THE HIGH COURT

[2023] IEHC 671

RECORD NO. 2022/135 M

BETWEEN

X.C.

APPLICANT

AND

Y.C.

RESPONDENT

JUDGMENT of Mr. Justice Barry O'Donnell delivered on the 22nd day of November, 2023.

INTRODUCTION

1. This judgment is given in relation to motions brought by each of the parties. The motions were heard by the court over the course of a single hearing, and other motions that were also listed were resolved by agreement without the need for adjudication.

2. In the underlying proceedings the applicant seeks relief pursuant to Part 15 of the Civil Partnership and Certain Rights and Obligations of Cohabitants Act, 2010 ("the 2010 Act"). The proceedings are characterised by a series of heavily contested factual disputes, underpinned by strong emotions. It is not necessary for the purpose of these applications to resolve or adjudicate on any of the underlying issues, and only a brief description of those matters will be given for the purpose of establishing the context for the motions. Despite the obviously contentious tenor of the underlying proceedings,

counsel for both parties made clear and thorough written and oral submissions that maintained a close focus on the legal issues to be determined, for which the court is grateful.

3. The proceedings were commenced by way of a Cohabitation Special Summons dated the 11 November 2022. As pleaded, the essentials of the applicant's case are that the parties commenced an intimate and committed relationship with each other in or about May 2017. The respondent purchased a substantial and valuable house in Dublin in or about May 2019 without a mortgage, and which is registered in his sole name. The parties had a daughter who was born in early 2020. The applicant pleads that the party's relationship started deteriorating in the latter half of 2019. The parties ceased living together as of the 15 November 2020, and the relationship ended on that date. The applicant seeks a declaration that the parties are qualified cohabitants for the purposes of section 172 of the 2010 Act. On foot of that declaration, the applicant goes on to seek a variety of ancillary orders under the 2010 Act, including a property adjustment order, periodical payments and a pension adjustment order. Further relief is sought by reference to the Domestic Violence Act 2018. Over the course of the proceedings, the applicant has sworn a series of affidavits, the most substantial of which runs to 105 paragraphs.

4. For his part, the respondent has also sworn a number of lengthy affidavits. The position on the affidavits is that almost every aspect of the case either is contested or subject to very different interpretations by the parties. The parties make allegations and counter allegations of arguments and poor conduct, including serious allegations of aggressive and violent behaviour. Of note, for the purpose of these motions, is that the respondent

strongly disputes that the relationship reached the threshold that would allow for a finding that the parties were qualified cohabitants. In that regard, the respondent's case is that the parties were in an on-and-off relationship and were not qualifying cohabitants, and that the relationship ended more than two years before the commencement of the proceedings, and therefore are out of time.

5. The first motion was brought by the respondent by notice of motion dated the 5 May 2023. In that motion, the respondent seeks two reliefs: first, an order directing the trial of a preliminary issue, being whether the applicant is a qualified cohabitant within the meaning of the 2010 Act. The second relief sought by the respondent is an order pending the determination of the preliminary issue, that the respondent is not required to file an affidavit of means pursuant to Order 70B, rules 5(3) and 16(5) of the Rules of the Superior Courts ("the RSC").

6. The second motion was brought by the applicant by way of notice of motion dated the 16 May 2023, in which the applicant seeks an order pursuant to O. 70B, r. 5(4) of the RSC, declaring that the respondent should not be entitled to defend the applicant's claim for relief by reason of his failure to serve an affidavit of means in compliance with the RSC. Alternatively, the applicant seeks an order compelling the respondent to serve an affidavit of means.

THE AFFIDAVIT OF MEANS ISSUE

7. The respondent's grounding affidavit is dated the 5 May 2023. In his affidavit, the respondent draws a close link between the request for the trial of a preliminary issue

and the question of the need for him to serve an affidavit of means. The respondent explains why he contends that the applicant is not a qualified cohabitant for the purposes of the 2010 Act. Following that evidence, the respondent contends that the court should, in effect, postpone the requirement for him to serve an affidavit of means until the preliminary issue is determined. This is premised on the argument that his right to privacy will be infringed unnecessarily if he is required to disclose his full financial position to the applicant where, as he argues, she will fail to establish that she is a qualified cohabitant. In that regard, the respondent states that he chose not to be engaged to or marry the applicant and chose to keep his finances separate and distinct from the applicant's. Furthermore, the respondent argues that, in the context of judicial separation proceedings between the applicant and her former husband, the applicant breached the in camera rule, and also emailed some exhibits to affidavits in these proceedings to her current partner.

