Neutral Citation Number [2005] IEHC 456

THE HIGH COURT

2005 155 CA

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989, AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

A. B.

APPLICANT

AND

R. B.

Judgment of Mr. Justice O'Higgins delivered the 8th day of December, 2005.

1. This matter comes before the court by way of an appeal from an order of the Circuit Court dated 19th April, 2005, in which a decree of divorce was granted to the applicant husband. Apart from an order pursuant to s. 18(10) of the Family Law (Divorce) Act 1996 that neither party should be entitled to apply for an order under this section for provision out of the other party's estate, the Circuit Court did not grant other ancillary relief, considering that such provision of the court already existed by virtue of a previous agreement made between the parties.

2. The applicant husband in this appeal contends that proper provision is not made for him as required by the Constitution and s. 5 of the Family Law (Divorce) Act 1996. I am satisfied that the parties have lived separate and apart from each other for at least four years during the previous five years, and that there is no reasonable prospect of a reconciliation between the parties. Accordingly the only issue to be determined in this case is the question of proper provision for the parties.

The Facts

3. The parties were married in March 1968 and have four children, none of whom is dependent. They lived at various addresses in the course of the marriage. It appears that both parties worked outside the home during the marriage, the applicant as a painter and decorator and subsequently teacher, and the respondent as a typesetter and subsequently as a proof reader. There has been little evidence concerning the history of the marriage in its earlier years.

4. The parties first separated in 1986, following which the respondent wife lived for a time in an apartment in Rathmines and subsequently bought a cottage in Ringsend for a sum of IR£10,000 and spent another IR£14,000 on refurbishing it. This venture was financed almost totally by a mortgage in the sum of IR£23,000. In 1993 the cottage realised IR£22,000 which was expended wholly for family purposes by the respondent during the time the parties lived in the home presently occupied by the respondent. She returned to live with the applicant in 1987. In 1987 they were a number of debts, and the mortgage on the then family home was in arrears. The parties sold the family home and bought a less expensive property. That property was in turn sold in early 1991. The net proceeds of sale were a sum of just over IR£20,000 which was divided equally between the parties who separated following the sale of the house. The parties went their separate ways. In late 1991, however, the applicant approached the respondent with a view to making a joint investment in the present family home, but at the behest of the wife who was unwell at the time the parties got back together and resumed their marriage in the new home. The new home was bought for a sum of IR£51,000, and was financed by contributions of IR£6,000 from each of the parties and a mortgage of IR£41,000. It appears that a sum of around IR£2,000 was expended on acquisition and incidental expenses associated with the purchase of the house. It is important to note that this equal division of property shortly after the wife inherited a sum of IR£10,000 from her mother, was intended to finalise matters (between the parties) after approximately 23 years of marriage. Shortly after the acquisition of the house the wife was made redundant from work and got a lump sum of IR£30,000, out of which she spent a sum of just over IR£14,000 in reduction of the mortgage. The remaining sum of approximately IR£16,000 was expended by her on household matters generally. In 1992, less than a year after the acquisition of the house, the applicant became a full time student and graduated in 1995 with a B.A. Honours in German and in 1995 he took a year off. In 1996 he resumed his studies and obtained a Higher Diploma in Education the following year, again achieving honours. During the period of his studentship his evidence was that during holiday and other periods he did some work teaching, painting and decorating. I am satisfied however that during the period following the purchase of the house in 1991 the contributions of the wife to household expenditure were very considerably more than those of the husband although is not possible to quantify accurately their respective contributions because the husband has no records of his income from painting and decorating for the relevant period. However, apart from paying a sum of IR£14,000 to reduce the mortgage already referred to, the respondent paid the mortgage at least until 1999, although with some support from her husband. The husband has given an estimate of the respective contributions of the parties as being some where in the region of 60/40 or 70/30, the wife paying the larger share. However the wife considers that his contribution was minimal.

5. In 1999 the respondent told the court that she had to leave the home. The circumstances in which she left have not been described, and neither party is relying on conduct as being a factor in this case (although the husband in his notice of appeal and his opening statement to the courts said he would be relying on such conduct). At any rate when the wife left the home the applicant husband continued to pay the mortgage.

