Neutral Citation: [2012] IEHC 612

THE HIGH COURT

[2000 No. 82 M]

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

AND

IN THE MATTER OF THE FAMILY LAW ACT 1995 AND IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT 1976 AS AMENDED

AND

IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT 1996

BETWEEN

D.T.

APPLICANT

AND

F.L.

RESPONDENT

JUDGMENT of Mr. Justice Abbott delivered on 10th day of February, 2012

1. The applicant (wife) and the respondent (husband) were married on the 30th August, 1980. They are both 58 years of age. They have three children of full age. The wife commenced this action for judicial separation or in the alternative divorce from her husband eight years ago. This Court heard the matter on a number of days commencing on the 19th October, 2010. The delay between the commencement of the proceedings and the eventual hearing is explained by the complex litigation history of the case in the meantime. When the proceedings were first initiated and the obligation arose on the husband to file an affidavit of means, the husband applied for and obtained an order of the Master directing that a preliminary issue be heard in relation to the recognition which the husband claimed for his Dutch divorce from the wife of 1984 and that the Irish Courts should decline jurisdiction on these proceedings on the ground of such recognition. He failed in the High Court (before Morris J.) and in the Supreme Court whereupon he commenced a second challenge by way of preliminary issue whereby he asked the High Court to decline jurisdiction in respect of the ancillary reliefs sought by the wife and relied on the Brussels Convention, several Community Regulations, known as Brussels 1, 2 and 2 *Bis* and a number of provisions of the EC Treaty. All of the husband's arguments were rejected by judgment and order of the High Court (McKechnie J.) made on the 9th March, 2006. The husband appealed this order of the High Court to the Supreme Court, and requested the Supreme Court also to refer a number of questions of interpretation for preliminary ruling to the Court of Justice of the European Communities. The Supreme Court rejected his appeal on the 29th July, 2008 and refused to make any reference to the Court of Justice of the European Communities. It was only after the resolution of these issues (which shall hereinafter be referred to as the preliminary issues) in July 2008 that the normal case management of the proceedings commenced by way of exchange of affidavits on the merits and the filing of affidavits of means together with exchange of reports as required under the practice direction. Two aspects are noteworthy arising from the preliminary issues as follows:

> (1) In order to obtain the permission of the Court to pursue further preliminary issues, the husband gave an undertaking to the High Court (McKechnie J.) to pursue these additional objections but no further objections giving rise to preliminary issues would be raised.
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> (2) Fennelly J. in giving the unanimous decision of the Supreme Court on the 28th July, 2008, in relation to the delay issue stated as follows:
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> > "In addition, I do not believe this Court should, in the exercise of its discretion, make a reference (to the Court of Justice). I am principally influenced by the propensity of the appellant to use legal procedures so as to delay and the attendant injustice to the respondent. In his first affidavit in November 2000 he raised one legal point only, namely, the recognition of his Dutch divorce. He appealed his unsuccessful pursuit of that point to this Court. Only then did he raise a number of other arguments to resist the jurisdiction of the Irish courts. He has appealed against the judgment of McKechnie J. to this Court. It is now more than eight years since the issue of the special summons. The appellant has been able to resist complying with his normal applications to furnish information as to his means, by agreeing to pay maintenance to his spouse on a provisional basis.
> >
> > It will be more than eight years from its date of issue before the respondent is able to get to hearing about their claim. I would not wish to delay her access to justice any further by reason of a reference, even in circumstances where I believe that the new urgent procedure before the Court of Justice might enable the reference of some questions to be concluded within a period of months."

Further preliminary objections

2. At the opening of the hearing of the proceedings, counsel on behalf of the husband submitted a written document dated the 18th October, 2010 (from which counsel distanced himself from by reason of the undertaking given to McKechnie J. and thus presented it only on behalf of the husband). Counsel for the husband had informed the Court that the husband continued to pursue his grievance that his Dutch divorce was not recognised in this jurisdiction with the EU Commission and the broad thrust of the document presented to the Court was primarily involved with the husband's arguments relating to his intention to take the case to the European Court of

Human Rights in addition to canvassing his concerns about EC and EU law. Notwithstanding that this document was not notified to the wife prior to the commencement of the hearing for the purpose of clarity I dismiss whatever claims are made or could be made in this document for the following reasons:

> (1) This Court is bound by the decision of the Supreme Court which not only dismisses the preliminary objections of the husband but also sets out the urgent imperative of having these proceedings dealt with and disposed of on the merits. The presentation of the document and any application upon which it is based is contrary to the undertaking given by the husband through his counsel before McKechnie J.
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> (2) Without prejudice to the foregoing, any arguments to the said document have no merit and no application to these proceedings.

