[2025] IEHC 76

THE HIGH COURT

CIRCUIT APPEAL

Record No. 2024 54 CAF

EASTERN CIRCUIT **COUNTY OF MEATH**

IN THE MATTER OF THE CIVIL PARTNERSHIP AND CERTAIN RIGHTS AND OBLIGATIONS OF COHABITANTS ACT, 2010, AS AMENDED

IN THE MATTER OF SECTION 5(1) OF THE FAMILY LAW ACT, 1981, AS AMENDED

IN THE MATTER OF SECTION 48 OF THE FAMILY LAW ACT, 1995, AS AMENDED

IN THE MATTER OF SECTION 44 OF THE FAMILY LAW (DIVORCE) ACT, 1996 AS AMENDED

IN THE MATTER OF THE LAND AND CONVEYANCING LAW REFORM ACT, 2009, AND

IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT 1976

BETWEEN

T. R.

Applicant/Appellant

AND

O. B. C

Respondent

JUDGMENT delivered by Ms. Justice Nuala Jackson on the 7th February 2025.

BACKGROUND

1. The Applicant/Appellant herein instituted proceedings pursuant to the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 as amended ('the 2010 Act') on the 27th April 2020. She subsequently issued separate proceedings under a number of different statutory provisions namely section 5(1) of the Family Law Act, 1981, as amended ('the 1981 Act'); section 48 of the Family Law Act, 1995, as amended ('the 1995 Act'); section 44 of the Family Law (Divorce) Act, 1996 as amended ('the 1996 Act'); and the Family Law (Maintenance of Spouses and Children) Act, 1976 ('the 1976 Act'). While the second set of proceedings sought reliefs relating to the erstwhile jointly occupied proceedings, the title to the said proceedings does not make reference to the Land and Conveyancing Law Reform Act, 2009 ('the 2009 Act') nor is this legislation referenced in the reliefs sought. However, reliefs are sought pursuant to the 2009 Act in the Counterclaim filed in the later proceedings.

2. A Notice of Appeal was served by the Applicant/Appellant and this references only the record number for the cohabitation proceedings. However, the Order of the Circuit Family Court from which the appeal is brought relates to Consent Terms encompassing both sets of proceedings and the re-visiting by way of appeal is sought in respect of the reliefs granted in both. I note that an application to consolidate was included in the second proceedings above but this does not appear to have been progressed. The Notice of Appeal appeals from the whole of the Order of the Circuit Family Court which Order was, as stated above, a composite for both proceedings. I have also considered the Affidavit of the Applicant/Appellant of the 18th October 2024, sworn in the context of the appeal, and it clearly encompasses both sets of proceedings. The evidence and submissions before me did likewise. In consequence, having heard from both of the parties, I am going to amend the Notice of Appeal to encompass both sets of proceedings as this clearly accords with the argument before me, with what both parties envisaged and is also with what the Circuit Family Court Order encompassed.

3. As I have commented previously, the statutory intricacy which forms the background to the within appeal demonstrates the legal complexity of litigation pertaining to non-marital families in Ireland.

4. I am setting out in this background the issues which are not substantially in dispute as between the parties.

5. There was little argument that the parties had cohabited for a long number of years, that they had done so in the context of an intimate and committed relationship and that the relationship was now at an end. There are two children of the relationship, both of whom remain dependent and will do so for a considerable number of years. The parties had both been in employment at the commencement of their relationship and for a number of years thereafter. The Applicant/Appellant gave up her employment outside the home in the context of family arrangements and, in particular, in the context of health deficits experienced by one of the children. She is now in receipt of modest earnings, supplemented by social welfare receipts. She has a modest pension provision from her time in employment. The Respondent remains in gainful employment outside the home. He continues to accumulate a pension in the context of his employment.

6. The children have at all times since the cessation of the relationship between the parties resided primarily with the Applicant/Appellant. There was no suggestion that this would change. The commitment of the Applicant/Appellant to the care of the children was not disputed. The Respondent asserted a desire to have a full and active involvement in the lives of the children and that the Applicant/Appellant was not supportive in this regard. While there have been difficulties in relation to contact between the Respondent and the children, this was not an active matter in this appeal. The only matter pertaining to the children which is at issue in the proceedings herein is that of maintenance.

7. Legal title to the residence in which the parties resided together is held in the sole name of the Respondent and it was purchased by him a number of years prior to the commencement of the relationship between the parties. It is subject to tracker mortgage[1] and, in consequence, the repayments have fluctuated greatly in recent years.