6. The husband had a taxable income of IR£7,000, approximately in 1998/99 although there was some additional income undeclared. The wife's taxable income was IR£12,280 for the same period.

The Judicial Separation Proceedings and the Consent

7. On 21st May, 1999, the wife, the respondent in these proceedings, instituted proceedings seeking judicial separation and the usual ancillary reliefs. The proceedings came for hearing on 19th July, 2000. On that date the court was informed that the parties had settled the matters in issue and consent was handed in and made a rule of court. The court granted a decree of judicial separation pursuant to s. 21(f) of the Acts and made ancillary orders by consent in the terms of the agreement reached between the parties. The agreement handed into court, however, failed to incorporate one of the terms that had been agreed between the parties, namely the liability of the respondent wife in these proceedings for tax liability of approximately IR£25,000 and accordingly the order was amended by consent. However, the amendment sought was itself inaccurate and further application had to be made to court to amend the order to reflect the agreement made between the parties. Mr. B. pointed out that he would not have consented to the incorrect amendment, and although this is so, it has no bearing on the matters in issue in these proceedings. The terms of what was actually agreed between the parties are not in dispute. However, the applicant in these proceedings maintained that the document actually signed by him had incorporated the provisions in relation to tax liability which were not on the agreement handed into court and which had to be subsequently added by way of amendment to the order handed into court. He also maintained that the order that was handed into court included a matter which had not been incorporated in the document originally signed by him but which was subsequently agreed by him after the signing of the document. Some time was spent in court canvassing these matters. It transpired that the applicant sought to have the consent order set aside on these very grounds. By way of notice of motion filed on

the 20th February, 2004, he sought an order based on his affidavit declaring null and void the separation settlement agreement. The matter came for hearing before Judge Linnane who, on reading the pleadings and documents filed and on hearing the evidence adduced and the arguments, refused the relief sought by the applicant husband. He appealed the order of the Circuit Court having obtained leave to extend the time for appeal. A date was fixed for the hearing of the appeal in the High Court. However, the respondent decided not to pursue the appeal and the matter was struck out in the High Court and the order of the Circuit Court was affirmed. In those circumstances the matter concerning the validity of the agreement is *res judicata* and held not a matter to be re-visited in these proceedings since the issue had been already decided as between the parties.

The Agreement

8. The agreement made between the parties with the benefit of legal advice of counsel and solicitor was made on the 19th July, 2000, and its provisions were incorporated into the order of the court made the same day.

9. Essentially it provided for the transfer of the family home to the wife, and the provision of a sum of IR£40,000 to the husband, the first sum of IR£30,000 to be paid on or before the 1st October, 2000, and the second sum of £10,000 on or before the 19th July, 2001.

10. The agreement purported to be "in full and final settlement of the above entitled proceedings and in all matters regarding the breakdown and termination of the marital relationship of the parties herein." It was also stated "that the applicant and respondent agree and acknowledge the terms of the settlement herein and make full and proper and adequate provision for each of them for now and into the future and in the event that either party seek a decree of divorce in the future then both parties agree and acknowledge that neither of them shall seek any financial relief against the other, save as to mutual orders pursuant to s. 18(10) and they further agreed and acknowledged that neither of them shall seek a pension adjustment to order against the other with regard to any pension which either may have in the future." It is clear from the above that the parties intended that the terms of consent agreement should constitute proper provision for the purpose of any future divorce application.

11. There are a number of ways of looking at the agreement. The background to the settlement is that at that time the family home was valued at either IR£173,000 or IR£175,000. I will take the figure as being IR£175,000 for the sake of convenience. There was a mortgage of approximately IR£30,000 outstanding on the family home, leaving an equity of IR£145,000 on the family home. In addition, there was a sum of approximately IR£25,000 being a debt of the husband's to the Revenue and a sum of approximately IR£4,000 being another debt to the Revenue in respect of capital gains tax on the sale of the cottage in Ringsend. Thus the value of the assets to be divided is IR£116,000, before taking into account the costs of disposal which were calculated to be approximately IR£10,000. The sum of distribution could be estimated as approximately IR£106,000. Thus, if the property had been divided in equal shares, half of the assets represented approximately IR£53,000. Even if one were to take out of that, the costs of sale, as the house was not to be sold in the terms of the consent, half of the assets would rise to a sum of IR£59,000. These calculations do not take into account any consideration of the sum of approximately £14,500 which was paid by the wife in reduction of the mortgage as part of her redundancy payment, approximately a year after the purchase of the house.

