



THE COURT OF APPEAL

Court of Appeal Record No. 2020/262

Neutral Citation Number [2023] IECA 109

Woulfe J.

Collins J.

Binchy J.

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

Between

A.X.

Applicant/Appellant

-and-

B.X.

Respondent

JUDGMENT (NO.2) of Mr. Justice Woulfe delivered on the 5th day of May, 2023

1. This judgment relates to three issues which have arisen consequential upon the judgment of the Court (Woulfe J.; Collins J. and Binchy J. concurring) delivered on the 5th October, 2022, which dismissed the appellant's appeal and affirmed the decision of the High Court as to a number of ancillary orders subsequent to a grant of a decree of divorce.

(a) Publication/Redaction of Judgment

2. In his written submissions dated the 5th October, 2022, the appellant submitted that the Court's judgment should only be published in circumstances where the Court can satisfy itself that by doing so the privacy of the parties is maintained. He later submitted that various matters should be redacted or anonymised to protect the privacy of the parties. In her written submissions delivered on the 24th October, 2022, the respondent submitted that any concerns about the identification of the parties could be addressed by suitable redaction of the judgment. She stated that an earlier judgment of the High Court in these proceedings had included criticism of the respondent's legal advisers, and in the circumstances it is only fair that the Court's judgment should be allowed to clearly stand as a counterweight.
3. The Court is of the view that the judgment should be published, subject to appropriate redactions to prevent the identification of the parties. The redactions include the names of professional advisers, but not the names of the respondent's solicitors as the Court accepts the above submission of the respondent in relation to same. Before publication, the Court circulated the draft redacted judgment to the parties so that they could consider same, and so that they could revert if either party felt that the Court had missed any necessary redaction not the subject of previous submissions, and this resulted in some further redactions. The redacted principal judgment will now be published in conjunction with this further judgment.

(b) Disclosure of Judgment

4. In her written submissions dated the 24th October, 2022, the respondent sought an order from this Court lifting the in camera rule to the extent of granting leave to her solicitors

to disclose the Court's judgment to (i) the Solicitors Disciplinary Tribunal, and (ii) its professional indemnity insurers. This issue is addressed in a separate judgment of Collins J., with which I agree.

(c) Costs

5. With regard to costs, as the appellant had been entirely unsuccessful in this appeal, the provisional view expressed by the Court in our judgment was that the respondent is entitled to her costs of the appeal. The parties were given liberty to contend for an alternative order.
6. The appellant accepted the provisional view of the Court and suggested that the Court would order that the appellant do pay to the respondent the costs of the appeal, to be adjudicated upon in default of agreement.
7. In her written submissions the respondent raised two matters regarding costs. Firstly, she submitted that the award of her costs should also include the costs reserved by the Court of Appeal in relation to the appellant's DAR motion heard in that Court over the course of half a day in April, 2021. She states that this was a substantial application brought by the appellant to take up the transcripts of 14 separate days of the High Court hearing, and was grounded upon a 36 page grounding affidavit, together with over 1,100 pages of exhibits. It was suggested that the Court of Appeal rejected the application in its entirety, save that it allowed the appellant to take up a very limited extract of the transcripts to clarify a narrow point of his evidence in the divorce proceedings.
8. Secondly, and more generally, the respondent referred to her concerns in relation to an order that her costs be adjudicated in default of agreement. These concerns are based on the history of the prolonged taxation of costs process in the judicial separation

proceedings. The respondent submits that the taxation/adjudication process has been used as a tool of oppression against the respondent by the appellant, in which he invariably represents himself. She argues that at every turn the appellant has sought to delay and complicate the adjudication process, including by bringing various applications, by raising of irrelevant matters, by prolix pleadings and by the bombarding of the decision-maker with documentation. She submits that the appellant's clear goal is to force the respondent to incur yet more costs and to frustrate the recovery of the costs awarded to her.