Decision of the Court

3. The court is satisfied on the evidence that:-

> (a) At the date of the institution of the proceedings, the parties hereto have lived apart from one another for a period of or periods amounting to at least four years during the previous five years.
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> (b) There is no reasonable prospect of reconciliation between the parties, and
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> (c) The court has in this judgment made such provision for the parties as it considers proper having regard to the circumstances for the spouses in accordance with s. 5(1)(c) of the Act of 1996 and accordingly, the court in exercise of its jurisdiction conferred by Article 41.3.2 of the Constitution, will make or grant a decree of divorce in respect of the parties marriage.

Effect of G. v. G. (Supreme Court) on 19th October, 2011 App No. 271 of 2009 Supreme Court (Denham C.J.)

4. Since the hearing of this case judgment was given in the case *G. v. G.*. That case involved an appeal by husband/provider who had through his own endeavours with the influence of some inheritance improved his fortunes vastly after a separation agreement was made by him with his separating wife. The thrust of the judgment was that the High Court, in judgment delivered by me, did not give sufficient weight to the terms of the settlement when making provision for the parties under the Constitution and the Family Law (Divorce) Act, 1996. Whereas the jurisprudence of this Court, prior to the decision in *G. v. G.*, indicated that the test which was applied to the weight to be attached to a settlement in any particular case had frequently been described by ascertaining where on the spectrum of weight between the cases *W.A. v. M.A.* through to *K. v. K.*, the particular case stood, the Supreme Court judgment clearly and authoritively says that considerably more weight should be given to a prior settlement. The settlement is to be given great weight approaching conclusiveness subject only to exceptions (concentrating mainly around need) which may be gleaned from the detailed criteria set out in the judgment in *G. v. G.*.

Submissions of the Parties

5. Mr. hUallacháin counsel on behalf of the applicant wife submitted as follows:-

> A. As the Dutch divorce had not been recognised in this country, the agreement on foot of which the divorce was granted should be give no weight.
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> B. If contrary to the submission in relation to the invalidity of the agreement under a non-recognised divorce, the court was of a mind to give it some weight, then the weight to be attached to same ought to be tempered by the manner in which the facts of this case could be distinguished from the facts of the *G. v. G.* case.
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> C. In the *G. v. G.* case there were no children of the marriage, whereas in the instant case there were a number of children of teenage and tender years who were effectively reared single-handedly by the wife.
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> D. The wife did not have sufficient or adequate legal advice as instanced by the fact that she never met her Dutch lawyer and was not made aware prior to the agreement of the Dutch system delivering only twelve years maintenance after divorce.
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> E. Her housing needs were not met leaving her in a position where she had to rent to the present day.
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> F. Whereas in *G. v. G.* the wife in sacrificing her career, sacrificed relatively little, the wife in this case had established herself professionally as a talented professional in the business sphere with the capacity to develop same in the business, professional and academic world with a flair for languages.
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> G. The Dutch divorce did not make any provision for pension and the applicant wife has no pension, whereas in G. v. G. it was accepted that the wife should have a pension.

Submissions on behalf of the Respondent Husband

6. Mr. Durcan on behalf of the respondent husband submitted that, notwithstanding the non-recognition of the divorce it was nevertheless a valid divorce in Holland and the settlement made in respect of same was a valid agreement in Holland. The judgment in *G. v. G.* did not distinguish between recognition or a non-recognition but rather put forward the test as to whether there was an agreement of a documentary nature which governed arrangements between the parties over a number of years, such as the arrangements (he submitted) which existed for many years in this case. He submitted that the "spectrum test" between *W.A. v. M.A.* (High Court, Hardiman J.) and *G. v. G.* (High Court, Finlay Geoghegan J.) was not permissible in the light of the judgment of the Supreme Court in *G. v. G.*. He submitted that as the evidence was that the wife applicant had €300,000 cash and had indicated that she will take up new employment in a business/profession, she was adequately provided for.