12. Alternatively, an estimated calculation was suggested by Mr. B.

13. On the basis that the family home was worth £175,000 he calculated that giving the following credits:

(a) IR£32,000 for the redundancy or severance money paid to the wife,

(b) IR£21,000 from the proceeds of the cottage in Ringsend; which the wife contributed to the household,

(c) IR£2,000 for the encashment of her pension,

(d) IR£10,000 for the costs of sale,

(e) IR£10,000 in respect of her inheritance from her mother,

(f) IR£32,000 for the mortgage,

14. The total of those sums is IR£107,000. If that sum were deducted from IR£175,000 there was IR£68,000. However, this is on the basis that the pension encashment was IR£2,000 whereas the wife asserted it was IR£4,000. Mr. B. suggested that IR£10,000 be clawed back from that sum in view of the fact that the sale of the house did not in fact take place. He also suggested that another IR£10,000 be added back in view of the fact that the wife's inheritance of IR£10,000 had been taken into account in previous separation prior to the purchase of the house when the parties had IR£10,500 each. Mr. B. then said that if the IR£4,000 from the encashment of the pension, together with the IR£30,000 from the redundancy money and IR£21,000 from the sale in Ringsend were added together, they made a total of IR£55,000. Those monies were expended on the welfare of the family. However Mr. B. argued that some of that money was, spent on the respondent and the child who was dependent at the time, it was therefore appropriate that he be given credit of one-third which would bring the amount up to IR£106,000. If that were divided equally his share would be IR£53,000.

15 Based on the approach outlined above it could be argued that the applicant in fact received over fifty per cent of the assets – although that would be over simplistic because of the deferral of part of his payment and the fact that the payment of the tax liability was the assignment of a debt. The fact that the respondent was able to defer the repayment of the debt is a matter which undoubtedly improved her position under the agreement.

16. It must be remembered that the Family Law (Divorce) Act 1996 does not mandate equal division of the assets. Neither party is entitled to claim half of the assets. What is required is proper provision for each of them, having regard to the statutory criteria and circumstances of the case.

17. Mr. B. said he was coerced and felt that he would have done better if he had not settled the case and insisted on going to a hearing. Mrs. B. also feels that she would have done better had she gone to court. The solicitor for Mr. B. at the time of the judicial separation proceedings told the court that she believed that she had negotiated a very good settlement on his behalf. The applicant told the court that the IR£25,000 owing to the revenue was merely "to make the figures stack up", and the respondent agreed to that in the sense that that figure did not recognise the fact that she would be given some time to pay that amount. However, I am satisfied that the debt of £25,000 to the Revenue was a real one. I am furthermore satisfied that it will have to be paid and that agreement has been made to pay it over a ten year period.

18. The applicant makes the point that of the sum of IR£40,000 which was to be paid to him, £10,000 was to be paid about a year later than the first tranche. He considers that that was deliberately done so as to disadvantage him but I am satisfied that at the date of the hearing and the agreement the wife felt that she would need the extra time to put in the extra £10,000. In fact she managed to increase her mortgage by getting a £40,000 loan in the year of the settlement.

19. It is important to point out also that the parties had separated previously, that the previous house had been sold and that the proceeds had been divided up equally, each of the parties receiving something in the region of £10,000. The applicant suggested in cross-examination that there was finality at that stage and this was agreed to by the respondent. The parties went their separate way at that time. In my view this has a bearing on the question as to what is proper provision in the context of the settlement dated the 19th July, 2000.

20. In light of all the foregoing, in my view the settlement arrived at in the subsequent order of the court made proper provision for both the applicant and respondent having regard to all the circumstances and the matters set out in the legislation in the Constitution.

21 The court must be satisfied that at the time of this hearing proper provision exists or will be made for the spouses and children. The time for the assessment of the assets of the husband and wife for the purposes of exercising such judgment is the date of the divorce hearing, in this case the current appeal (*DT v. CT* [2002] 3 I.R. 334). I propose to deal with these matters *seriatim*.