[1] The Applicant/Appellant contended that the mortgage relating to the property at issue herein was an interest only mortgage. This would not appear to be correct rather the mortgage is a tracker mortgage.

The Applicant/Appellant moved into the property in or about 2010 in the context of the relationship between the parties and she continues to reside there with the children.

8. There was allegation and counter-allegation in the pleadings herein. The Applicant/Appellant contended that she had made contribution towards this residence in the form of renovations, maintenance and furnishing expenditure. This was disputed. She further contended that she had contributed equally towards the mortgage while she was in gainful employment and that, upon cessation of such employment, that family and household expenses had been shared with the Respondent paying the mortgage and the Applicant/Appellant discharging other necessary expenses of the family. This was disputed. The Applicant/Appellant furthermore contended that she had contributed a redundancy payment which she received to the family's outgoings and also that she had provided a lump sum to the Respondent from her resources to discharge a loan. This was disputed. These contributions were of some antiquity but nevertheless relevant. It was also contended that the Applicant/Appellant had facilitated the Respondent in attending courses for educational enhancement which assisted him in his career path. This was disputed as to the particulars thereof. The Applicant/Appellant also asserted that she had utilised the proceeds of a personal injury claim for the benefit of the children and their expenses. There is no doubt from the evidence before me that during the period of cohabitation both parties contributed, financially and otherwise, to family requirements.

9. The parties separated in or about 2017/2018. The date of separation is also a matter of dispute. The separation of the parties would appear to have taken the Applicant/Appellant by surprise and her assertion that she remained emotionally traumatised from this was evident during the hearing of this appeal. This would appear to have occurred in the context of the commencement of a new relationship by the Respondent. The circumstances of separation were disputed by the Respondent. The Respondent continued to discharge the mortgage (albeit with certain defaults alleged and proven) and allegations of failure to maintain were made by the Applicant/Appellant. It was no doubt unfortunate and insensitive that the Respondent served a Notice to Quit upon the Applicant/Appellant approximately one year post separation. This was, of course, also an entirely inappropriate step legally as the Applicant/Appellant has never been a tenant in the property concerned. Allegations of

maintenance default were also made by the Applicant/Appellant and, on the evidence before me, it would appear that there was at times inadequacy of support for the family by the Respondent since separation.

10. The Respondent is now living with his new partner in a property elsewhere. An investment property held by the Respondent had been disposed of during the course of the proceedings and the Applicant/Appellant alleged non-disclosure in this regard and that the Respondent had received personal benefit from this disposal. It was also asserted that the Respondent had received a personal injuries damages award which he had utilised for his own benefit and from which neither the Applicant/Appellant nor the children had benefitted. Again, this was disputed.

11. Both parties swore and filed Affidavits of Means in the context of the Circuit Family Court applications. The only Affidavit of Means of the Applicant/Appellant provided to me was sworn on the 5th July 2024, immediately prior to the Circuit Family Court listing. She asserted a beneficial interest in the residence in which the parties cohabited. She had modest salary together with social welfare assistance, primarily One Parent Family Allowance. Her debts were modest also but, in accordance with her testimony before me, there was a sum averred to be due and owing to her family in circumstances in which she asserted that maintenance and support shortcomings had been supplemented by support from her family of origin. The personal expenditure (which included expenditure for the children) was, for the most part, appropriate and not excessive.

12. The only Affidavit of Means of the Respondent provided to me, sworn on the 21st June 2024, also shortly prior to the listing of this matter for hearing before the Circuit Family Court, referenced two properties, both subject to mortgages. There was no reference to rental income from the property not occupied by the Applicant but, likewise, there was no expenditure in respect of this property claimed (mortgage arrears, management fees and NPPR outstanding were referenced in the Third Schedule of such Affidavit of Means). As stated above, this property had been sold when the matter came on for hearing before me and it would appear that this had occurred in July 2024, prior to the ruling of the matter before the Circuit Family Court. The Respondent's basic salary

was set out therein but, while there was reference to a discretionary bonus, the amount of same was not specified. Expenditure was unremarkable save that in certain respects it seemed to be extremely modest. There is reference to indebtedness including arrears in respect of mortgages and debts due.