Conclusion in relation to G. v. G. (Supreme Court) and it Application in this Case

1. While the Dutch divorce agreement was not an agreement which every lawyer would draft with a view to settling separation proceedings in Ireland, it nevertheless constitutes an agreement which has been documented up to the standard required in the judgment of the Chief Justice in *G. v. G.*, and more importantly, this agreement has been acted upon by the parties insofar as it governed the separation of the husband and wife in Holland and the very radical return of the wife with all the children to Ireland. The Dutch agreement, therefore, should be given almost decisive weight subject to the exception or exceptions indicated by the particular needs arising from the failure of the settlement to address them. These needs I identify as a need for pension for the wife which is now non-existent and maintenance in the event of the wife not achieving her employment targets. The only other need which might constitute an exception might be the need for additional maintenance income or lump sum for the additional cost of nursing homes for the parties in their old age. However, this need may be more equitably dealt with in the context of *G. v. G.* by maintenance and the postponement by the court by way of provision for further consideration to allow for payment of lump sum for maintenance in the event of the husband wishing to have a blocking order made in respect of a claim by the wife for maintenance against the estate of the husband in the event of death over non-existence of adequate insurance cover. The consideration by the court of the potential of the husband to generate assets (perhaps considerable) while having now no relevance to any distributive intentions of the court which have been forbidden by the judgment of the Supreme Court in *G. v. G.,* is that the basic needs of the wife as now ascertained in accordance with the *G. v. G.* judgment would be utterly destroyed if provision is not made for costs of the proceedings which the wife has had to initiate to achieve provision, which she may not have anticipated to be slow in the first instance and hence, it is appropriate that the court would have considered the economic prospects of the husband in the event of the fortunes of his employment and shareholdings improving during the lifetime of the parties.

2. The court is obliged not to make an order if it would not be (as directed by s. 20(5)) "in the interests of justice to do so". This test was colloquially described by McGuinness J. as one to ensure that the judgment was not "too harsh". It would seem now that where there is a prior agreement the judgment is not "too harsh" if needs are met.

Consideration of Provision

7. I consider the matters referred to in subs (2) of s. 20 of the Act of 1996, paras. (a) to (l) inclusive by setting them out seriatim as follows:-

(a) the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future,

I set out the capital position of the husband using a summary and analysis of difference between the valuation of Peelo & Partners on behalf of the wife and Browne & Murphy on behalf of the husband, which Mr. Gerard Durcan S.C., counsel for the husband referred to in his submission and which was exhibited in evidence on the 29th October, 2010.

Total per Peelo & Partners report		€8,137,675.00
Total per Browne & Partners report		€6,358,673.00
Difference		**€1,779,002.00**
Difference made up as follows:(Only differences of €20k + have been noted		
Valuation of private company	€1,921,756.00	
CGT	(€480,440.00)	
		€1,441,316.00
Valuation of second private company	€76,562.00	
CGT	(€17,801.00)	
		€58,761.00
ICS account No.		€51,325.00
Legal fees re preliminary issue		€139,280.00
A1 portfolio		€21,148.00
A1 US$ loan		€23,970.00
Other differences of less than €20k		€43,202.00
Total		**€1,779,002.00**

As will be seen from the foregoing table the main difference in the valuations arises from the valuation of the private company, which is due to the fact that whereas Peelo & Partners valued on a dividend yield basis, Browne & Murphy valued on a valuation on net assets basis with appropriate allowances in both cases for minority stake holding. Browne & Murphy used a valuation of the second private company carried out by an independent expert and used a derivative of this valuation to value the husband's interest in the second private company. In resolving any conflicts between the two valuers in respect of their valuations, the court accepts that the main driver of the difference is the contrast between the assets valuation method and the dividends valuation method, and the court further accepts that in appropriate circumstances both are valid professional means of valuation. In circumstances where the holding is a minority shareholding and there is a commercial dividend policy reflecting real market rates of return on equity capital, then the dividend method of valuation is to be preferred, classically in the extreme cases of high yielding low growth defensive stocks in the equity markets. Where the dividend yield is problematic or non existent or erratic, then the net asset valuation based on appropriate discounts for minority shareholding, ease of liquidation and costs of liquidation would be the more preferable basis for valuation. Until the collapse of the Irish economy in 2008, the first private company was a strong player in the Irish market making fantastic profits and paying significant and consistent dividends, wages and bonuses for the husband. This had been a persistent pattern and it was also highlighted by strong growth which itself would be a boost to confidence in any dividend yield valuation. The collapse of the Irish economy has turned the picture around so greatly that the court has heard evidence that the domestic market for the first private company's goods and services has diminished considerably and is unlikely to recover while fiscal and banking problems remain as they are in the domestic economy. The business of the first private company was capital intensive necessitating concomitant high borrowings which leave the company with many capital intensive assets such as land, plant and building which have depreciated in