22. Section 20 of the Family Law (Divorce) Act 1996 sets out a list of factors to which the court must have regard in determining the question of proper provision.

> (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,"The applicant, in his affidavit sworn on the 2nd November, 2005, sets out his income as being €458.91 per week and gives the source as unemployment benefit, when not employed as €138.80 and employment from two schools and €18,067.44.

23. His outgoings amount to €421.00 per week. He lists among his liabilities capital gains tax to the Revenue Commissioners in the sum of €5,200 but told us in court that he does not believe that he will have to pay this. There is no evidence as to his plans into the future but it is reasonable to act on the basis that he will continue teaching for some years into the future. It seems also that he has the capacity to work as a decorator. However, there is no specific evidence as to what the constraints are on either of these occupations in the future.

24. The evidence of the respondent is that she worked as a proof-reader and sub-editor since February, 2000, having previously worked as a typesetter. She earns a salary and told the court that she receives about €2,400 a month. Some weeks she works four days, other weeks five days. She has mortgage repayments of €566 a month. Her present mortgage is in the region of €78,000. It is a twenty-year mortgage which will run until she is aged 73. Her evidence is that she hopes to retire at the age of 65 but she is worried that because of her health and its affect on her efficiency she may not be in a position to do that. The family home is a three bedroomed house and is currently valued at €390,000.

> (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 remarriage of the spouse or otherwise)."Both the applicant's and the respondent's financial needs extend to looking after themselves, although one of the children of the family lives with his mother at the moment. The applicant currently pays €160 a week for his accommodation and the mortgage on the family home is in the sum of approximately €79,000. The mortgage repayments are €556.24 per month or €6,794.88 per annum.

25. The husband has a capital gains tax liability to the revenue commissioners in the sum of €4,000 to €5,000 but his evidence was that he doesn't believe that he will have to pay this. The wife has an obligation (to which a reference has already been made) to the revenue commissioners in the sum of €25,000, having already discharged a sum in excess of €4,000. (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."There is little evidence as to the standard of living enjoyed by the family before the proceedings were instituted but based on the level of debt which caused them to have to sell one house and in light of the limited income during the period from 1991 to 2000 it is clear that the spouses lived modestly.

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

26. The applicant is fifty nine, the respondent is fifty seven. They were married in 1968 and the judicial separation order was made in July of the year of 2000, a period of over thirty two years later. However the parties were separated for a time and came back together in 1987. The parties subsequently separated again and the family home was sold in June 1991 and the proceeds were divided equally between the parties. However, they bought the present family home in 1991 and while that was originally intended to be an investment between them as a separated couple they resumed their marriage at that time.

> (e) "Any physical or mental disability of either of the spouses."

27. The wife suffers from bipolar disorder and attendant and consequent depression which she says impacts on her ability to work efficiently. The court was told that the husband is in good health but suffers from anxiety.

> (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 to them by looking after the home or caring for the family."

28. The evidence has been that both spouses worked during the marriage and contributed to the financial resources of the family. The court is not satisfied that either party made a significant contribution to the earning capacity, property or financial resources of the other spouse by looking after the home or caring for the family. While there is a dearth of evidence on this topic it appears that both parties were working outside the home and both contributed to the welfare of the family, until 1991. After the purchase of the present family home in November, 1991 it would appear that the respondent made a greater financial contribution to the family than the husband and that she also, by her work, enabled him to become a full time student thus enhancing his earning capacity as a teacher.

(g) "The effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each other 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 activities in order to look after the home or care for the family."

29. In my view this subsection of the act has no application in the present case. There is no evidence that the future capacity of either of the spouses has been impaired by reason of them having foregone opportunities of remunerative activity in order to look after the home or care for the family.

(h) "Any income or benefits to which either of the spouses is entitled by or under statute."

30. There is no evidence of any income or benefits under this heading other than the fact that when the husband is unemployed he is entitled to the relevant state benefits. There is no reason to believe that the position will be any different in the case of the wife.

(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."

31. Although it was intimated that the applicant might have regard to this section in this appeal no evidence has been tendered by either side in relation to the conduct of the other spouse being such that it would be a factor to be taken into account under this subsection.

(j) "The accommodation needs of either of the spouses."