CONSENT TERMS

13. The compromise agreement between the parties provided that the Applicant/Appellant could continue to reside in the cohabitation residence until July 2029. At this time, the two children would be aged 16 years and 15 years of age. Upon inquiry as to why this date was agreed upon (having regard to the fact that it did not appear to me to be referable to any particular stage in the children's upbringing), it appeared to be a date linked to negotiation rather than any such particularity. Pending sale, the mortgage, local property tax and management charges in respect of the property were to be discharged equally by the parties. The net proceeds of sale, after deduction of a number of items including management fee arrears and a loan to a third party, were to be divided 65% to the Respondent and 35% to the Applicant/Appellant. The Respondent was to pay maintenance for the support of the two dependent children in the sum of €433.33 per month together with 50% of specified, vouched children's expenses and also the Respondent to continue to discharge private health insurance in respect of the children. The compromise terms included a provision that the Applicant/Appellant is not a qualified cohabitant and such proceedings under the 2010 Act were to be struck out with no order. It was also a term of the compromise that the parties had never been engaged to be married.

14. As previously stated, while the Notice of Appeal was from the whole of the Order of the Circuit Family Court, there were two matters which were primarily at issue before me:
    (a) Financial provision as between the parties going forward, including periodic maintenance going forward and responsibility for household outgoings;
    (b) The date of disposal of the family home;
    (c) The distribution of the proceeds of sale.

The Applicant/Appellant swore an Affidavit in the context of the appeal and therein made an open offer which sought to substantially alter the Orders made below as regards the matters at (a) and (b) and (c) above.

EVIDENCE ON APPEAL

15. The Applicant/Appellant argued that there had been a lack of disclosure on the part of the Respondent. She argued that she had not seen his vouching until after the settlement terms were signed and ruled and that she would not have signed the terms had she been aware of the true financial position of the Respondent. However, it is clear from correspondence from the Applicant/Appellant's then solicitors that vouching had been provided prior to the resolution of the proceedings in the context of a listing for hearing before the Circuit Family Court. Correspondence indicates that queries were raised in respect of such vouching. The Applicant/Appellant asserted that there was understatement of some income and that additional income was not disclosed at all. Concealment of resources from the sale of the second property of the Respondent was also alleged. These alleged shortcomings were raised by the Applicant/Appellant some short number of weeks post-settlement although the Notice of Appeal had already been served at this time.

16. The Applicant/Appellant gave evidence of most constrained financial circumstances and that the children and herself were suffering financial hardship. She gave evidence of utilities being cut off or endangered and having to rely upon her parents for supplementary income. She indicated that she was reliant upon charitable organisations for support and she contrasted her lifestyle with the lifestyle which she asserted the Respondent enjoyed. She indicated that he did not have accommodation costs as he was living with his new partner in that person's house. She gave evidence of the support which she had given to the Respondent over a considerable period. She asserted a lack of support from him at the time of separation. She indicated that her financial position did not permit her to discharge one half of the mortgage repayment. While the distress of the Applicant/Appellant was obvious, I was provided with some most unfortunate email correspondence from the Applicant/Appellant to the Respondent which correspondence was threatening and abusive in nature. The commitment of the

Applicant/Appellant to the children is undoubted but threats of interference with their relationship with their father presented as a most unsavoury aspect of this case. This was particularly unfortunate in the context of her subsequent evidence that the children adored their father and have a good relationship with him.

17. The Applicant/Appellant spoke of the abandonment of the family by the Respondent at the time of separation, asserted to be in July 2018. She gave evidence that this abandonment was physical, emotional and financial. She gave evidence of trying to do her best for the children and that she had experienced and was experiencing stress due to financial instability. She indicated that she lives frugally, simply wishes a decent lifestyle for the children and that she just wanted them to have normal and usual opportunities but that she consistently cannot arrange for them to do normal and usual activities due to lack of financial resources. She stated that she wanted the children to be safe and that she would be happy to take up social housing in due course at the earliest possible opportunity so that the Respondent could receive his share from the property. It was clear from the evidence of the Applicant that her primary concern was periodic maintenance and the respective responsibilities of the parties for other household outgoings.