8. I should note that prior to the hearing of these motions, a separate motion concerning allegations that the in camera rule had been breached was compromised by agreement between the parties, with an undertaking being given by the applicant. In those premises, and specifically where the respondent accepted that the undertaking was sufficient to resolve that motion, I do not consider that the court should treat prior allegations about breaches of the in camera rule as significant for the resolution of these motions. That is not to say that a breach of the in camera rule is not serious or a matter to be deprecated, rather it seems to the court that the explanations and undertakings given are sufficient to allow the court to proceed on the basis that the applicant now understands the clear necessity to ensure that no further breaches occur. On one level

that should be sufficient to address the initial concern that service of the affidavit of means should be delayed or postponed.

9. The applicant filed a replying affidavit on the 9 June 2023. In relation to the affidavit of means issue, the applicant contends that the respondent brought his motion in order to respond to a letter dated the 25 April 2023 from the applicant's solicitors. That letter, which was exhibited, effectively notes that the respondent had defaulted in serving an affidavit of means and put him on notice that an application would be made for default orders if it was not received within a period of 14 days. In addition, the applicant disputes that the parties' finances were kept separate, and she argues that the privacy concerns in reality represent a desire to delay the proper prosecution of the proceedings. The applicant notes that she has made a full disclosure of her means.

10. The second related motion was the applicant's motion addressing the default in service of an affidavit of means. That motion was grounded on an affidavit sworn by the applicant's solicitor which sets out the alleged default, and cross references an affidavit sworn by the applicant in the context of the underlying proceedings.

11. Finally in this regard, the court was furnished with an open letter that was sent by the respondent's solicitor to the applicant's solicitor dated the 6 October 2023, in reference to the applicant's motion requiring the respondent to swear an affidavit of means. The letter sets out the following:

> "Our client confirms that his net worth is not less than €30,000,000.
>
> Manifestly, our client is in a position to meet any reasonable order the Court might make in this case in the unlikely event that your client is successful.

In the circumstances, we submit that there is no necessity for an affidavit of means or for any vouching."

12. The letter of the 6 October 2023 seeks to deploy what is described euphemistically in English caselaw as "the millionaire's defence". Hence, at the hearing the court was faced with two arguments. First, the argument that the court should postpone the respondent's obligation to comply with the requirement to serve an affidavit of means until after the determination of a preliminary issue as a means of preserving the respondent's privacy rights. Second, the argument that the respondent's personal wealth was so extensive that there was no need to serve an affidavit of means or engage in vouching because the respondent was in a position to meet any order providing financial relief to the applicant.

RELEVANT LEGAL PROVISIONS

13. Cohabitation proceedings under the 2010 Act are addressed in Part III of O.70B of the RSC.

14. O.70B, r.17 makes clear that an applicant seeking relief under the 2010 Act is required to swear an affidavit verifying the proceedings. O.70B, r.17(2) provides that the verifying affidavit shall include, inter alia, evidence of the degree of financial dependence of either party on the other and any agreements in respect of their finances, along with particulars of the degree and nature of any financial arrangements between the parties.

15. The obligation under O.70B, r.17 applies to the applicant's verifying affidavit and any reply thereto. Where a respondent counterclaims – and the respondent in this case has counterclaimed for relief at paragraph 86 of his affidavit of the 10 March 2023 – this is to be set out by way of replying affidavit and the obligations under the Order apply to the counterclaimant (see, O.70B, r.21).

16. In addition to the obligations to include certain financial information in the affidavits sworn in the proceedings, O.70B, r.16 (5) provides that the provisions of r.5 and rs.7-14 of O.70B apply *mutatis mutandis* in cohabitation proceedings as they do in civil partnership proceedings.

17. In turn, r.5 provides as follows:

"5.(1) Without prejudice to:

(a) the right of any party to seek particulars of any matter from the other party to any proceeding, or

(b) the right of any party to apply to the Court for an order of discovery, or

(c) the jurisdiction of the Court under section 142 of the Act, in case where financial relief under the Act is sought each party shall file and serve an Affidavit of Means in the proceeding.

(2) The Affidavit of Means shall be in Form No 1 in Appendix II.

(3) An Affidavit of Means of the applicant shall be served with the verifying affidavit grounding the proceeding and the Affidavit of Means of any respondent or any other party shall be served with the replying affidavit in the proceeding unless otherwise ordered by the Master or the Court. Subsequent to the service of an Affidavit of Means

either party may request the other party to vouch all or any of the items referred to therein within 21 days of the said request."