32. This is an important factor in this case. The applicant is living in rented accommodation which at present costs him €160 per week. The respondent wife, as has already been stated, lives in the family three bed-roomed home. Not unnaturally the husband at the age of fifty nine would like some accommodation of his own, other than rented accommodation, and this matter is discussed later.

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

33. Unfortunately neither of the spouses has a pension, and therefore this subsection has no applicability to the present case.

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

34. This subsection has no applicability in the present case. One of the children of the marriage is at present living with his mother but he is not a dependent child in a legal sense.

35. Section 20(3) of the Family Law (Divorce) Act 1996 provides:

"In deciding whether to make an order under a provision referred to in subsection (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."

36. While the consent in these proceedings did not constitute a separation agreement, nonetheless it was the basis on which the court made the order. The fact that s. 20 expressly refers to a separation agreement does not implicitly preclude the court from having regard to the previous consent order which was the basis on which the consent order of the court was made. The court is obliged to have regard to all the circumstances of the parties and their children. The point was considered by Finlay Geoghegan J. in R.G. v. C.G. (Unreported judgment the 8th day of February, 2005) where she specifically held at p. 9 that:

"The court is obliged to have regard to all the circumstances of the parties and their children. Such circumstances on the facts of this case include the Consent which was received and filed and incorporating into the Consent Order and I am satisfied that at s. 20 of the Act of 1996 requires this Court to have regard to it."

37. The weight to be attached to consent orders which are purported to be in full and final settlement of issues between the parties has been the subject of judicial consideration, not only in *M.K v. J.K* [No. 2] [2003] 1 IR 326 but also in the case of *W.A. v. M.A.* [2004] IEHC 387 and in the case of *R.G. v. C.G.*.

38. The observations of O'Neill J. in *M.K. v. J.K.* are pertinent in the present case, even though it is not a separation agreement as such but a court order incorporating its terms. At p. 344 – 346 he observes as follows:-

"The separation deed issue

It would seem to me that this issue necessarily arises for consideration first. Section 20(3) of the Act of 1996 places upon the court an obligation to have regard to the terms of any separation agreement which is still in force. Section 20(1) places upon the court an obligation to ensure that, in the making of an order under ss. 12, 13, 14, 15(1)(a), 16, 17, 18, or 22 of the Act of 1996 or in determining the provisions of such an order, that such provision as the courts thinks proper either exists or will be made for dependant spouses or members of the family concerned. Thus, the court has two unavoidable mandatory obligations. Counsel for the applicant contends that it must examine the circumstances of the parties de novo to ensure that proper provision exists or will be made and that this exercise must be done first before considering whether or not provisions made in a separation deed are a proper provision.

Counsel for the respondent submits that the Act of 1996 does not require a de novo consideration of the circumstances where a deed of separation is in force.

In my view, the order in which either of these exercises is carried out by the trial judge must be left to his or her discretion. Clearly both must be done, but the order in which they are done will undoubtedly depend on the circumstances of each case and the manner in which the trial judge, in the light of those circumstances, deems to be the most appropriate way to approach the case. Undoubtedly in a case where the separation deed is of recent date, it would be likely that a court would consider the terms of the deed of separation at an initial stage unless there was manifest a change of circumstance such that a different provision would have been likely to have been made when the separation agreement was entered into, the inquiry might well proceed on the basis that, in the absence of any material change of

circumstance, the separation deed having been entered into at a recent date and with the benefit of appropriate advice, prima facie contained "proper provision". It would appear to me that the wording of s. 20(1) not only permits but indeed could be said to contemplate such an approach where it says as follows:-

> '... the court shall ensure that such provision as the court considers proper having regard to the circumstances exists ...'

A recent separation deed in force in circumstances where there is no manifest change in circumstances could be said to fulfil the requirements of s. 20(1).

A different situation manifestly would pertain where the separation deed, though still in force, is of a more distant origin in time. That situation will be likely to be accompanied by material changes in the circumstances of the parties or the dependants and would warrant an inquiry at the initial phase of the trial to establish exactly what were the relevant circumstances of the parties and their dependants. Having established this in the light of the criteria set out in a s. 20(2) then the court could move to consider whether the terms of the separation deed were a "proper provision". In this context I once again draw attention to the use of the word "exists" in s. 20(1). In my view, this means that it is at the time of the making of the application to the court that the provision must exist or that it will be made. Construing s. 20(1) with s. 20(3) gives rise, in my view, to the unavoidable conclusion that, in complying with s. 20(3), the court required to "have regard" to the terms of a separation agreement, must examine that agreement to ensure that at the time of the application, the agreement in light of the circumstances of the parties, either at that time "makes a proper provision" or that it contains obligations which will ensure that such provision will be made."