9. The respondent requests that the Court should make an appropriate order to protect her against what she describes as the appellant's ongoing abuse of the adjudication process. She submits that this could be achieved in a number of ways, whether by varying the High Court order for proper provision to include a further lump sum for costs, or by measuring the costs, or by an order directing a payment on account of costs pursuant to the Court's power under O. 99, r. 2(5) of the Rules of the Superior Courts.
10. The appellant replied to these arguments in his later written submissions dated the 31st October, 2022. Firstly, as regards the reserved costs issue, he submitted that it was not true to say that the Court of Appeal rejected his DAR application in its entirety. It had granted him liberty to take up the transcripts of part of two days of the High Court hearing.
11. Secondly, as regards the special form of costs order sought by the respondent, the appellant denies that he had used the taxation/adjudication process as a tool of oppression against the respondent. On the contrary, it is said, the respondent's solicitor and own client costs arising from the judicial separation proceedings had been reduced by a significant sum by the Taxing Master on taxation. The appellant also denies that he ever sought to drag out the taxation process. He submits that the principal reason

that the taxation proceedings went on for so long was that the respondent's submissions to the Taxing Master, and to the High Court on the review of taxation, were subsequently proven to be untrue.

- 12.** As regards this Court measuring the costs, the appellant disputes the power of the Court to make such an order. He argues that s. 154 of the Legal Services Regulation Act 2015 ("the 2015 Act") is very clear that if any party is ordered to pay costs, then they have a right for those costs to be adjudicated. Insofar as O. 99, r. 7(2) appears to confer the courts with a power to make a measured costs order in lieu of adjudication, he submits that the provision would in effect constitute the repealing and/or amending of s. 154 and would therefore be unconstitutional.
- 13.** The appellant also submitted that the Court should not, and perhaps could not, make an order for a payment on account of costs. He referred to the High Court Practice Direction HC71 regarding payment on account of costs pending taxation, and argued that this Practice Direction was envisaged in circumstances that no longer exist of long delays, and under a legal cost statutory framework that no longer exists, and that the courts should not cite HC71 as a basis for awarding a payment of costs on account.
- 14.** The Court's ruling on the two costs matters arising is as follows.
- 15.** Firstly, as regards the costs reserved by the Court of Appeal on foot of the appellant's DAR motion, the order for costs in favour of the respondent should include 85% of these reserved costs, in circumstances where the appellant was largely unsuccessful in the application in question. The Court of Appeal only granted him liberty to take up the transcripts of the DAR of a limited part of two days of the High Court hearing, as opposed to the full fourteen days as sought by him.
- 16.** Secondly, the Court notes the respondent's concerns in relation to the usual form of costs order that her costs simply be adjudicated in default of agreement. The Court is

of the view that it is appropriate to make some form of special order, given the lengthy history of the prolonged taxation of costs process in the previous judicial separation proceedings.

- 17.** The Court does not consider it appropriate to make any order varying the High Court order for proper provision to include a further lump sum for costs. Nor is persuaded that it should measure the respondent's costs, a step which would deprive the appellant of the benefit of adjudication under the 2015 Act. The Court is satisfied that the appropriate form of additional order is an order directing payment of a reasonable sum on account of the respondent's costs, pending the adjudication of such costs. The Court notes the judgment of this Court in *Fitzpatrick v. Behan* [2021] IECA 23, where the Court (per Donnelly J.) held that it would be anomalous if the Court of Appeal had no similar inherent jurisdiction to the High Court. This inherent jurisdiction can be viewed as consistent with and reflected in r. 1(5) and r. 7(1) of the recently recast O. 99 of the Rules of the Superior Courts.
- 18.** As regards the amount of the interim payment, the respondent's solicitors wrote to the appellant by letter dated the 11th October, 2022, setting out a schedule of the costs incurred by the respondent in this appeal in a total sum of €88,247.58. No response was received to this letter.
- 19.** The respondent has proposed that the appropriate payment on account should be set at €52,148.55, *i.e.* 60% of the respondent's costs as set out. The Court will order a more conservative figure of €45,906.06, which represents 50% of the professional fees and 75% of the outlay as set out, inclusive of VAT.
- 20.** This order will be made on undertakings being given by the solicitor for the respondent (i) that, in the event of adjudication realising a smaller sum than that directed to be paid on account, such overpayment will be repaid immediately; and (ii) that she will seek to

adjudicate the costs of the appeal (and all other outstanding costs) as quickly as possible. The Court will order that the interim payment be made within twenty eight days from the date of this ruling.

- 21.** In the circumstances, it is not necessary for the Court to consider the question of whether the provisions of the 2015 Act preclude the making of an order measuring the costs. However, the fact that the Court does not consider it appropriate to make such an order here should not be taken to indicate that it accepts that there is any force in the appellant's submissions on this point.
- 22.** As this judgment is being delivered electronically, I note that each of Collins J. and Binchy J. have indicated their agreement with it and with the orders I propose.