18. The reference in r.5(1)(c) of the RSC to section 142 of the 2010 Act is a reference to a provision in civil partnership proceedings, which at sub-section (1) obliges each party to give the party "such particulars of his or her financial circumstances, including property and income … as may reasonably be required for the purpose of the proceedings." Section 142(2) provides that "the court may direct a person who fails or refuses to comply with *subsection (1)* to comply with it." As O.70B, r.16(5) applies the provisions of r.5 *mutatis mutandis* to cohabitation proceedings, it can be taken that in a cohabitation case the reference in r.5(1)(c) to section 142 can be understood as a reference to the analogous section 197 of the 2010 Act.

19. O.70B of the RSC was inserted by SI 348 of 2011 and amended by SI 16 of 2016, and as such set out statutory rules that must be adhered to. However, the rules are intended to ensure the proper prosecution of claims under the 2010 Act, and at this point it would be helpful to address some relevant provisions in Part 15 of that Act.

20. The purpose of the 2010 Act as stated in its long title is to provide for the registration of civil partners and the consequences of that registration and to provide for the rights and obligations of cohabitants and connected matters.

21. The overall structure of Part 15 of the 2010 Act is directed towards enabling the court to make a series of decisions. The decisions to be made by the court are largely

sequential. First, as a threshold matter the court must determine if the parties are cohabitants and if so whether they are qualified cohabitants. Section 172(1) of the 2010 Act defines a person as a cohabitant as being, "one of 2 adults (whether of the same or the opposite sex) who live together as a couple in an intimate and committed relationship and who are not related to each other within the prohibited degrees of relationship or married to each other or civil partners of each other."

22. Hence, there is a need to rule out certain negative factors, such as marriage or a relationship within prohibited degrees, and to establish certain positive features. The positive features of the relationship are set out in section 172(1): the parties must be adults, they must live together as a couple, and their relationship must meet the criteria of being intimate and committed. In order for the court to be able to make those positive determinations the court is required by section 172(2) to take into account a series of further factors that are set out at section 172(2)(a) - (g). This is a mandatory provision, the court "shall take into account all the circumstances of the relationship and in particular shall have regard to the following:" (emphasis added). In those premises it seems clear that the court cannot find that there is a relationship of cohabitation without considering all the circumstances of the relationship and having specific regard to the identified matters. This has been confirmed by the Court of Appeal in *M.W. v. D.C.* [2017] IECA 255.

23. It follows that, prima facie, the court cannot make the first threshold finding without having before it evidence of those matters. Among the matters that the court must have regard to are:

"(c) the degree of financial dependence of either adult on the other and any agreements in respect of their finances;

(d) the degree and nature of any financial arrangements between the adults including any joint purchase of an estate or interest in land or joint acquisition of personal property;"

24. If the court is satisfied that the evidence establishes cohabitation the next threshold question is whether the party is a "qualified cohabitant". In that regard, section 172(5) defines that term as:

"For the purposes of this Part, a qualified cohabitant means an adult who was in a relationship of cohabitation with another adult and who, immediately before the time that the relationship ended, whether through death or otherwise, was living with the other adult as a couple for a period –

(a) of 2 years or more, in the case where they are the parents of one or more dependent children, and

(b) of 5 years or more, in any other case."

25. Accordingly, in addition to the need for cohabitation as a couple in an intimate and committed relationship, the parties must satisfy the court that they remained so for the periods set out in section 172(5) of the 2010 Act. In *M.W. v. D.C.*, the Court of Appeal clarified that the natural and ordinary meaning of the words used by the Oireachtas in section 172(5)(a) of the 2010 Act, when viewed in the context of the entirety of that section and Part 15 of the 2010 Act, is that the relevant period must be a single period of 2 years immediately before the time when the relationship ended.

26. Only where those threshold criteria are established will the court need to consider granting applications for relief under the remaining provisions of Part 15. This was the approach adopted by Binchy J. in this court in *X.Y. v. Z.W.* [2019] IEHC 257, although in that case it is notable that the court held a unitary trial and heard all of the evidence relevant to all of the issues.

27. The powers of the court when addressing the question of relief are extensive and bear a close and striking resemblance to the powers of the court to make ancillary orders in the case of judicial separation and divorce. This is so notwithstanding that the powers of the court in a divorce case derive from the Constitution with the imperative to ensure that proper provision is made for the parties and their dependent children. In that regard, section 173(2) provides as follows:

> "If the qualified cohabitant satisfies the court that he or she is financially dependent on the other cohabitant and that the financial dependence arises from the relationship or the ending of the relationship, the court may, if satisfied that it is just and equitable to do so in all the circumstances, make the order concerned."

