcher v Cowcher [1972] 1 All ER 944 introduces a further element of accounting complexity. Under those principles where a sale of property takes place the proceeds are to be distributed in accordance with the ascertained beneficial interests applying the principle that where a fund

is being distributed a party cannot take anything out of the fund until he has made good what he owes the fund and the party who has discharged another's secured obligation wholly or in part is entitled to be repaid out of the security the sums paid by him. While under article 27 the court has regard to the property rights of the parties amongst the other factors to be taken into account it would undermine the intended width and flexibility of the property adjustment regime to require the court to determine with exactitude the strict property rights of the parties or to give pre-eminence to those strict property rights.

Property Adjustment Orders and the ECHR

An order varying a parties beneficial and strict property rights in property is an interference of that party's property or personal possessions. This potentially calls into play Article 1 Protocol 1 of the European Convention on Human Rights ("the ECHR"). It provides:-

> "Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to the procure the payment of taxes or other contributions or penalties."

Under section 6(1) of the Human Rights Act 1998 ("HRA 1998") it is unlawful for a public authority (which includes a court) to act in a way which is incompatible with a Convention right. Section 6(1) does not apply to an act if "as the result of one or more provisions of primary legislation the authority could not have acted differently."

Under section 3(i) it is provided that:-

> "so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

When it is not possible to do so and the court is satisfied that the statutory provision is incompatible with the Convention the court may make a declaration of incompatibility.

In this case neither parties sought to argue that the Matrimonial Causes (Northern Ireland) Order 1978 is incompatible with the Convention and neither party argued that the pre-Convention approach of the courts to the legislation was incompatible with the provisions of the Convention nor did they seek to argue that the court is now required to apply the provisions of the legislation in a different way.

In civil litigation inter parties when the parties are professionally represented and where the parties on advice do not put before the court any Convention rights arguments the question arises as to way in which the court should approach a possible Convention issues. The answer to this question is not entirely clear. On the one hand the obligation imposed on the court to act compatibly with the Convention and to construe and give effect to the legislation in a way which is compatible with the Convention rights points to an activist and interventionist role on the part of the court which differs from the more traditional role of the court in an accusatorial system. On the other hand if the parties do not seek to rely on any Convention right and are content to proceed upon the basis that the case raises no special Convention issues there are obvious dangers in the court of its own motion pursuing issues and points which the parties on advice do not consider it necessary or appropriate to pursue. For the court to do so could lead to unnecessary lengthening of proceedings and to the increase of costs, could lead to parties into irrelevant blind alleys and could lead to unnecessary appeals. It has been said that the real impact of HRA 1998 will be in the way it encourages a new approach and a reconsideration of domestic law in the light of Convention rights. HRA 1998 will encourage practitioners and courts practising in every area of law to examine the law in the light of HRA 1998 to ensure that it is compatible with Convention rights.

For my own part pending further guidance from higher courts I tend to the view that if parties decide not to pursue a Convention right issue, in the absence of any apparent breach of Convention rights the court should proceed upon the basis that there is no Convention

issue. If the court considers that there is a question as to whether a Convention right has been breached it should ask the parties whether they are relying on any Convention rights and if they inform the courts that they are not then the court should proceed on the basis that the case does not raise any specific Convention law issues. In such circumstances the parties should be considered to have waived any Convention right or made a concession that there is no breach of Convention law or that no relevant provision of the Convention is engaged. What effect such waiver or concession has on the event of an appeal would be a matter for the relevant appellate court.

Quite different considerations would of course apply in criminal cases, in cases where litigants are unrepresented and in ex parte applications.

In the course of the argument although I raised the question of Article 1 of Protocol 1 the Convention neither counsel sought to pursue any Convention issue. Although I did not expressly ask the parties whether they were relying on any Convention issues I am satisfied that the parties advisedly decided not to pursue any Convention issues.

As it is I do not consider that there is any serious question as to the compatibility of the relevant provisions of the 1978 Order with the Convention and I do not consider that that legislation must not be read or given effect in a way different from the way it was read and given effect before the Convention became incorporated into domestic law by the 1998 Act. The provisions of Part III of the 1978 Order appears to satisfy the "fair balance" test achieving a fair balance between individual rights and freedoms and the public interest. In James v UK [1986] 8 EHRR 123 the ECHR held that "the taking of property in pursuance of a policy calculated to enhance social justice within the community can property be described as being in the public interest." Those words are apt to cover the property adjustment powers contained in the 1978 Order. Those provisions as heretofore construed and applied, appear to be accordingly, in the public interest (as determined by the state within its margin of

appreciation), prescribe by law the relevant conditions to be applied and are not contrary to the general principles of international law.

Determination of how the proceeds of sale should be divided

The spouses were joint tenants of the property and thus entitled to the premises in equal shares in equity. In broad terms if one were to apply strict property rights and the principles of equitable accounting the proceeds of sale should be divided equally but the wife's share should be debited with half the mortgage repayments made by the husband after the parties separated (when it would be unrealistic to apply the presumption of advancement). The husband's share would be credited with half those payments. Furthermore the husband's share should be debited with half the rental income received by him which he should strictly have accounted for to his wife. His wife's share would be credited accordingly. The husband's share would further be debited with the mortgage debt due to the bank since it was his own debt guaranteed by the wife who would be entitled to seek an indemnity in respect of that debt once she paid off the debt or part of it on his behalf.

However, to approach the matter in that way would be both artificial and unfair to the parties. In its approach to the proper division of the funds representing the proceeds of the sale the court should have regard to the wide range of considerations set out in article 27. In particular in this case I take into account the following matters:-

1. The earnings and earning capacity of the parties (which must also take account of the fact that the wife has had pensionable employment for a considerable period of time unlike the husband);
2. The circumstances of the acquisition and rebuilding of the house and the funding of the mortgage and the cost of work. On the facts I am satisfied that the husband contributed more in physical effort than in financial terms;
3. The bank debt represented a debt which was built up largely because of the cost of the works, the funding of the mortgage and the payment of other outgoings;

4. The very substantial increase in the value of the property itself which would not have been possible without the major contribution of the husband to the remedial works.

I do not leave out of account the wife's case that she was pressurised to sign a guarantee which I have accepted in some measure. Whether she had signed the guarantee or not the final outcome in my view would not have been different since the husband's debt was built up largely as the result of expenses incurred in the funding of the works, the payment of the mortgage and other outgoings in respect of the home. Nor do I leave out of account the fact that some small part of the bank debt may have been due to business expenses incurred by the husband in the failed venture but I am satisfied that that represented only a small part of that debt. In the main the business debts arising out of the failed venture were built up in separate accounts and give rise to separate actual or potential liabilities of the husband.

I conclude in all the circumstances that the Master's order should be upheld.

Some observations

This case illustrates the expenses and delay that can be involved in hotly contested matrimonial disputes and degree of emotion which can be generated. It necessitated detailed hearings before the Master which generated a considerable quantity of documents which, though voluminous, failed in some instances to fully identify all the issues. It has led to a protracted appeal hearing which ultimately turned on the question whether the wife should receive an additional £7,500. The expense of the appeal was disproportionate to issues at stake. Fortunately in many matrimonial cases good sense prevails and sensible matrimonial agreements are drawn up to resolve the issues for the future. When agreement cannot be reached parties and their advisors should actively consider alternative dispute resolution as a means of resolving their differences. Apart from being likely to reduce the expense to the parties it would help to reduce the severe emotional pressures that must flow from the contesting of such claims through the courts.

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