

*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: 14/6/18

IN THE HIGH COURT OF JUSTICE OF NORTHERN IRELAND

FAMILY DIVISION

BETWEEN:

P

Petitioner;

and

P

Respondent.

(Side Agreement in Ancillary Relief Proceedings)

Master Bell

THE APPLICATION

[1] In this judgment I shall, for ease of reference, refer to the petitioner and the respondent as “the wife” and “the husband”. The wife is represented by Miss Anyadike-Danes QC and Mr Anderson and the husband is represented by Miss O’Grady QC. (I note that Miss Anyadike-Danes and Mr Anderson did not represent the wife at the original hearing of the ancillary relief proceedings).

[2] The parties are requested to consider the terms of this judgment and to inform the Matrimonial Office in writing within two weeks as to whether there is any reason why the judgment should not be published on the Court Service website or as to whether it requires any further anonymisation prior to publication. If the Office is not so informed within that timescale then it will be published in its present form.

[3] This is an application by the husband to enforce a matrimonial agreement which was made a rule of court in February 2018. Specifically the

husband asks me to exercise my power under section 33 of the Judicature (Northern Ireland) Act 1978 and sign a deed of transfer on behalf of the wife which would have the effect of transferring to the husband her legal and beneficial interest in the matrimonial home. This should have been done by the wife within 8 weeks of the date of the agreement but has not yet been done. The husband's solicitors hold the sum of £114,000 which is to be paid to the wife and are ready to transfer this to the wife's solicitors.

[4] Upon the listing of this application I asked the wife's counsel why I should not do as the husband requested. Initially Mr Anderson was reluctant to answer the question. He indicated simply that he was pursuing another mechanism to cause the agreement to be set aside. However I was aware that his client had neither applied to me to set my own order aside nor had she filed a notice of appeal. Eventually I suggested to Mr Anderson that I would exercise my power under section 33 of the 1978 Act unless he provided me with a good reason not to. He therefore submitted a written position paper on the application.

THE FACTS

[5] The husband and wife were parties in divorce proceedings. They could not agree between themselves the appropriate division of their property and so this matter was the issue of ancillary relief proceedings. A hearing commenced before me and evidence was given. During that hearing the wife was cross examined on 7 November 2016 by Miss O'Grady QC about two sets of medical records and why one set differed from the other. During that exchange the wife gave the following evidence :

"I have no idea. I have never altered doctors' notes ever. These are the only time I have ever seen my medical notes other than when I handed them to Murry Kelly Moore. So these have not been re-typed by me. If that is the allegation I am on oath and I categorically state on oath that I have not altered these notes. I have no idea how this has happened."

[6] The wife's counsel submits that, as a result of the exchange between the wife and Miss O'Grady, and for various other reasons (unspecified by counsel), the wife was led to believe that she would be prosecuted, convicted and imprisoned for perjury if the ancillary relief proceedings continued. She therefore entered into a matrimonial agreement on 27 February 2018 dealing with the property issues in the ancillary relief proceedings. This agreement was then presented to the court and the court was invited to make that agreement a rule of court, which the court did.

[7] Unknown to the court, however, the parties on that day had also entered into a Side Agreement. This agreement has now been revealed to me in a written position paper which I received from the wife's counsel yesterday:

"SIDE AGREEMENT to the Matrimonial Agreement dated 27th February 2018

1. The Petitioner agrees to the terms of the matrimonial full and final agreement dated 27th February 2018 on foot of the AR application.
2. The Side Agreement is strictly confidential between the parties and neither party nor their legal advisors nor any other person on their behalf shall be at liberty to disclose the terms of the Side Agreement to any other party. Failure to comply with this requirement renders null and void the matrimonial full and final agreement entered into between the parties.
3. The matrimonial full and final agreement is subject to the Respondent's agreement that neither the Respondent nor anyone on his behalf either now or at any time hereafter will report any matters whatsoever touching upon the conduct of these proceedings or the evidence given therein to the PPS or any prosecuting authority.
4. In the event that the terms herein are breached, thereby rendering null and void the terms of the matrimonial full and final Agreement between the parties, then the Petitioner is at liberty to have her ancillary relief application re-listed before the Court under the provision of Liberty to Apply for the purpose of further pursuing her claim.

This has been read and understood by both the petitioner and the Respondent and their advisors."

[8] The wife submits that she was not and is not guilty of perjury but that the terms of the Side Agreement were intrinsic to the terms upon which the parties intended to settle the proceedings.

DECISION

[9] I have before me an application seeking that I exercise the power under section 33 of the 1978 Act and sign the deed of transfer in respect of the former matrimonial home. The wife is effectively arguing that her own action in revealing the existence of the Side Agreement renders what has been termed

the "Matrimonial full and final Agreement" null and void. It therefore falls that I must construe whether the Side Agreement has had that effect.

[10] I consider that what has occurred in this case is that the wife, who for some reason does not want to honour the agreement she entered into to transfer her interest in the matrimonial home to the husband, is attempting to use the Side Agreement, which was entered into as a shield for her protection from prosecution, conviction, and punishment for perjury, as a sword to kill the main Matrimonial Agreement. This was not in my view the purpose of the Side Agreement and I do not consider that using the ordinary rules of construction it can properly be construed to allow her to do this. The purpose of the Side Agreement was to protect her, not to provide her with a mechanism to fail to honour her obligations should she change her mind about what she had signed up to. The Matrimonial Agreement which was made a rule of court therefore stands and can be enforced.

[11] Even if I had not reached that conclusion on how the Side Agreement should be interpreted, the same outcome might well be reached on alternative grounds. I consider that it is important to outline some of the issues which are arguably involved.

[12] In the case before me the court was invited to make a matrimonial agreement a rule of court. This is often referred to as a consent order. The agreement which the parties reach becomes part of a court order. What is the effect of the agreement having become a part of a court order? In *de Lasala v de Lasala* [1980] A.C. 546 Lord Diplock stated the principle that:

"... financial arrangements that are agreed upon between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order; ..."

In *Thwaite v Thwaite* [1982] Fam. 1 Ormrod L.J. applied that principle at p. 8:

"We respectfully adopt it and believe that it removes much of the confusion about consent orders which has prevailed in this jurisdiction. It does, however, represent a significant departure from the general principle frequently stated in cases arising in other divisions of the High Court, that the force and effect of consent orders derives from the contract between the parties leading to or evidenced by, or incorporated in, the consent order: ... A distinction, therefore, has to be made between consent orders made in this and other types of litigation."

[13] Although the point was not argued properly before me (the position paper from the wife was furnished too late to allow Miss O'Grady to fully reply to it) there is a significant issue as to whether, once the matrimonial agreement has been made a rule of court, a previously undisclosed Side Agreement between the parties can overturn an order made by the court. The wife's position paper offers the case of *Soulsbury v Soulsbury* [2007] EWCA Civ 969 as an authority for this being feasible. I am not persuaded that that decision can be read in this way.

[14] Accordingly, I will grant the husband's application and will exercise the power under section 33 of the 1978 Act to sign the deed of transfer.