28. The orders concerned include property adjustment orders (section 174), compensatory maintenance orders (section 175), and pension adjustment orders (section 187), with ancillary powers around those orders. The orders may only be made where the court is satisfied that it is "just and equitable to do so in the circumstances." Emphasising the extensive nature of the matters that the court must consider in determining whether or not it is just and equitable in all the circumstances, section 173(3) in further mandatory language requires that the court shall have regard to a series of matters set out from

section 173(3)(a) - (j). For the purposes of these applications the court notes, in particular, that regard must be had of:

> "(a) the financial circumstances, needs and obligations of each qualified cohabitant existing as at the date of the application or which are likely to arise in the future,
>
> […]
>
> (h) the effect on the earning capacity of each of the cohabitants of the responsibilities assumed by each of them during the period they lived together as a couple and the degree to which the future earning capacity of a qualified cohabitant is impaired by reason of that qualified cohabitant having relinquished or foregone the opportunity of remunerative activity in order to look after the home,".

29. Significantly, for the purposes of the matters under consideration in this application, section 197 of the 2010 Act emphasises the need for disclosure:

> "(1) In proceedings under this Part, each of the qualified cohabitants shall give to the other the particulars of his or her property or income that may be reasonably required for the purposes of the proceedings.
>
> (2) The court may direct a person who fails or refuses to comply with *subsection (1)* to comply with it.
>
> (3) A qualified cohabitant who fails or refuses to comply with *subsection (1)* or a direction under *subsection (2)* commits an offence and is liable on summary conviction to a class C fine, or to imprisonment for a term not exceeding 6 months, or to both."

THE ARGUMENTS

30. Viewed in the round, counsel for the respondent urged the court to view the provisions of Part 15 as separate and distinct from family law proceedings. In that regard, it was argued that proceedings under Part 15 of the 2010 Act are not "family law light". The argument was made that the 2010 Act is not concerned with "proper provision" as that term is used in family law, but rather with ensuring that a form of financial safety net should be available. On the other hand, while counsel for the applicant accepted that this was not strictly speaking a proper provision case, issue was taken with the proposition that the legislation merely provided a financial safety net.

31. The court's view is that Part 15 of the 2010 Act falls to be understood and implemented on its own terms. The use of descriptors such as "safety net" does not really advance the argument. What appears clear is the Oireachtas has legislated in order to provide qualified cohabitants with the entitlement to seek orders where they claim that as a result of their relationship, or the ending of the relationship, they have become financially dependent on the other cohabitant. The legislation addresses and seeks to ameliorate in a structured, just and equitable manner the position of persons who, while not married, have entered an intimate and committed relationship of a qualifying duration. The entitlement to seek relief arises where that relationship ends, whether through death or otherwise. The cohabitation relationship is legally different on many levels to marriage, in terms of nature, ancillary effects and rights. It is important to note that where an application is made for divorce, the court cannot grant a decree of divorce unless or until the court is satisfied that proper provision can be made from the available assets for the parties and their dependents. In cohabitation cases the court is faced with a relationship that has ended – and has no role in formally terminating the relationship

- and only considers the question of how financial dependency can be addressed if an application is made in that regard.

32. However, those differences, which are important, do not mean that the court should ignore the similarities in available ancillary reliefs between judicial separation and divorce proceedings and cohabitation proceedings, and the fact that there are close similarities in the factors that the Oireachtas has directed as being relevant. The similarities are quite striking and permit the court, cautiously, to draw on family law caselaw to assist in determining these issues where required.

33. Summarising the arguments in relation to the affidavit of means issue, the applicant's arguments proceeded in the first instance from the wording of the relevant rules. The service of an affidavit of means is mandatory. In addition, it was observed that it is a regular feature of litigation that parties are required to disclose information that otherwise would remain private or confidential. Counsel for the applicant cautioned that care should be taken to make sure that better off litigants are not relieved of the disclosure burdens imposed on less well-off litigants. Finally, counsel noted that this application was novel and the evidential basis for the respondent's stance was very slim; there was no affidavit evidence dealing with the resources issues, just a short letter.

34. By way of reply, the respondent argued that the relevant rules permitted the court to exercise a degree of flexibility and reference was made to O.124 which it was said highlighted the ability of the court to adopt a level of discretion in cases where there was non-compliance with the RSC. The differences between the legislation on

cohabitation and divorce was emphasised. Counsel argued that there was a practical benefit in the course proposed by the respondent, both from the perspective of the parties and from the perspective of the efficient use of judicial resources. Counsel argued that the court has a power to intervene to prevent breaches of privacy consistent with the administration of justice and fairness to the parties. In relation to the question of evidence, counsel volunteered that if required his client was willing to confirm the extent of his available liquid wealth on affidavit. Finally, counsel brought the court through the English authorities on the so-called "millionaire's defence".

ANALYSIS

35. The starting point for analysing the question of whether the respondent should serve an affidavit of means must be the relevant statute and the associated rules of court. I have set out what I consider to be the provisions relevant to this application above.