18. The Respondent asserted that the Applicant/Appellant wished to take the benefit of the parts of the consent terms which suited her and to abdicate from those that did not. She accepted the maintenance payment agreed but had failed to discharge her share of the mortgage repayment. An absence of full disclosure by the Applicant/Appellant was also asserted, in particular in relation to certain social welfare benefits which she received but which were not in her Affidavit of Means. Luxury expenditure by the Applicant/Appellant was asserted which expenditure belied her stated penury. Reference was made to foreign holiday travel. The Respondent stated that he had offered assistance in the form of practical childcare which would enable the Applicant/Appellant to engage in additional work and this had been refused. He denied the lack of participation in the children's lives which the Applicant/Appellant asserted. He informed me that he had substantial financial constraints as the mortgage on the residential property was a tracker mortgage and, in consequence, had increased significantly in recent years. It must, of course, be noted that there have been some

interest rate reductions more recently and, indeed, since the appeal hearing herein. He confirmed that he does pay rent to his partner in respect of his now accommodation. He referenced lifestyle curtailments which he has on an ongoing basis and additional payments which he had made for the benefit of the Applicant/Appellant and the children and their household.

19. As with the Applicant/Appellant, the stress of his situation was obvious. He made reference to very significant numbers of abusive emails which he had received. Allegations of untruthfulness and non-disclosure were vehemently denied. He referenced an outstanding bill for legal fees in the sum of €30,000 which he did not know how he would discharge. He asserted that the Applicant/Appellant had additional income from child minding which had not been disclosed.

LEGAL ISSUES ARISING

20. This matter comes before me by way of appeal from an Order of the Circuit Court made on the 10th July 2024. The Order of the Circuit Court made at that time was a most usual one. The Court was informed that the parties had compromised the proceedings and that Consent Terms, executed by them and witnessed by their respective then solicitors, were to be ruled by that court. This was the Order made:

> *"That Orders be made as set out in the Consent Terms filed this day and dated the 10th July, 2024, which is attached as a schedule to this order AND where the terms fall outside the pleadings herein receive same and make a Rule of Court."*

21. The Applicant was legally represented at that time, having received the benefit of legal aid. The Respondent was legally represented by a privately funded solicitor. Neither was legally represented in the context of this appeal.

22. In any event, the Applicant/Appellant is clearly most unhappy with the terms of the settlement entered into and with the consequent Circuit Family Court orders made.

23. This case gives rise to a complex legal issue, and particularly so in the context of certain family law proceedings, of the extent to which consent orders may be appealed. At the commencement of the proceedings, I raised this issue with both of the parties.

Understandably, this issue was rendered further difficult by the unrepresented status of both parties and the lack of legal advice and assistance available to them. The Applicant/Appellant referenced her right to appeal and her dissatisfaction with the Circuit Family Court orders. She argued that these orders were insufficient to address the needs of herself and the dependent children, that they were unfair and unreasonable having regard to the greater resources of the Respondent, that the Respondent enjoyed a lifestyle standard far in excess of that open to her and the children and furthermore she argued that there had been non-disclosure of his full financial resources on the part of the Respondent.

24. The Respondent denied such non-disclosure. The Respondent denied that the settlement achieved was unfair or inadequate. He denied that he had a higher standard of living such as the Applicant/Appellant asserted and he argued, on the contrary, that he was deeply in debt due to the costs of proceedings to date and that he simply did not know where he would get the resources to discharge his continuing indebtedness. I wish to be clear that he did not make any criticism of his previous lawyers and acknowledged the services received in respect of the legal fees due and owing. The overwhelming factor obvious in this appeal was the very considerable degree of stress and anxiety which was being experienced by both parties. This is only to be expected where resources are finite and limited and proceedings have been ongoing for almost five years.

25. It is undoubtedly the case that a substantial difficulty arises from the lack of legal argument herein in respect of this complex legal issue. Definitive determination of the legal principles concerned in the context of certain family law applications must await a different case where the matters are fully explored.

THE LAW

26. The appeal in this matter derives from section 37 of the Courts of Justice Act, 1936 (as applied by section 48(3) of the Courts (Supplemental Provisions) Act. 1961) as no oral evidence was heard by the Circuit Family Court:

> *"37. – (1) An appeal shall lie to the High Court sitting in Dublin from every judgment given or order made (...) by the Circuit Court in any civil action or*

matter at the hearing or for the determination of which no oral evidence was given.

(2) Every appeal under this section to the High Court shall be heard and determined by one judge of the High Court sitting in Dublin and shall be so heard by way of rehearing of the action or matter in which the judgement or order the subject of such appeal was given or made, but no evidence which was not given and received in the Circuit Court shall be given or received on the hearing of such appeal without the special leave of the judge hearing such appeal."