value and which are not capable of generating enough income to service parallel debt. In these circumstances the court would be driven more to accepting the net asset basis of valuation, especially as the court accepts, notwithstanding some misgivings of Ms. Maire Whelan S.C. (now Attorney General) of the lack of an evidential base for such conclusion, that the company is not paying a dividend and is unlikely, for some years, to resume paying a dividend. However, the case is much more complicated than that insofar as Mr. Durcan advanced the argument to the court that the present liquidity crisis in banking, Irish fiscal problems and general uncertainty and decline in the Irish market coupled with the husband's own liquidity problems render it impossible to make such provision. I accept that argument in the short term, based on the evidence and taking judicial notice of the extremely critical situation of businesses typical of the first private company. However, it emerged during the course of the hearing that the first private company had taken significant steps to reinvent itself and had branched out to foreign markets for the first time in a significant way and had achieved a contract in one of the medium to strong European countries approaching €400m; while the husband in evidence stated that this would only be a once off contract, I find it unlikely that this will be so having regard to the fact that the husband is a driving force behind the company with strong European experience from his previous employment in Holland, and also with a work force which would have been drawn from many European and other foreign countries which leaves him in a position to compete in a skilful way for further foreign contracts to re-establish the first private company in a more sustainable way. Also, as the first private company is privately held by many shareholders, depending on the dividend, it is likely that dividend paying may be resumed in the medium term, (as in five years) in parallel with the recovery of the company due to an export business and recovery of the Irish public expenditure following rigorous IMF pruning up to 2014, so that a recovery is likely to be in place in five years time. I also take into consideration that in five years time the husband will be approaching 65 and near what may be described as, his ultimate retirement age, when both he and his employers will seek to give him a fair and equitable exit mechanism by allowing a buy-out of his shares in the first private company and also allow an exit of the second private company so as to ensure that the first private company can be in a position to assure any successor of the husband to be newly recruited as a replacement that they can expect as good a reward as the husband for their endeavours, which the husband has justly earned by applying his skill and genius to ensure the growth of the first company in good times and its exceptional survival by developing new markets in bad times.

I, therefore, propose to take a valuation in the round of assets of the husband at €8m in five years time, but effectively for the time being of not much more than a €1m. There has not been any significant dispute about the valuation based Peelo & Partners of the wife's assets at a net €300,000.00, and it is noteworthy that the wife has no pension and no house. It is also noteworthy that the €8m valuation of Peelo & Partners for the husband's assets include a €3m odd for pensions which itself will be subject to financial commitments for geared investments and fluctuations in the stock market and are best valued in the medium term if any confidence is to be established apart from a sum in the region of €700,000.00 which the husband cashed before the conclusion of the hearing, and which the husband retains in cash form pending the decision of this Court. The two alternative valuations chosen by me of €1m odd available at the present time and €8m in five years time, informs the structure and dynamic of the provision to be made as a result of the considerations in this judgment.

Income of Husband
The report of Browne & Murphy dated the 18th October, 2009, presented in evidence in court on the 21st October, 2010, sets out monthly net income of €16,078.00 which includes €38,883.00 net from his salary in the first private company. This allows for his evidence both given orally and in his last affidavit of means sworn on the 13th October, 2010, setting out the fact that his salary had been reduced and that no dividends would be payable by company No. 1 in the foreseeable future. The context of this income which shows the decline in fortunes of the company and of the earning capacity of the husband (and which is also a basis for considerable suspicion by the wife) is set out in the gross income figures for the years 07, 08 and 09 of €1,388,596.00, €1,098.293.00 and €612,046.00 respectively. The income of the husband is unlikely to increase in the short term and his gradual scaling down of his managerial functions in the company may well prevent him from reaching the same spectacular heights of, - say, - 2007, but I would expect, as already indicated, that by the end of a period of five years the dividends may have recommenced and there might be some recovery by way of improved salary bonus arising from survival of the company through diversification in the depression. The main recovery of resources for the husband may thus arise from slowly recovering prospects of an exit strategy helped by normal retirement maturity considerations within the company and improvements of the fortunes of the company. There may also be recovery and maturity in some at least of the pension funds of the husband.