36. In the first instance, section 197(1) of the 2010 Act provides for a mandatory obligation with criminal consequences in cases of default for qualified cohabitants to give the other party "the particulars of his or her property or income that may reasonably be required for the purposes of the proceedings."

37. This strongly suggests that the Oireachtas clearly intended that disclosure is unavoidable in proceedings under Part 15 of the 2010 Act. The extent of that disclosure is that which is reasonably required for the purposes of the proceedings. Hence, the extent, as opposed to the fact of disclosure, will depend on the proceedings. Here, there

are extensive conflicts of evidence around issues, inter alia, of dependency and arrangements in relation to the Dublin property.

38. Moreover, the court must have regard to the task that the Oireachtas has set for the trial judge in the earlier provisions of Part 15 of the 2010 Act. By section 173(3)(a) and (h), the court must have regard to the financial circumstances, needs and obligations of each qualified cohabitant existing at the date of the application or which are likely to arise in the future; and the effect on the earning capacity of each of the cohabitants of responsibilities assumed by each of them during the period that they lived together as a couple and the degree to which the future earning capacity of a qualified cohabitant is impaired by reason of that qualified cohabitant having relinquished or foregone the opportunity of remunerative activity in order to look after the home. It is very difficult to understand how the trial judge can carry out those tasks without having a clear picture of the parties' respective means.

39. Furthermore, insofar as O.70B, r.5 provides procedures for the litigation of claims under Part 15 of the 2010 Act, as noted above, there is a mandatory obligation on each party to file and serve an affidavit of means within specified time periods.

40. Accordingly, the court finds on the basis of Part 15 of the 2010 Act and the associated rules of court that there is a mandatory obligation on the respondent to file and serve an affidavit of means. The real question seems to be whether the court has any discretion to waive that obligation and if so how should such a jurisdiction be operated.

41. It is possible to identify some language within the relevant rules and the statute that could support the existence of a jurisdiction permitting the court to take the steps urged by the respondent.

42. Section 197 (1) of the 2010 Act qualifies the requirement to make disclosure by limiting it to disclosure that may reasonably be required for the purposes of the proceedings. In addition, in cases of default, section 197(2) provides that the court may direct a person who fails or refuses to comply with subsection (1) to comply with it.

43. In the case of O.70B, r.5(4) provides:

> "In the event of a party failing to comply with the provisions in relation to the filing and serving of an Affidavit of Means or failing properly to vouch the matters set out therein, the Court may, on application by notice of motion, grant an order for discovery and/or make any such order as the Court deems appropriate and necessary, including an order that such party shall not be entitled to pursue or defend as appropriate such claim for any ancillary relief under the Act save as permitted by the Court and upon such terms as the Court may determine are appropriate or the Court may adjourn the proceeding for a specified period of time to enable compliance with any such previous request or order of the Court."

44. In the court's view, neither of the above provisions support the existence of a power to waive the necessity for the respondent to file and serve an affidavit of means. Whether one approaches the reference to "reasonably required" in section 197(1) as directed to the specific proceedings or the general task of the court set out in sections 174, 175, or

187 or a combination of the two, the language does not bear a construction that a party will comply with the obligation merely by demonstrating that they are so wealthy as to be able to meet any award that may be made. Likewise, O.70B, r.5 does not make the service of an affidavit of means optional. Sub-rule (4) does allow the court to respond with some flexibility to a situation where a party fails or refuses to serve an affidavit of means, but (a) the power of the court only is triggered in a situation where there is default in the primary and overriding obligation, and (b) the range of remedies open to the court in such cases is directed to achieving not restricting proper disclosure.

45. That is not to say that in cases of dispute the court is not entitled to limit disclosure by not requiring disclosure or vouching of matters of minimal value or importance. For example, if a bank account statement shows regular payments of grocery bills it may be wholly unnecessary to require the production of individual receipts and so forth.

46. The court is not persuaded that O.124 assists the respondent in this application. O.124 appears more directed to irregularities in the form of proceedings rather than failures to comply with rules of the type in issue in these motions. More importantly, where cohabitation proceedings involve a series of clear and structured procedural rules, which include express provisions addressing defaults in the disclosure process, it is difficult to understand how they could be overridden by the far more general provisions of O.124.