27. There is nothing in sub-section (1) of this section which precludes the Applicant/Appellant from so doing in the context of a consent order. The difficulty arises in the context of sub-section (2) of section 37 which states that such appeals are to be heard by way of re-hearing. However, it is amply clear from relevant caselaw that there are curtailments on the extent to which and circumstances in which a consent order will be altered on appeal. This arises from the issues of how there can be a rehearing of a matter when there has been no hearing of it at first instance, the essence of an appeal being that it is to afford a second opportunity to re-argue a matter. In cases such as the present, there has been no argument at first instance and thus no hearing from which the statute envisages a re-hearing. The authorities in this regard have been considered most recently by this Court (Bradley J.) in **Paes v O'Connor** [2024] IEHC 199.

28. In that case, the Defendant in equity proceedings purported to appeal a compromise which was recorded in a subsequent Order made by the Circuit Court. As in the present case, the proceedings were not heard by the Circuit Court as that court had been informed that the parties had reached agreement and settlement. The relief being sought was pursuant to section 31 of the 2009 Act. The background to that case, as with the present, was a non-marital, cohabitation relationship between the parties. Unlike in the present instance, the Defendant in the **Paes** case was not legally represented at the time of the settlement which was ruled before the Circuit Court but that court had made robust enquiry as to her satisfaction with the terms agreed. Dissatisfaction with the terms was expressed by the Defendant in that case shortly after the ruling of them. Notice of Appeal was subsequently served. Bradley J. first considered the question of

whether an appeal in these circumstances is misconceived, having regard to the fact that there has been no actual hearing before the Circuit Court. This was on the basis that a "*de novo* re-hearing" (paragraph 36 of the judgment) requires that there has been a hearing at first instance and there had been no such hearing. The consequential difficulty arising is that if a hearing is then permitted on appeal, this will, in fact, be the first hearing of the matter and the right of appeal is, in consequence, denied to a party who might be dissatisfied with the outcome of this hearing. The difficulty is explained with clarity in the judgement of Power J. in **Mars Capital Ireland DAC v Hunter** [2020] IEHC 192 (albeit that the circumstances being considered in that case were somewhat different to the present, involving the non-appearance of a plaintiff causing a motion (for leave to execute an Order for Possession) issued by it to be struck out):

> *"18. Section 37(2) of the Act of 1936 provides that an appeal to the High Court is to be heard and determined 'by way of rehearing of the action or matter in which the [Circuit Court] judgment or order the subject of such appeal was given or made'.*
>
> *19. Having heard the parties and considered their submissions, I am satisfied that, in this case, there was, in fact, no decision of the Circuit Court which could be the subject of an appeal to this Court. In circumstances where the Circuit Court has neither heard nor determined an application because the application itself was struck out due to the nonattendance of the moving party, then the appropriate course of action is for that party to issue a fresh motion before the Circuit Court rather than asking this Court to hear the motion for the first time.*
>
> *20. In this regard, I am guided by the judgment of the Court of Appeal (Finlay Geoghegan J.) in Kelly v National University of Ireland Dublin aka UCD [2017] 3 I.R. 237, which confirmed that on the hearing of an appeal from the Circuit Court pursuant to s. 37 of the Act of 1936, the High Court is exercising a limited appellate jurisdiction conferred by statute and is not acting as a court of first instance with its full originating jurisdiction pursuant to Article 34.3.1 of the Constitution. As in Kelly, no authority has been opened before this Court which indicates that the High Court, when exercising its 'statutory appellate jurisdiction in a Circuit Court appeal, has an inherent jurisdiction to hear and determine an application at first instance which cannot be said to be the purpose*

of or in connection with the determination of the particular circuit appeal'. As Finlay Geoghegan J. pointed out, the High Court cannot 'confer on itself a jurisdiction that it does not otherwise have'.

21. Insofar as the plaintiff relies upon AIB v Cosgrove, I am satisfied that the case is distinguishable on a number of grounds, not least of which is the fact that there was a hearing before the Circuit Court. In this case, there was no hearing at all.

22. In Permanent TSB plc formerly Irish Life and Permanent plc v O'Connor [2018] IEHC 339, Barrett J. accepted the contention made by the defendants in that case to the effect that within our court system, in proceedings commenced before the Circuit Court, parties typically have two chances to make their respective cases. They have an initial trial before the Circuit Court on such evidence as is put before that court. A party to such proceedings who considers that she or he has one or more grounds of appeal, has a right of appeal to the High Court, where a de novo hearing is undertaken. Following such a de novo hearing, matters typically end.