Income of the Wife

In accordance with her affidavit of means of the 17th September, 2010, and her evidence, the wife's income is €36,000.00 per annum consisting of maintenance paid by the husband. In her evidence she said she is shortly to qualify professionally having obtained post-graduate qualifications in her subject and would hope to commence practice-employment so as to generate enough income to maintain herself after 2011. I consider that she is too optimistic in this, and there should be reviewable maintenance.

(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise),

The affidavit of means of the husband indicates that his monthly outgoings amount to €30,575.00 as set out in the fourth schedule relating to monthly personal outgoings. These include the house mortgage for €9,285.00 and four other loans set out at the top of the schedule. This list of monthly outgoings includes €3,000.00 maintenance for the applicant and some payments to his son directly, in addition to payment of €5,000.00 to his current partner for household costs, childrens costs of new relationship and childminders (€5,000.00 per month). It is likely that as the income of the husband decreases from employment it will be very substantially supplemented by income available for pensions, especially in the event of recovery. In the environment where taxation law has now established thresholds for pensions funds, the incentive for the husband to accumulate further pensions through his employment may not be as significant as in the past and consequently I will not speculate on any further pensions he may accumulate or the benefit of that. Neither do I take pension contributions into account in relation to the husband's needs, obligations or responsibilities in the future. The children of the husband's new partnership are young and are likely to be dependent for some time. Having regard to the fact that the husband's monthly outgoings of €30,000.00 odd greatly exceed his monthly income of €23,000.00 net, it seems that the husband is significantly over stretched in the short term. The borrowings and commitments which he has inherited from the good times like 2007, have changed from being affordable to being of considerable concern and pose a considerable cash flow challenge to a man even of the husband's considerable financial and personal resources.

While the wife's counsel unearthed a further commitment of almost €400,000.00 in respect of the cost of a massive luxury item (the MLI) and says that his use and purchase of such an item indicates the vastly disproportionate level of lifestyle expenditure of the husband compared with that of the wife, I am also satisfied that the MLI, while impressive, is yet another embarrassing legacy from the good times. This disparity between expenditure commitments and income on a monthly basis is typical of newly impoverished rich couples coming before this Court. The consolation which the husband and wife in this case have is that as a couple they are not insolvent, certainly in the medium term. In such situations the pattern of provision by the court for a dependent spouse such as a wife involves a commitment to make significant provision for the wife, as the court intends in this case, but in view of the fact that

the cash flow position and banking facilities do not allow the funding of lump sums to the wife means that the wife (even if now only for the costs of proceedings) to be provided for through the structure of the provision of lump sums by postponing their payment, actually finances the provision instead of the banks. This implicit financing arises by the postponement for a considerable period in this case up to two years which, in better times, might be expected to be paid immediately through the facility of bank finance for the providing husband.

In relation to the wife's intention to support herself in the future, I consider that this is an admirable objective and I have no doubt that her education, commitment and intelligence allied with her varied experience of life, will leave her very employable, but she faces into a challenging and difficult world commercially and notwithstanding her brimming confidence I consider that the court should make provision for continuance of maintenance years from the date of the order in this case to enable the wife to catch up with some of her borrowing and to cater for transition to a new home. The level of this maintenance should be €5,000.00 gross as suggested by the Attorney General and this would seem fair having regard to the fact that the husband's present partner receives €5,000.00 per month for household expenses (and this is not tax deductible in the case of a partner). In the context of need in relation to maintenance identified by the judgment in *G. v. G.*, I find that it would be absolutely unreasonable to expect a divorcing spouse to live on a sum less than that being given to a partner who has little or no rights either statutory or constitutional in comparison.