47. This construction of the obligation also avoids a scenario where the cart is put before the horse. For instance, in this case the applicant seeks a pension adjustment order. Whether or not there is any reality to the trial court making such an order is not something that can be commented on at this stage. The point, however, is that this

aspect of the claim cannot be adjudicated properly unless the court and the applicant have evidence of whether or not there is a pension and, if so, its extent. Similarly, it appears to be common case that the respondent holds the Dublin property in his sole name. The applicant seeks a property adjustment order. How is that to be adjudicated in the absence of proper evidence with vouching of the ownership and title to that property? In effect, the approach of the respondent – whether intended or not – would fetter the role of the court by requiring the adjudication of the full hearing to proceed on the basis that the only outcome could be the making of a lump sum or periodic maintenance order. None of that is consistent with the overall structure of Part 15 of the 2010 Act.

48. A cautious analogy can be drawn with the situation under the relevant divorce legislation, bearing in mind that in divorce cases the court has a strict constitutionally derived obligation to ensure that proper provision is made for parties and their dependent children. Where the court under the 2010 Act has a mandatory obligation to have regard to a series of factors, it is helpful to consider briefly the manner in which the courts have characterised the disclosure obligation in divorce cases. In *Q.R. v S.T.* [2016] IECA 421, the Court of Appeal made a number of observations on the importance of disclosure. That element of the case concerned a claim that the husband was guilty of litigation misconduct, mainly by reason of his failure to disclose his means. In the course of her judgment, Irvine J. (as she then was) noted a number of matters. Importantly, at paragraph 62, the court identified "the policy considerations which underlie the obligation of parties to be candid and to fully comply with their disclosure obligations in judicial separation and divorce proceedings". The Court of Appeal drew on observations in a number of judgments, to highlight that the court, to

some extent, has an inquisitorial function to ensure that the parties are provided for properly. That leads to a situation where the parties have an obligation not only to each other but also to the court to make full and frank disclosure of all of the material facts relevant to the exercise of the court's powers, including their resources.

49. In the case of applications for relief in cohabitation proceedings under Part 15 of the 2010 Act, the court is tasked with an exercise that is sufficiently similar to the task of ensuring proper provision in judicial separation proceedings to make the observations of Irvine J. in *Q.R. v S.R.* apposite and relevant to this case.

50. In relation to the privacy concerns of the respondent, the following can be said. First, it is true that filing and serving an affidavit of means will involve the respondent disclosing otherwise confidential information to the applicant along with her lawyers and any expert she may instruct. However, this is part of the scheme legislated for in the 2010 Act and the relevant rules of court. The proceedings, as provided for in section 199 of the 2010 Act will be heard otherwise than in public. The applicant has given an undertaking to abide by the in camera rule and this has been accepted by the applicant and the court. Second, as noted by counsel for the applicant, many court proceedings invariably involve some disclosure of information that a party would otherwise prefer to remain private. While it is correct that the respondent did not commence the proceedings or volunteer to come to court, some disclosure of information cannot be avoided if the respondent wishes to continue to defend the proceedings. The court does not find that the privacy arguments outweigh the clear mandatory disclosure obligations that arise in this case under the legislation and associated rules.

51. In circumstances where the court has found that there is no jurisdiction to waive the obligation to file and serve an affidavit of means, it follows that there is no need to address the English caselaw relating to the "millionaire's defence".

52. In all the circumstances and for the reasons set out above, the court considers that on its own the respondent's application to have the court waive his obligation to file and serve an affidavit of means cannot succeed. However, the court will need to consider how to approach the application for a modular hearing before making a final decision on this obligation, particularly as it may lead to a need to consider whether in that scenario it would be appropriate to defer compelling a party to file an affidavit of means.

THE PRELIMINARY/MODULAR TRIAL ISSUE

53. The second issue addressed in this judgment is the respondent's application for the trial of a preliminary issue. This was sought by way of the notice of motion dated the 5 May 2023. The respondent's grounding affidavit of the 5 May 2023 sets out the basis on which that relief was sought.

54. First, the respondent sets out the two preliminary issues that he says can be addressed. These are the question of whether the applicant has commenced proceedings within the relevant statutory two year period from the end of the relationship. Second, and with more emphasis, the respondent explains why he contends that the parties were not qualified cohabitants for the purposes of Part 15 of the 2010 Act.

55. It can be noted that both matters require the resolution of facts that are heavily disputed in the existing affidavits, and the affidavits refer to other potential witnesses to various contentious matters.

56. The respondent contends that addressing these preliminary issues will give rise to savings in costs and court time. In respect of time, this is addressed in a single paragraph, where the respondent asserts, without very much more, that determining the issue of whether the parties are qualified cohabitants instead of hearing the full action "will require substantially different time allocations." The affidavit does not provide time estimates in that regard. In respect of costs, the argument is made that savings will be made if the qualified cohabitant issue is determined as a preliminary matter. This is on the basis that there will be a shorter trial and certain costs involving experts will be avoided. None of this was elaborated upon and no costs estimates were given. While the court is content to accept that there will be some costs and time savings if the issue of whether the applicant is a qualified cohabitant is determined in favour of the respondent, it is not possible to provide any detail in that regard or to predict the likely costs saving with any accuracy. This is particularly problematic where, as discussed below, the reality is that both parties are likely to be the main and most important witnesses for each of the proposed modules.