23. In that case, the defendants argued that the evidence which was placed before the High Court was not properly in evidence before the Circuit Court and thus they were getting only one chance to make their case and had no right of appeal if the High Court decided matters in a way that the defendants considered to be erroneous.

24. I agree with the approach taken by Barrett J. in that case. He stated: "The very least that a financial institution must do if it seeks a possession order is to ensure that it has its evidence in order; the very least that a trial court must do is to provide judgment solely on the basis of such evidence as is properly before it; and the very least that the High Court must do in terms of Circuit appeals is to ensure that it offers and undertakes a de novo hearing of the case previously heard, and that it is not acting as a court of entirely first instance adjudging for the first time on evidence of critical significance in terms of the relief initially sought in the Circuit Court."

25. Whilst this case did not concern a possession order per se, the plaintiff's motion, nevertheless, sought leave to execute an order for possession, albeit

some considerable time after the making of that order. In the circumstances, I am satisfied that it was incumbent upon the plaintiff in bringing such a motion, to attend at the hearing thereof and to make whatever arguments it considered appropriate in support of its application. It is not open to the plaintiff to fail to attend the hearing of its own motion, not once, but on two occasions, and then to appeal a 'strike out' of its application to the High Court under s. 37(1) of the Act of 1936.

26. If this Court were to proceed to hear this application as an appeal, the result would be that the defendant would have only one opportunity to have matters fully and properly heard, rather than two, as is his entitlement." (underlining added)

29. In the **Paes** case the setting aside of the compromise was argued on grounds of duress. In the present case, the Applicant/Appellant argues that the compromise should be re-opened on grounds of non-disclosure. The judgement of Bradley J. also considers the appropriate course of action where the circumstances of the settlement are challenged (whether on the basis of fraud, duress, non-disclosure or such like). At paragraph 39 he states:

"39. As just mentioned, the process of the presentation of the settlement agreement to the Circuit Court and that court's engagement was largely informed by the fact that Ms. O'Connor was a litigant in person who had reached a settlement. Notwithstanding that, in this application Ms. O'Connor essentially seeks to set aside the settlement agreement on grounds of alleged duress but attempts to do so via the prism of a purported appeal from the Order of the Circuit Court dated 29th November 2022 which incorporated the settlement agreement. The fact that the settlement was made an order of the Circuit Court, however, was more to do with the giving effect to, or the manner of the enforcement of the settlement agreement. The enforcement of the settlement agreement, however, is not a matter which I have to address save for the observation that the terms of the settlement agreement and order provided for "liberty to apply"."

30. The re-opening of a disputed compromise agreement was further addressed by Bradley J. at paragraph 41 and following of his judgment:

> *"41. Further, in O'Sullivan v Weisz [2005] IEHC 74 Finnegan P. held (at page 5 of his judgment) that notwithstanding the observations of Phillimore LJ in the Court of Appeal in England and Wales in Binder v Alachouzos [1972] 2 All ER 189*
>
> > *"a judgment given or an order made by consent may in a fresh action brought for that purpose be set aside on any ground which would invalidate a compromise not contained in a judgment or order: Weilding v Sanderson (1897) 2 CH 534, Hickman v Berens (1895) 2 CH 638. Thus a compromise may be set aside on the ground that it was illegal as against public policy, or obtained by fraud, or misrepresentation, or non disclosure, or was concluded under a mutual mistake of fact. Specifically a compromise can be set aside on the ground that it was obtained by duress: Cumming v Ince (1847) 11 Q.B. 112. Thus the compromise and the agreement sought to be set aside by the Plaintiff in these proceedings can be set aside on the grounds of duress. Duress can encompass economic duress. A compromise gains no additional status by being embodied [sic.] in an order or by being made a Rule of Court".*
>
> *42. As stated, in seeking to impeach the settlement agreement/consent reached between the parties on 29th November 2022, Ms. O'Connor essentially seeks to set aside the settlement agreement on alleged grounds of duress but attempts to do so via the prism of a purported appeal from the Order of the Circuit Court dated 29th November 2022 which incorporated the settlement into a court order.*
>
> *43. The attempt to do so, however, falls foul of the decision of the Supreme Court in Charalambous v Nagle [2011] IESC 11.*
>
> *44. In that case an order had been made by the Circuit Court (His Honour Judge Terence O'Sullivan) on consent that Ms. Nagle recover possession of the premises, the Avoca Inn, from Mr. Charalambous. Both parties were legally represented before the Circuit Court. The Order cites that it was made "on consent". Mr. Charalambous appealed the Order and the High Court (Edwards J.) refused the appeal on the grounds that it was an order made on consent, that no appeal lay, and ordered that: (a) the appeal do stand refused; (b) the order of the Circuit Court was affirmed; and (c) the respondent do recover against the*