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be,

Mr. Durcan cross examined the wife on the standard of living enjoyed by her over the last few years and she conceded that it was quite comfortable. However, she said that it was punctuated by moves from one house to the other, as, when she would make rented accommodation homely and comfortable, the landlord would get a perfectly natural desire to put it on the market when it was looking well, giving rise to the necessity of movement again and a consequent insecurity of her standard of living. The husband, on his affidavit of means, seems to have enjoyed a good standard of living and it would be consistent with his position as a Chief Executive of an important company to enjoy such a standard, including the MLI.

(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,

As indicated the husband and wife are both 58 years of age. They lived together for 12 years or so but under this criterion, and the court always considers of relevance, the length of the dependency of children, if any. In this case the dependency of the children ended with the last one at the date of the proceedings. That involves a family tie and effective duration of the marriage for 30 years and by any standards this is a long duration and one which merits no reduction of the provisions such as might arise in the case of a very short marriage. However, the weight to be attached to the agreement reduces the weight to be attached to this criterion.

(e) any physical or mental disability of either of the spouses,

Neither person has any physical or mental disability. Quite the contrary, both are brimful of energy and ability despite their advancing middle years. However, in the case of the wife there must be some concern that unless she has some additional capital sum over and above a modest house, which Mr. Durcan proposes, (and I accept), she should purchase on her own as a cash assets base, she may not have any independent source of capital to cover nursing home costs as the pension fund, which the court is prepared to direct her to invest, is unlikely to cover all of these in the event of a premature and prolonged debilitation or ill health. The husband, despite his stressed cash flow difficulties will have no such problem as his asset base and pension funds will be more than ample to cater for any contingency for the rest of his life. I consider that as nursing homes costs are not now evidenced and that the equity in the home intended to be purchased by the wife may be available together with some of the pension, there is no immediate "need" under this rubric which could be catered for by an additional lump sum.

(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family,

The husband and wife in this case have reared and nurtured their children very well, although the greater proportion of the day to day care of the children was the responsibility of the mother, and for many years she was a fulltime housewife having foregone her career as a linguistically talented secretary – administrator and potential for further education as evidenced by correspondence from a university in 1992. The Dutch divorce document, to which I shall refer later, placed particular responsibility on the wife to look after the children, leaving the involvement of the husband up to his discretion and wishes. Quite apart from any question of the enforceability of any such provision in any jurisdiction, this provision emphasises (in a rhetorical way at least), the proposition that the husband was able to pursue a stellar career in his employment in the various enterprises where he was employed or involved without significant family obligations. In fairness to the husband he does not seem to have exploited this strange clause to the detriment of the children, as evidenced by his significant involvement with the children and his continuing and obvious good relations with them, coupled with his capacity with the wife to negotiate their future without any unnecessary litigation. In normal circumstances and prior to *G. v. G*. the involvement of the parents in the family, both from the point of view of homemakers and wealth accumulators or income earners, would indicate that there should be an approach towards provision of moving towards equality. This approach has now been prohibited by *G. v. G*. In any event, a rush to provide mathematical equality could be counterproductive form the point of view of firstly, threatening sustainability of a wealth creation, - and holding operation headed up by the husband, by imposing cash flow obligations which would not be matched by the poor liquidity conditions prevailing and secondly, by killing off the incentive of the husband to continue to conserve and improve this capacity. Furthermore, insofar as *G. v. G*. directs the court in circumstances such as this case to give decisive weight to the Dutch agreement subject to need, the possibility of a postponed "earn out" sum for the wife when times improve is not allowed.

(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family,

As indicted in (f) above, the capacity of the wife was curbed in relation to taking up full-time employment by her obligations to a young family, although she did for a number of years take up employment as a secretary which she has described in a position paper as low level employment. Her stellar achievements academically and professionally in recent times have indicated that her early promise as a linguistically talented secretary-administrator was well borne out, and she relinquished the opportunity of a level of activity (which she is shortly to have obtained in her mature years), to look after the home and care for the family. This loss of opportunity was made worse by an unhappy and unproductive sojourn in the Netherlands. However, the Dutch agreement and the

weight to be given to it, prevents compensation to be given to compensate the wife for this loss of opportunity.

(*h) any income or benefits to which either of the spouses is entitled by or under statute*,

The husband is unlikely to benefit from any income under statute.

