THE HIGH COURT

[2024] IEHC 131

[2023 No. 1 CAT]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989

– AND –

IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

A

APPLICANT/RESPONDENT

– AND –

B(2)

RESPONDENT/APPELLANT

JUDGMENT of Mr Justice Max Barrett delivered on 1st March 2024.

SUMMARY

In this judgment I explain why I will not exercise my discretion to release a party from its implied undertaking not to use discovered documentation obtained in other proceedings.

1. This application follows on my judgment in *A v. B* [2023] IEHC 254 (the 'First Judgment') and should be read in tandem with the First Judgment. I refer, in particular, to my observations at §§17-19 of the First Judgment (quoted later below), in which I affirmed a decision of the Circuit Court.

2. Ms A is separately suing, inter alia, the solicitor for Mr B, I understand in proceedings (the 'Second Proceedings') concerning certain mortgage arrangements. In the course of the Second Proceedings discovery has been made of certain documentation. Among that documentation are three letters which pertain to the original advice referred to at §17 of the First Judgment. Mr B has learned of the three letters (it is not entirely clear to me how) and wishes to rely on them in what his own counsel admits would be a challenging application to re-open proceedings that have long been determined. (That challenge would be for a later application; however, I expect that after this judgment that application will not be made.)

3. I have been provided with copies of the discovered correspondence. With every respect the correspondence is something of a nothing. The height of the three letters is a letter of 3rd July 2006 in which Ms A's solicitor indicates that from her instructions it would appear that Ms A never intended to be domiciled in Country Q and always felt that she was domiciled in Ireland. Why is that something of a nothing? Because I was aware, and the Circuit Court judge whose decision I affirmed, was aware that this was the view of Ms A's original solicitor acting on her understanding of her instructions. It was not, however, the view of Ms A's later solicitor or indeed her counsel, acting presumably on their understanding of their instructions. I treated expressly with this issue in the First Judgment, noting, among other matters, as follows at §§17-19 of the First Judgment:

> "17. *Mr B sought a divorce in Ireland sometime around the end of 2004. Matters then took the turn that has led to the present application coming before me. In April 2006, Ms A received legal advice that the circumstances that I have described above pointed to her, as a matter of Irish law, (i) having retained her domicile of origin in Ireland at all times, and (ii) never having acquired a domicile of choice in Country Q, with the result that (iii) the divorce in Country Q would not be*

recognised as a matter of Irish law and hence (iv) Ms A, as a matter of Irish law, has continued to be married at all times to Mr X.

18. *Ms A proceeded in accordance with this advice for a time, subsequently switched solicitor (and counsel) and now no longer accepts this advice. There was some suggestion at the hearing that there was some significance to her having accepted the initial advice and having proceeded on same and that (for whatever reason) Ms A is no longer satisfied to proceed on this advice. In this regard, however, I respectfully accept the submission of counsel for Ms A. The advice received in 2006 was but advice and Ms A acted on that advice. She later switched solicitor (and counsel) and now is proceeding differently (I presume on different advice, though my notes do not indicate that this was expressly stated). When doctors honestly differ, their patients sometimes die; when lawyers honestly differ, their clients sometimes alter their course of action. That is all that seems to have happened here.*

19. *On 11th May 2022, Judge Berkeley adjudged in the Circuit Court that Ms A was domiciled in Country Q on 5th July 1996 and that her divorce in Country Q can be recognised in Ireland. That matter has come on appeal to me. I respectfully agree with the conclusion reached by Judge Berkeley.*"

4. Not only was I aware of the difference between the advices of the first and second solicitors and counsel (as was the Circuit Court) but, in what was a *de novo* hearing, Ms A took to the witness box and was examined and cross-examined on every issue that Mr B wished to be put to her. I do not see that any of the letters now before me would have made an iota of difference to the proceedings. All they confirm is that Ms A's original solicitor held the view that she did based on her understanding of her instructions (and I do not see any other way in which she could have held the view that she did). Obviously, based on their understanding of their instructions, the later solicitor and later counsel for Ms A took a different view of matters, which view found favour in both the Circuit Court and the High Court.

5. I turn now to the law concerning the application now before me, which is an application for leave to allow the three letters discovered in the Second Proceedings to ground some form of application to re-open the proceedings which were the subject of the First Judgment. The law as regards such an application has been succinctly summarised in *Barry and ors v. BDO* [2023] IEHC 61. I note in particular the factors, stated at §18 of same as required to present for such an application to be successful. I treat with those factors in the next paragraph.

6. It will be clear from what I have already stated above that I do not see any "*special circumstances*" (*Barry*, 18(1)) to present that would justify my granting the leave now sought. It will be clear that I consider it would "*cause an injustice*" (*Barry*, 18(2)) to Ms A, the party who made discovery, for me to grant the leave now sought for the reasons I have already touched upon: I was aware (as was the Circuit Court) of the disparate legal advice offered to Ms A and the matter was expressly ruled upon in my judgment. The discovered letters add nothing of significance to what was already known. Also, while the discovered documentation is clearly of relevance to what was decided in the First Judgment adds nothing of significance to what was already known. Therefore, I do not see that the release of that documentation now is "*necessary in the interests of justice*" (*Barry*, 18(3)). It follows from the foregoing that three of the six factors, stated at §18 of *Barry*, as being required to present for an application such as that now before me to be successful do not present here. Consequently this application must fail.

7. It became the practice during the Covid lockdowns for the courts to give a preliminary indication of the view on costs at the end of a judgment, subject to any contrary argument that the parties might wish to make. My preliminary view is this. It remains the case that it is not the norm in practice in family law proceedings to order costs against either side. Here I see reason for departing from that norm. Ms A is not at all a well-to-do woman financially. She, her solicitor, and counsel have been brought to court on two occasions (once when this matter was mentioned and once when it was heard, with no little argument between the parties on both occasions). Having now seen the discovered documentation I do not see that this application could ever have succeeded when one has regard to the factors identified in *Barry*. Moreover, I am mindful that this application has been brought long after the First Judgment had fully and finally determined matters on appeal, following an original hearing in the Circuit Court and a *de novo* hearing in the High Court (in the latter of which – I do not know what happened in the court below – Ms A was examined and, perhaps more importantly, cross-examined on her

evidence, by experienced, competent counsel). That being so, my preliminary view is that I should make an order for costs against Mr B in respect of the present application. That is, however, but a preliminary view and I will hear both parties in this regard, should they wish.