appellant the costs of the appeal. Separate intoxicating liquor licence proceedings and Circuit Court and High Court proceedings in relation to the matters also issued. When the matter came before the Supreme Court, Denham J. (as she then was) observed at paragraph 27 of her judgment that the kernel of the case related to a consent order of the Circuit Court and in that context further stated at paragraphs 28 and 29 (and in the context of the order from His Honour Judge O'Sullivan) that "(28) [t]here were no grounds raised upon which to set aside the consent order on a basis recognised by law. The appellant has brought several sets of proceedings subsequent to the order of the 5th February, 2008. However, there has been no claim of fraud. (29) These were final orders. Final orders are final and conclusive and may not be relitigated except in circumstances such as indicated in Belville Holdings v Revenue Commissioners [1994] 1 ILRM 29."

Clearly the circumstances which pertained in **Belville Holdings v. Revenue Commissioners**[2] aforementioned do not arise in the present instance.

31. Bradley J. also made reference to **Flynn v. Desmond** [2015] IECA 34:

"54. Similarly, in Flynn v Desmond [2015] IECA 34 the Court of Appeal (Peart J., Hogan J., and Mahon J.; judgment delivered by Mahon J.) addressed the circumstances where the High Court (Birmingham J., as he then was) had made an order that proceedings had been compromised by an agreement made between the Plaintiff and the Defendant, wherein it was agreed that a sum of money was to be paid to the Plaintiff in settlement of his personal injury claim. The Plaintiff, however, then appealed the High Court Order and the Court of Appeal (Mahon J.) observed as follows at paragraphs 17 to 19 of the judgment:

> *"17. A litigant is entitled to process, manage and conclude his litigation in the absence of legal advice or representation, and many choose to do so. There is, of course, a very considerable public interest in upholding the finality of settlements and courts have been traditionally wary of permitting any litigant to undo any such settlement.*

[2] [1994] 1 ILRM 29 – this case referenced (a) an accidental slip in the order as drawn up i.e. the slip rule and (b) when the Court itself finds that the order does not correctly state what the Court actually decided and intended.

18. It is true, of course, that the plaintiff is a litigant in person. But this in itself cannot be a reason for allowing the settlement to be undone, for if it were so, it would mean, in effect, that no settlement with a litigant in person would ever be final. It must also be recalled, moreover, that the plaintiff accepts that he was advised that he should seek independent advice prior to concluding the settlement.""

Of course, in the present instance, the Applicant/Appellant was not a litigant in person when the compromise was reached.

32. In the context of the present case, a possible distinguishing feature arises for consideration:

    Is the law in relation to the appeal of a consent order different in family law than is the position in other legal areas?

33. In the context of divorce, there is a constitutional and legislative mandate upon the court hearing the matter to make proper provision for the members of the family and no Decree of Divorce may be granted absent the court being satisfied that such proper provision has been made. The first instance court must have a hearing and determination on this essential proof. There is a legislative check list of factors to which a court must have regard in determining proper provision (section 20 of the 1996 Act). Undoubtedly, the agreement of the parties is one such factor[3], indeed, an important factor but under the constitutional and legislative code applicable, the compromise of the parties is not and cannot be determinative.[4]

34. Likewise, in the context of an application for a Decree of Judicial Separation, the court is, in certain circumstances, mandated by legislation to ensure that specified standards of propriety are achieved in the context of the ancillary reliefs, absent which no Decree

[3] Section 5(1)(c) and section 20(1) of the 1996 Act refer to the court ensuring that proper provision "having regard to the circumstances exists or will be made for the spouse sand any dependent member of the family concerned."