(*i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it*,

The Attorney General argued strongly on behalf of the wife that the delay of ten years in the proceedings strongly criticised in the judgment of Fennelly J. in the Supreme Court appeal (quoted in the early part of this judgment), is such that it would be unjust to disregard from the point of the view of making additional provision on that score to the wife. I do not agree with that view for the following reasons:-

> 1. The fact that McKechnie J. in the second application relating to preliminary issues, allowed these issues to be litigated using his discretion, indicates certain *bona fides* relating to the conduct of the husband which, (if not borne out by the Supreme Court view), were perceived by the husband himself, as being present in this case.
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> 2. The Supreme Court, in fact, allowed further issues to be litigated on the appeal over and above those allowed by McKechnie J., albeit for the purpose of having all matters discussed fully.
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> 3. The first occasion when an issue of abuse of process by delay arose was in the course of the Supreme Court appeal as shown by the passage of the judgment of Fennelly J. quoted above.
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> 4. The abuse of process by a party including delay and vexatious litigation is a matter which is generally dealt with by way of costs provision, and I propose to deal with this aspect. Having regard to the fact that the jurisprudence points at this conduct if it is used as a penalty must be "so obvious and gross" as would in the opinion of the court be unjust to disregard I would think for litigation conduct to come into the category of para (i) conduct, it should be conduct approaching absolute clear and unapologetic contempt of the court process coupled with equally objectionable behaviour to the wife and/or children.

(j) the accommodation needs of either of the spouses,

The husband is in satisfactory accommodation living with his partner and children of the new relationship. The house is significantly in negative equity but it is likely that the husband will struggle on with this, continue to pay the mortgage and remain in satisfactory accommodation there for the foreseeable future. The wife, on the other hand, is reliant on rented accommodation which, as stated earlier, she find unsatisfactory. Mr. Durcan has submitted that she is now in the happy position with some cash at her disposal to purchase a house in a buyers market. His client (the husband) has criticised her for living in five bedroom house before, but it must be realised that the rent being charged for this house was €2,000.00 which is still almost what would normally be charged for a mid market three to four bedroom house, even in these depressed conditions. While the wife may not be able to provide herself with a house in the same leafy suburban surroundings she may have enjoyed in the past, I am satisfied that with cash in hand she may be able to purchase a three to four bedroom house appropriate to her needs in reasonably salubrious surroundings.

(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring,

The husband's pensions have been fully described and notwithstanding that some of them may "bomb out" in value completely, others have the potential notwithstanding further claims which may have to be funded by other parts of the pension fund to improve in value exponentially in the event of underlying investment conditions improving. I have not doubt that the husband as a prudent investor will manage his pensions well, and use existing funds to cater for claims which, if unanswered, might cause the underlying geared funds to be lost, and will await the appropriate time of upturn in the international economy and maturity of the investment to cash them in. By reason of the decree of divorce the wife will lose any entitlement to a pension unless the court makes provision for one. At this stage I am accordingly strongly of the view that the court (possibly in paternalistic fashion), should direct a lump sum payment or, if appropriate, a pension adjustment order to transfer funds of €450,000.00 out of the sum of €700,000.00 odd raised by the husband and which he stated to the court would be held to the credit of these proceedings until provision is made by order following this judgment to be invested immediately by the wife to provide for her pension. The figure of €450,000.00 a little above Mr. Marsh's estimate but I have made the increase in view of a need for some "hedge" against nursing home costs and the fact that the pension issue only got desultory attention in the "pre *G. v. G.*" hearing. I make no apology for this paternalistic approach as the experience of this Court has indicated that in the flurry of divorce settlements parties may often lose sight of such mundane matters as providing for basic pension provision. My enormous respect for the wife and her prudence and wisdom is tempered by the fact that the Oireachtas when dealing with pensions (especially on the lower end of the scale concerning social provision rather than wealth accumulation), takes a very paternalistic attitude indeed towards ring fencing of pension provisions.

(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.

The affidavit of means of the husband sets out the monthly contribution to his current partner in respect of household expenses and two children. His current partner also has a small business, although not doing very well. I consider that in view of the fact that there is a long term economic relationship between the husband and his current partner, cemented by the presence of two of the children of the relationship, that is entirely appropriate to consider the rights of his partner under (l) and I am satisfied that under current arrangements as indicated by the husband's affidavit of means and the general evidence in relation to his ability to survive in employment and business spheres notwithstanding current economic difficulties indicates that the interests of his partner and their two young children will be well looked after in the future.