39. It is clear from the above that the court must examine the agreement (in this case that which led to the making of court order) in construing what is proper provision at this hearing. It is clear too that whether the agreement is recent or not may be of considerable significance.

40. In the case of *W.A. v. M.A.* the parties had married in 1978 and the relationship ended in 1998, if not before. In 1993 the parties entered a deed of separation and a side agreement. Hardiman J. considered the legality of the concept of absolute finality and his observations were as follows:

> "It is clear that the separation agreement was intended to be, as far as possible, a final agreement. Moreover, the parties specifically envisaged the possibility that divorce a vinculo would become available in the future and desired that the arrangements set out in the Deed of Separation would govern their mutual relations in that event. The agreement fairly envisaged that each party would live a personally and economically independent and self sufficient life with no further claims on each other. These terms, together with the financial arrangements set out in the agreement are plainly matters to which the Court must have regard at this juncture."
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> For the reasons extensively discussed in *D.T. v. C.T.* the concept of absolute finality, or a "clean break" as it is expressed in the neighbouring jurisdiction, is not available in Irish law. However, Keane CJ said:
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> > "It seems to me that, unless the courts are precluded from so holding by the express terms of the constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the 'clean break' approach which are clearly beneficial. As Denham J. observed in *F. v. F.* (judicial separation) [1995] 2 IR 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favoured in England, intended that the Court should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of future litigation between the parties."

41. Having expressed his respectful disagreement with another decision on the topic, Keane, C.J. continued, at page 365:

> "…it is not correct to say that the legislation goes so far as virtually to prevent financial finality. On no view could such an outcome be regarded as desirable and I am satisfied that it is most emphatically not mandated by the legislation under consideration."

42. In the same case, Murray J. (as he then was) said at page 411:

> "I also agree that when making proper provisions for the spouses a court may, in appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. That is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s. 22 of the Act of 1996, where that provisions applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit."

43. It appears, therefore, that the desideratum of certainty and finality, where that is attainable, has been fully recognised by the Courts. It is, perhaps, particularly obtainable in cases where the parties resources are relatively substantial. The fact that this is so under the current statutory regime must colour the manner in which the Court "has regard to" the terms of a separation agreement which, in the context of certain financial and property provisions, sought finality."

44. Having considered the English authorities and having stressed that he did not regard the English case as determinative of the matter Hardiman J. concluded as follows:

> "Particularly having regard to the terms of s. 20(3) of the Act of 1996 I cannot approach the question of what is proper in the circumstances of this case without giving very significant weight to the terms of the separation agreement. I must also construe the word "proper" having regard to its context as part of a statutory provision."

45. In granting a decree of divorce in that case the Judge made no further ancillary order under sections 12, 13, 14, 15, 16, 17 or 22 of the Family Law (Divorce) Act, 1996. He made an order under s. 18(10) that neither spouse be entitled to apply for an order under any other of the provisions.

46. However, the facts of that case differ greatly from the facts in the present case both in terms of the length of the marriage and the circumstances in which the assets of the parties changed after the separation agreement. The resources of the parties in that case were also far greater than what are available to the parties in this case. In spite of factual differences the approach taken by Hardiman J. seems to me to be useful and helpful in deciding the present case.

47. The question of agreements purporting to full and final was also addressed by Finlay Geoghegan J. in the case of *R.G. v. C.G*. The facts in that case also differ from those in the present one, in that the assets were considerably greater. However there are some strong similarities between the two cases. That case also concerned a consent which was subsequently incorporated into the order of the court. In *R.G. v. C.G*. the order of the Circuit Court was made on the 8th November, 2000, (a day after the consent of the parties). The order in this case was made on the 19th July, 2000, and amended on the 20th September, and again on the 31st October, 2000. The proceedings seeking divorce in the case of *R.G. v. C.G*. commenced on the 20th May, 2003 – a period of less than three years after the consent. In the present case, the divorce proceedings were commenced on the 22nd June, 2004, a period of almost four years after the consent of July, 2000.