57. The applicant opposed the application and set out her position in an affidavit sworn on the 9 June 2023. First, the applicant contends that this motion is part of a pattern on the part of the respondent to delay the proceedings and ultimate trial. Second, the applicant explains why from her perspective the proceedings are not statute-barred and that she will be found to be a qualified cohabitant. Third, the applicant makes the point that she

believes the application for the trial of a preliminary issue is not brought bona fides and in fact amounts to an attempt to defer the respondent's disclosure obligations. Fourth, in circumstances where there is such a conflict on the evidence the applicant contends that there is no basis for the trial of a preliminary issue.

58. Matters developed in the period between the filing of the affidavits and the hearing of the motions. The parties delivered written submissions, and the respondent's submissions, which were dated the 6 October 2023, accepted that there were no or not enough agreed facts to allow for the trial of a preliminary issue under either O.25, r.1 or O.34, r.2 of the RSC. Instead, the respondent proposed that the application was better characterised as an application for a modular trial.

59. In essence, the respondent proposed that the question of whether the applicant was a qualified cohabitant should be dealt with in a first module. Depending on the outcome of that module any further hearing that was required would deal with the nature and quantum of any financial orders that may need to be made in the applicant's favour. The respondent submitted that a negative answer to the question posed in the proposed first module would be determinative of the entire proceedings. The respondent submitted that if this approach was adopted there would be a saving of court time and costs. The respondent argued that the applicant would not be prejudiced by this approach. On the other hand, the respondent submitted that he would be prejudiced if he had to face a full trial in the sense that not only would he have to make disclosure of his financial circumstances he would also have to bear the costs of a longer trial and the instruction of experts where those matters may not be necessary.

60. The applicant's written submissions were delivered on the 12 October 2023. The submissions note that the respondent at that point was seeking a modular trial without any permission to amend the relief sought in his motion. More substantively, the applicant drew attention to the fact that the respondent had not referred to any of the relevant case law regarding modular trial in his written submissions, and that the established caselaw did not support the application. Even if the court was minded to permit argument on the issue of a modular trial, the applicant submitted that the respondent had failed to discharge his burden of proof and that there was insufficient evidence to allow the court to determine the issue in the respondent's favour.

61. From the court's viewpoint it was a matter for the respondent to decide not to pursue the application for the trial of a preliminary issue; although, in light of the caselaw and rules relating to those matters it was sensible for that application to be abandoned. The attempt to change tracks shortly before the hearing and to seek a modular trial was problematic. However, despite the fact that there was no formal application to amend the relief sought in the notice of motion, the matter was argued fully before the court. Because the issue had been addressed in the written submissions and because it was very clear that the applicant's legal team was able to address the recast application the court will determine the issue. It would have been a poor use of the court's time and the parties' resources to have the motion adjourned to await what would have been a very similar hearing some time down the road.

62. The court has a jurisdiction to direct that a case is addressed by way of separate modules. Generally, but not exclusively, this course of action is most effective in the case of very complex and potentially lengthy trials involving multiple issues that are

capable of being addressed separately. It also can be a very effective use of resources in damages cases where issues of liability and quantum each will require significant portions of court time. At the level of principle, there is no reason why a modular approach could not be contemplated in particularly complex cohabitation cases. Moreover, in such a case there may be arguments why certain disclosure obligations ought to be deferred on the grounds that they will not be relevant until an earlier module is determined and in the interests of reducing the associated costs burden.

63. The manner in which the court should approach general applications for a modular trial has been the subject of a number of judgments. In that regard, I have considered the following: *Cork Plastics (Manufacturing) & ors v. Ineos Compound UK Ltd & ors* [2008] IEHC 93, *James Elliott Construction Limited v. Lagan & ors* [2016] IEHC 599, *McCann v. Desmond* [2010] 4 I.R. 554, *Donatex Limited v. Dublin Docklands Development Authority* [2011] IEHC 538, and *Novartis Pharma AG v. Eli Lilly Nederlands B.V.* [2021] IEHC 814.

64. The caselaw emphasises that the court's undoubted jurisdiction to direct a modular trial is governed by the requirement that the outcome be just. As Costello J. put it at paragraph 27 of *James Elliott Construction*:

> "In assessing the application, the overriding consideration of the Court must be the administration of justice and, in particular, to ensure that the trial is a fair one."

