Master 28

08/12/2005

IN THE HIGH COURT OF JUSTICE NORTHERN IRELAND

FAMILY DIVISION

Between

McM

Petitioner

And

McM

Respondent

Master Redpath

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

In this matter the Respondent wife has been awarded a lump sum of £400,000 and allowed to retain her own assets in full and final settlement of any claims that she might have arising from the marriage.

This was an eleven year childless marriage. It was a second marriage for both parties. The lump sum of £400,000 awarded to the wife represents a figure in the region of between 25% and 30% of the joint assets. There was a significant departure from equality due to the length of the marriage and the fact that the vast bulk of the matrimonial property was inherited by the Petitioner husband. The final Calderbank offer was made by the Petitioner to the Respondent in the sum of £280,000, so it can be seen that this offer fell well short of what the Respondent's entitlement was worked out to be. Miss McGrenera QC for the Respondent pointed out that although the costs of the Petitioner were in the region of £80,000 the outlays had only

amounted to some £13,000 and that the case had been prudently run. She also pointed out that the Respondent undertook in 2001 not to spend any further monies but in fact £400,000 was expended post 2001. This is a subject I will return to later.

Mr Shaw QC argued that there should be no order as to costs. He pointed out that although the Calderbank offer was less than the figure eventually awarded, the case was opened on behalf of the Petitioner that the Respondent should receive between 25% and 30% of the nett estate. It would appear that no formal offer in that amount was actually made. He also pointed out that the Petitioner had been in receipt of Legal Aid until November 2004. An outsider glancing at this case may well wonder how it is that a man with an estate valued in the region of £2million should be entitled to free Legal Aid. This is the effect, in my view, at times the distorting effect, of Rule 13B in Schedule 2 to the Legal Aid (Assessment of Resources) Regulations 1981 (as amended) which in broad terms provide that if an asset is in dispute then it is not taken into account for capital purposes in assessing legal aid. Therefore we have the situation in this case, and it is not uncommon, where the Respondent is a supply teacher with a very modest income and is not in receipt of Legal Aid, but the Petitioner, who it seems to me was choosing not to generate much income during the period of the separation and had capital assets of £2million was in receipt of Legal Aid.

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 unsimilar to that of a normal civil claimant. Costs should therefore prima facia followed 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 unassertained 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.

Before applying these principles to the instant case I think some regard must had to the substantive judgment in G –v- G & J. I think it is important to note at the outset that in that case there was very little departure from equality with the husband receiving 54.35% and the wife receiving 45.64% of the assets.

In paragraph 48 of the Judgment, the Learned Judge states: -

> "In summary therefore, these authorities make it clear that the court has a very broad discretion to make financial awards under Article 25 and has, in big money cases, increasingly chosen to guide the exercise of this discretion by the overarching objective of fairness."

I am of the view that the overarching objective of fairness must also apply to cost orders in cases such as this. If the Respondent were to have to pay her own costs

of £80,000 this would reduce her lump sum to £320,000. The Petitioner's costs, post Legal Aid were approximately £40,000 and therefore we would have a situation were the Respondent would be left with £320,000 plus her own modest assets and the Petitioner would be left with assets in excess of £1.5million. The issue of costs therefore can have a disproportionate effect on the order that has been made. I am of the view that the proper order for costs in big money cases where there is a minimum departure from equality is that the parties go back to back on costs. In cases where is there is a very significant departure from equality as there was in this case, where the Petitioner's Calderbank offer fell well short of the order that was made, and where there is an allegation that some of the estate has been dissipated in breach of an undertaking then the situation can be quite different.

The case was made in this application that the Petitioner had disposed of £400,000 worth of assets in breach of an undertaking given between solicitors. Whilst it is clear that he seems to have run up an overdraft of £400,000 post separation I concluded in my judgment that much of this has been expended on setting his son up as a diary farmer. The Estate Agents valuing the estate took the value of the improvements into account, although this did not by any means cover the entirety of the £400,000. Even taking this into account it is clear that this money was expended in breach of an undertaking and that a significant sum out of the £4000,000 was not properly accounted for.

Accordingly, having taken all matters into consideration and in particular the court's discretion in dealing with matters relating to costs, I intend to order that the Petitioner pay 60% of the Respondent's costs from the 30 November 2004, the approximate date of the expiration of his Legal Aid certificate.