48. The terms of the consent, which were subsequently made an order of court in both cases, are similar in that they are both aimed at finality although in the case of *R.G. v. C.G*. a clean break not envisaged. In that case paragraph F of the consent provided as follows:-

> "F - The parties hereto acknowledge that the within terms constitute a full an final settlement of all matters arising pursuant to the Judicial Separation and Family Law Reform Act 1989, the Family Law Act 1995, and any amending legislation and further acknowledge that neither parties (sic) shall be entitled to issue proceedings one against the other save for a decree of divorce pursuant to the Family Law (Divorce) Act 1996. The parties in particular acknowledge that the within terms constitute "proper provisions" within the meaning of the Family Law (Divorce) Act 1996 and that neither party should be entitled to make a claim one against the other save for periodic maintenance."

49. As has already been mentioned, the agreement in the present case also contained the following term: "the applicant and respondent agree and acknowledge that the terms of settlement herein make full and proper and adequate provision for each of them now and into the future and in the event that either party seeks a decree of divorce in the future, then both parties agree and acknowledge that neither of them shall seek any financial relief against the other, save as to mutual orders pursuant to s. 18 (10) and they further agree and acknowledge that neither of them shall seek a pension adjustment order against the other with regard to any pension which either of them may have".

50. Finlay Geoghegan J. cited a passage as follows from the judgment of Munby J. in *X. v. X*. [2002] 1 F.L.R. 508 para. (81):

> "A contract which purports to deprive the court of a jurisdiction which it would otherwise have is contrary to public policy. Thus, a spouse cannot validly agree, whether expressly or impliedly, not to apply to the court for maintenance or other forms of ancillary relief…"

51. She went on to state that:

> "Insofar as the wife purported to agree not to apply for ancillary orders in any divorce proceedings it is unenforceable in accordance with the above principles."

52. By the same reasoning it appears to me that, insofar as in the present case the parties purport to agree not to apply for the ancillary orders in the divorce proceedings, such agreement is unenforceable.

53. Finlay Geoghegan J. in finding that it was appropriate that the court have regard to the consent order made prior to the making of the order in the Circuit Court stated that

> "The court should also have regard to the fact that it was an agreement based on the then assets of the parties (including in respect of certain assets envisaged potential development and increase in value.
>
> That the court should also have regard to the similarity and the provisions of s. 20 in the Act of 1989 and s. 16 of the Act of 1995 with that of s. 20 of the Act of 1996.
>
> It also appears proper that the court should have regard as part of the circumstances which now exist to the implementation by the parties of the provision of the consent orders – In this case the respondent increased her mortgage and borrowed IR£40,000 for the purpose of complying with the order of the court."

54. She also pointed out that the consent order in that case "does not reflect an intention by the parties in 2000 to achieve a clean break financially even so far as permitted by Irish law on the contrary, it indicates an intention that the husband should continue indefinite to support the wife with periodical payments for her benefit and separate payments in respect of the dependant children. In addition, the house in which the wife was to live was to be purchased in the name of the husband and held in trust for the wife with other consequential provisions."

55. This is in stark contrast with the intention of the parties in the present case which appears to be to make a clean break. Neither party wish to have any financial involvement with the other after the settlement other than to in terms of implementing it. In the present case it is clear that the agreement was entered into in the knowledge that the value of the home would increase.

56. In the case of *R.G. v. C.G.*, Finlay Geoghegan J. concluded that it would not be appropriate to take the acknowledgement that the terms would constitute proper provision within the meaning of the Family Law Divorce Act into account on the following basis. She stated at p. 13:

> "The proper provision for the parties must exist at the date of the hearing of the application for the decree of divorce. Further, it must be based upon the value of the assets of the parties at that date and the circumstances as they then exist. The acknowledgement included in the Consent of 7th November, 2000, if it is to relate to a proper construction of the Act of 1996 must be considered to be an acknowledgement of potential proper provision at a future unknown date. What if divorce proceedings had not been brought for a period of ten years? When so properly construed it appears too uncertain a matter to be a matter which this court should take into account."