65. Subject to that governing principle, the courts have adopted a series of non-exhaustive guidelines to approaching an application for a modular trial. A helpful summary is given by Twomey J. at paragraph 28 of his judgment in *Novartis*:

"i. The default position in relation to litigation is that there should be a unitary trial.

ii. The onus is on the party seeking a departure from the default position to persuade the court that there are sufficient reasons to order a modular trial.

iii. Where proceedings are complex and the trial is likely to be lengthy and there is the possibility of a considerable saving of court time and parties' costs, then it is appropriate for the court to consider modularisation.

iv. The key consideration is the fair administration of justice and in particular the absence of prejudice for the party objecting to the modularisation. In this regard, a court should not order the modularisation of a trial if it creates a risk of prejudice to the other party sufficient to justify the refusal of the order.

v. Where the Court is not satisfied that the application for modularisation is brought in good faith so that it is likely to benefit both parties to the litigation, but for some ulterior benefit to the applicant, then it should be refused."

66. In this application, the court is not satisfied that the respondent has made out a sufficient case for a modular trial. That conclusion has been reached by reference to a number of the relevant guiding principles.

67. First, the respondent has not adduced sufficient evidence to justify the court directing a modular trial. In that regard, the respondent's evidence grounding the application was directed to a related, but different, proposition - the trial of a preliminary issue. Even taking that evidence as supporting this recast application, it was terse and lacking in detail. At the hearing of the motion, counsel for the respondent suggested that a unitary trial could take in or around 8 days, with four of those days being required for the

financial/ancillary orders element of the claim. Apart from that submission, and with respect to the experience of counsel, the evidence was vague and very generalised. On one level, because the proceedings have been delayed by the failure of the respondent to file an affidavit of means there remains a level of uncertainty about the full extent of the potential for disputed evidence about what generally can be described as the financial circumstances of the parties. Even so, given the nature of the claim it would be somewhat surprising if the case required 8 days for a unitary trial.

68. Second, I do not accept that the case is sufficiently complex or lengthy to justify a modular approach. The reality is that the applicant and respondent will be the primary witnesses. What is proposed seems to be either (a) that both will give evidence about their relationship – which invariably will involve evidence about their respective financial arrangements and the purchase of the Dublin house and then their financial needs/dependency or (b) that both parties will be required to give evidence about their relationship and in some sense not be questioned or give evidence about their finances until a second module. The court considers that it would be extremely difficult to ensure a fair hearing where a witness has to give bifurcated evidence or has to duplicate evidence already given in an earlier module. A further complication is that where parts of this case could reduce itself to a "swearing match" regarding certain aspects of the parties' relationship, credibility may very well take on real significance. It would be unfair and practically very difficult if cross examination of the parties was limited to only parts of the evidence and not others. Finally, at the risk of repetition, this case does not strike the court as particularly complex. Once the main parties and their witnesses have given evidence, the quantum issues are unlikely to require a great deal more time to address.

69. Third, even if a workable scheme for a modular trial could be devised it would disproportionately benefit the respondent. The applicant seeks a straightforward unitary trial and presumably is aware of the potential risks and benefits of this litigation. If she was required to face a modular trial and succeed in the first module she would be exposed to the delay and additional costs. Invariably, dividing the case into two modules brings a risk that, overall, the case may take more time and, therefore, increase the costs to the parties. That burden, I am satisfied, has more impact on the applicant given the respondent's assertions about his personal wealth.

70. Fourth, this is a case where there is a strong sense that the application was not brought for the benefit of both parties, but instead to achieve an objective sought by the respondent. The respondent has averred that, at least in part, he seeks to have a modular trial so that he can defer his obligation to serve an affidavit of means. This is not to say that the application has been brought mala fides, and I am satisfied that the application was moved for bona fide reasons. But those reasons militate strongly against granting the application. Aside from the issue that the application was not brought primarily to benefit the parties (which itself is a reason to refuse the application), if the respondent succeeded in having a modular trial and not serving his affidavit of means or otherwise having to disclose his financial circumstances the practical effect would be that the applicant could be seriously compromised in her ability to cross examine the respondent in circumstances where the respondent would not be similarly affected.

71. In the circumstances and for the reasons set out the court will refuse the application for a modular hearing. In those premises, the court will also refuse the respondent's request

to waive or defer his obligation to file and serve an affidavit of means. The court will not make an order preventing the respondent from defending the claim, but instead will make an order pursuant to O.70B, r.5(4) compelling the respondent to serve an affidavit of means.

72. I will hear from the parties in relation to the time period within which the affidavit will be filed and served, and in relation to costs, and for that purpose will list the matter before the Court at 10.30 on Tuesday, 28 November 2023.