Effect of Purported Divorce Agreement

8. Section 20(3) of the Act of 1996 provides as follows:-

> *"In deciding whether to make an order under provision referred to its subs (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force."*

A divorce agreement was signed by the parties on the 13th July, 1994, after the wife had retained a Dutch lawyer to seek and obtain

maintenance for herself and her children and the couples children, which itself was subject to the continuation only on condition of an early application for divorce. The original divorce agreement is exhibited in Dutch and an agreed English translation was also exhibited in the affidavits and during the hearing. At that stage the children were ranging in ages from 12 down to 7.

9. The Attorney General on behalf of the wife, in her submissions and the presentation of the case, set out to have the Dutch divorce agreement condemned so as to be utterly disregarded from the point of view of limiting the provision for the wife in this case. I do not accept that her criticism applies with any great strength to the Dutch divorce agreement from its inception and early workings at least. It must be remembered that the Dutch assets, consisting merely of the family home, were sold and the wife received some of the capital. It is submitted that the maintenance was reasonably generous and adequate

10. Taken in the round (and Dutch limitation period for maintenance of twelve years apart), I am not so sure that any better deal could have been negotiated or provided for by the court in the pre 1996 Act and pre- *T. v. T* age. While, no doubt, the parsimonious attitude of the husband manifested itself in early course by leaving the wife in a position where she had to claim supplementary social welfare in Ireland for a short time in the transition from Holland to Ireland, it seems that there was some capital available for a deposit on a house and it would have been on the cards between the couple to have some type of a house purchased with low finance guaranteed by the husband in the earlier days. This purchase of the house allowing for balancing between mortgage payments and saving of rent, would at least in this case have given the wife an opportunity to have the benefit of the nominal improvement in house prices from 1994 to 2002, (even allowing for the fact that the current slump seems to have battered house prices back to 2002 levels). The particular criticisms of the Attorney General of the Dutch divorce settlement, I will deal with as follows:-

> 1. Great emphasis was put on the phrase in relation to children "the starting point for this (custody arrangement) shall be that the woman shall be responsible for the actual care and upbringing of the children, and the man where possible will be involved in the upbringing of the children". As highlighted earlier in this judgment, this provision if left on its own could be regarded as outrageously presumptuous and illegal in the Irish context. However, the phrase obviously did not inform the attitude of the husband throughout the marriage to the children as noted in this judgment, and I consider that any illegality in the phrase arguably could be cured by the context out of which it was quoted.
>
> 2. Likewise, great play was made of the fact that the wife did not meet the Dutch lawyer. While this is an extremely quirky occurrence, I am satisfied that notwithstanding the suspicion of the court, it had little bearing on the agreement insofar as the wife knew well what she was doing, as for instance, knowing that the Dutch divorce which she was "obtaining" by the divorce agreement would not be recognised in this country which was to be her destination with her children and she knew, at least, that there was fifteen year limitation period on the maintenance. Further play was made of the fact that the Dutch lawyer did not advise the wife of the change of Dutch law from 15 to 12 year period from divorce prior to the making of the agreement. These views apart, I am, however, satisfied that whatever the acceptability of the Dutch divorce agreement in the round might have been from the outset, over the progress of time and having regard to the great disparity of income which arose between the parties, the maintenance provisions of the Dutch agreement were greatly deficient were they not to be supplemented by the orders of this Court.

10. The court now proposes to make the following order regarding provisions subject to the parties addressing me in relation to costs and the timing of their payment, and the technical aspects of the draft order:-

> (i) The wife shall be entitled to €5,000 per month maintenance payable on the same terms as hitherto – to be reviewed after one year in the event of establishing a new profession.
>
> (ii) The husband shall pay to the wife by way of pension adjustment order or otherwise, the sum of €450,000 to the wife upon the strict understanding that the same is invested as a pension for the wife. The form of order shall be settled having regard to pension law requirements.
>
> (iii) Each party shall be entitled to the sole beneficial occupation of the dwellings which they now occupy or in such replacement dwellings and neither party shall be required to consent to the disposal of same under the provisions of the Family Home Protection Act.
>
> (iv) The wife shall be entitled to apply for maintenance against the estate of the husband for maintenance in the event of needs arising.
>
> (v) The husband shall pay the costs of these proceedings to be taxed in default of agreement.