57. However it is clear that Finlay Geoghegan J. made her findings on the facts of that particular case.

58. In my view it is appropriate in this case that the consent of the parties, which subsequently was incorporated into the order of the Circuit Court, should be taken into account. In my view while the terms of the agreement are not binding on this court it would be unrealistic not to take them into consideration and it is appropriate that "very considerable weight" be attached to the agreement and the intention of the parties.

59. In applying the legal provisions to the facts of this case the following matters seem to me of considerable importance. Firstly, I have found the agreement between the parties which was made an order of the court did make proper provision for the parties at the time when it was made. In so finding the fact that the parties had gone their separate ways and divided their assets equally shortly before the purchase of the family home, must be taken as significant. The respective financial contributions to the family income and the payment and reduction of the mortgage are also important factors to take into account in that regard. It is of significance too that the agreement was intended to finalise, as far as possible, the separation of the parties. The only change in financial circumstances is that the applicant husband now generates a somewhat higher income than he did at the time of the separation, relative to the income of the respondent. However, the only significant change is that since the agreement of 2000 the value of the family home has increased substantially.

60. In *R.G. v. C.G.* the court specifically rejected the submission that there had to be a material change of circumstances from those existing at the time of the consent in the judicial separation proceedings in order for this court to make ancillary orders under the 1996 Act. I respectfully agree. However the presence or absence of a change of circumstances is a significant factor to which the court must have regard. The duty of this court is to assess whether proper provision exists for the parties as of the date of the hearing. In so assessing I am to have regard to the statutory provisions and the circumstances of the case. Those circumstances include the consent. It must be remembered also that s. 20 (5) of the Act precludes the court from making an order under a provision referred to in subsection 1 "unless it would be in the interest of justice to do so."

61. In this case the main change in circumstances since the consent and the subsequent order of the court in the judicial separation proceedings relates to the value of the family home. The family home is now valued at €390,000 and is subject to a mortgage of approximately €80,000. At the time of the agreement it was valued at approximately IR£175,000. It is important to note however that at the time of entering into the agreement the likelihood of the property increasing in value was known to the parties.

62. The applicant told the court that if the respondent were to increase her mortgage by an extra sum of €125,000 it would be possible for her to finance that increase at a relatively modest cost to herself were she to rent out two of the three bedrooms in the house. If she were to do so the applicant maintained that he would be able to finance the purchase of a modest apartment with assistance from his son. I am not convinced that such finance would be readily available to the applicant in view of the fact that she has already a mortgage commitment until the age of 73, some eight years after her due retirement date. It is conceded that the necessary mortgage would be a ten year mortgage with more expensive repayments. I do not consider that this would be fair on the respondent given the circumstances of the case, as outlined in this judgment. It is unfortunate indeed that the applicant is left in a position in which he is forced into the position of having to rely on rented accommodation, but I do not consider it realistic, just or practical for the wife to provide the monies to enable the applicant to purchase a home by increasing her mortgage by IR£125,000 to be financed by renting out two of the three bedrooms in her home. Nor am I satisfied that it would be fair to order the sale of the property to enable the respondent to buy a smaller property and at the same time furnishing the sum of €125,000 to the applicant. In arriving at that conclusion, I have attached considerable weight to the fact that the parties entered into an agreement intending it to have finality. Moreover the respondent has lived in the home since 1991 with the exception of a period when she left him. I find that she has paid by far the largest share as she paid the mortgage during the time when the parties lived there although there were some contributions to the family by the applicant. It is also a matter of considerable significance that when the parties separated in 1991, and the then family home was sold, the proceeds were divided equally between the parties. The respondent agreed with the suggestion that there was finality at that stage. The parties received a little over £10,000 each. A sum of £10,000, inherited from the respondents mother, was included in that equalisation. Notwithstanding all those factors, in my view the dramatic increase in value of the house is a factor too significant to be altogether left out of the account. That increase in value was not due to the efforts of the respondent but rather on factors outside her control. I realise that any increase in mortgage will not be easy for the respondent. Taking all relevant factors into account, I consider that proper provision would be achieved by the transfer from the respondent to the applicant a sum of €30,000, on or before 1st April, 2006. Apart from that variation I affirm the order of the Circuit Court.