Master 38

09/01/2006

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

C

Petitioner

V

C

Respondent

(No 4 of 2005)

Master Redpath

I have already given substantive Judgment in this case and this judgment relates to costs only.

This was a complex case involving evidence over a number of days and the order reflects the complexity of the issues involved. At the end of the day the petitioner has been awarded a 50% share of a total estate which I valued at £2.115 million. The most difficult issues in the case concerned the valuation of two private limited companies and much time and effort was spent with valuers, accountants and witnesses regarding asbestos removal before a final figure could be arrived at.

The situation regarding matrimonial costs in Northern Ireland is quite different from that in England. As Gillen J pointed out in G –v- G & J costs in Northern Ireland are governed by the Family Proceedings Rules (NI) 1996. Rule 1.4 provides as follows: -

> "1) Subject to the provisions of these rules and any statutory provision, the Rules of the Supreme Court (NI) 1980 and the County Court Rules (NI) 1981 other than CCR Order 25 Rule 20 (which deals with a new hearing and a rehearing) shall apply with necessary

> modifications to the commencement of family proceedings in, and to the practice and procedure in family proceedings pending in, the High Court and County Court respectively."

Order 62 Rule 3 of the Rules of the Supreme Court (NI) provides as follows: -

> "This Rule shall have effect subject only to the following provisions of this order.
>
> 2) No party to any proceedings shall be entitled to recover any of the costs of those proceedings from any other party to those proceeding except under an order of the Court.
>
> 3) If the Court in its exercise of its discretion sees fit to make any order as to costs in any proceedings, the Court should order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

In G -v- G & J the Learned Judge reviewed the post White –v- White [2001] 1AC 596 situation as far as costs are concerned: -

> "I have come to the conclusion that the approach has to be revisited in light of the law that now obtains post White –v- White and Lambert –v- Lambert. Where the law was that the wife's claim was viewed as being against the husband's money for a sum necessary to meet her reasonable requirements the position was not dissimilar to that of a normal civil claimant. Costs should therefore prima facia follow the event. The function of the court is now different in light of White –v- White where essentially equality is now the yardstick of fairness. There has been both a conceptual and a policy change from a 'reasonable requirements' approach to an 'entitlement approach'. Another way of putting this is that the parties now come to court to determine their unascertained shares in the pool of assets that has evolved during the course of the marriage. I think there is much to be said for now looking upon the division of matrimonial assets following divorce as being something akin to the division of partnership assets on the dissolution of a partnership where costs in big money cases are seen as a necessary expense of the dissolution with each party bearing their own costs. The advantage of such an

> approach is that it will introduce some degree of certainty into a system where at the end of the day the Judge has a very wide discretion about how to decide the outcome of the case and where at times, it has to be recognised that different Judges come to different conclusions. In reality therefore, it is difficult and sometimes impossible to predict what a court is going to order. In these circumstances, the cost penalty for getting it wrong, can often be very significant."

The Learned Judge, goes on to quote deputy High Court Judge Nicholas Mostyn QC in the case of GW –v- RW [2003] 2FLR108: -

> "In my judgment, a safer starting point nowadays in a big money case, were the assets exceed the aggregate of the parties needs, is that there should be no order as to costs. That starting point should be readily departed from where unreasonableness by one or other party is demonstrated. This approach, I believe is consistent with the spirit of the judgment of Butler-Sloss LJ in Gojkovic –v- Gojkvoic [1992] FAM40."

In G –v- G & J the Learned Judge eventually with some detailed exceptions that he averted to in his main judgment ordered that the parties go back to back on costs.

Calderbank correspondence had been forwarded in this case, firstly by the Petitioner on the 11 January 2005 and then on the part of the Respondent on 14 January 2005. It should be noted that the Respondent's offer was specifically on an equality basis and I can confirm that that was the approach the respondent took throughout the hearing. Essentially, the Petitioner proposed to realise all the assets in the case in cash and to take her share. The respondent's approach was to adopt, as I have already said, an equality approach but offered ongoing maintenance with the Petitioner to retain her shareholdings in the two companies. Interestingly enough, the final figures arrived at, taking into account the valuations I placed on the companies, were not that far apart and essentially not that far from what was eventually awarded.

Superficially the Respondent's Calderbank offer could be regarded as closer to what the Court finally ordered than the Petitioners but differed importantly concerning the issue of ongoing maintenance.

I take the view that the Calderbank correspondence is not conclusive and as senior counsel has put it 'neither party landed a knockout blow by the use of it'.

It is obviously important in cases such as this, when costs issues arise, for the court to have regard to the manner in which the parties have conducted in the case. In page 3 of my substantive judgment, I stated

> 'I should state at the outset that I find as a fact that the respondent in this case set out with a deliberate course of reducing the value of his interest in both these companies'.

I then set out the three main areas of concern that I have regarding the way the Respondent conducted his case. On page 7 of my judgement in the second and third paragraph I set out further concerns I had about the quality of the evidence given by the Respondent's accountant. On page 10 of my judgment, in the last paragraph, I deal with the evidence given in relation to the cost of moving asbestos, the quality of which I described the as 'lamentable'. An entire afternoon of evidence was taken up in relation to this issue.

The case was made on behalf of the Respondent, and it is a reasonable point to make, that in his original Calderbank letter he suggested that the parties retain their own shareholding and had that been agreed that the case was made on his behalf that there would have been no necessity for any accountancy evidence. However, it became clear fairly rapidly that this course of action was not acceptable to the petitioner and that the court would have to endeavour to find a proper valuation for the two companies. I have already pointed out in the main judgment and referred to

in this judgment the problems I had with the way the evidence was presented on behalf of the respondent in that regard.

Accordingly, having taken all matters into consideration, I consider it fair, given the way that the case was run, that the Respondent be condemned in 25% of the Petitioners costs.