[4] Legislative recognition of the relevance of party agreement also arises in the context of the significance given to separation agreements in section 20(3) of the 1996 Act.

may be granted. Section 3(2)(a) of the Judicial Separation and Family Law Reform Act, 1989 states:

> *'(2) (a) Where there are, in respect of the spouses concerned, any dependent children of the family, the court shall not grant a decree of judicial separation unless the court—*
>
> *(ii) is satisfied that such provision has been made, or*
>
> *(ii) intends by order upon the granting of the decree to make such provision, for the welfare of those children as is proper in the circumstances.'*

Again, a hearing and determination is essential even if agreed terms are proffered to the court by the parties.

35. The within proceedings do not involve the granting of any matrimonial decree or reliefs ancillary thereto. The within proceedings concern applications for:
    (i) The granting of reliefs in the context of the cohabitation legislation;
    (ii) The granting of relief in the context of section 31 of the Land and Conveyancing Law Reform Act, 2009; and
    (iii) The granting of relief in the context of maintenance legislation.

36. In relation to (i) above, section 173 of the 2010 Act provides for an application for redress to be made by an economically dependent qualified cohabitant. A "qualified cohabitant" is defined in section 172 of the 2010 Act. In the present case, the Applicant/Appellant has agreed in the Consent Terms that she is not a qualified cohabitant and she has signed a document so confirming and she did so with the benefit of independent legal advice. No determination was made by the Circuit Family Court in this regard rather the Applicant/Appellant agreed that the proceedings under the 2010 Act could be struck out on the basis that she was not a qualified cohabitant. In all of the circumstances and having regard to the evidence before me, in particular the signed Consent Terms, I am satisfied that it is not appropriate for me to grant redress as pleaded pursuant to the 2010 Act in circumstances in which there is a signed acknowledgment of the Applicant/Appellant that she is not a qualified cohabitant. To permit this matter to be litigated for the first time in the context of an appeal would be entirely unreasonable and unfair and contrary to authority.

37. In this regard, I have also had regard to the special recognition of the validity of agreements between cohabitants provided for in section 202 of the 2010 Act. I note that the Consent Terms herein satisfy the validity criteria provided for in section 202(2) of the 2010 Act and also that section 202(3) provides that a cohabitants' agreement may provide that neither cohabitant may apply for an order for redress under section 173. On the evidence before me and having regard to the Consent Terms executed here, there are no exceptional circumstances such as would justify the varying or setting aside of the agreement reached on the basis that serious injustice would otherwise arise.

38. In the context of relief under the 2009 Act, the principles enunciated by Bradley J., referenced extensively above, apply.

39. The final category of order sought by the Applicant/Appellant relates to maintenance for the support of the dependent children pursuant to section 5A of the Family Law (Maintenance of Spouses and Children) Act, 1976 as amended (periodic maintenance) and section 44 of the Family Law Act, 1995 (lump sum maintenance). Section 5A of the 1976 Act permits a court where it appears to the Court that a parent has failed to provide such maintenance for the child as is proper in the circumstances to make such periodical payments order for the support of the child as the Court may consider proper. Clearly, the section bestows upon the court a discretion to determine what is proper. The court is not, however, at large in this regard. The factors to be taken into account by a court in the exercise of this discretion are set out in sub-section (3) of the section:

> *'(3) The Court, in deciding whether to make a maintenance order under this section and, if it decides to do so, in determining the amount of any payment, shall have regard to all the circumstances of the case and, in particular, to the following matters—*
> *(a) the income, earning capacity (if any), property and other financial resources of—*
> *(i) each parent,*
> *(ii) the dependent child in respect of whom the order is sought, and*
> *(iii) any other dependent children of either parent,*

including income or benefits to which either parent, the dependent child as aforesaid or such other dependent children are entitled by or under statute with the exception of a benefit or allowance or any increase in such benefit or allowance in respect of any dependent children granted to either parent of such children, and

(b) the financial and other responsibilities of each parent towards—

(i) a spouse or a civil partner;

(ii) the dependent child in respect of whom the order is sought, and

(iii) any other dependent children of either parent,

and the needs of any dependent child as aforesaid or of any such other dependent children, including the need for care and attention.'

40. In the present case, the parties reached agreement in relation to these reliefs and there was no court hearing or determination in relation to them. In essence, the Applicant/Appellant, having so compromised matters and having foregone her entitlement to litigate these issues before the Circuit Family Court, seeks to have a first instance hearing in the context of an appeal. This is not what is envisaged by statute, is contrary to authority and would negate the function and purpose of the appeal process.

41. Having regard to the foregoing, I will dismiss the appeal.