Neutral Citation: [2008] IEHC 473

THE HIGH COURT

[2004 No. 41 M]

IN THE MATTER OF THE FAMILY (DIVORCE) ACT 1996, AND IN THE MATTER OF THE FAMILY LAW ACT 1995,

BETWEEN

Y. G.

APPLICANT

AND

N. G.

RESPONDENT

Judgment of Mr. Justice Abbott delivered on the 12th day of December, 2008

1. The applicant and the respondent were married to each other on the 4th February, 1977. The applicant is aged 53 and the respondent is aged 55. They met when the applicant (who is from England) came to Ireland in 1975. The applicant qualified as a state enrolled nurse in the UK. While she did some nursing type work in Ireland, her English qualification was not recognised and for reasons connected with ill health she claims that she has not worked since 2003, and has been in receipt of disability allowance since that time. At the start of the marriage the parties took up residence in a house inherited by the respondent from his aunt and uncle. The applicant came to the marriage with £3,000 savings, and the parties both ran a garage and a farm in the early years of the marriage. Gradually the respondent became the prime mover in various property developments and in relation to one of the developments, actively engaged as a builder selling on houses in an estate developed and built on by a company referred to as C.P. Limited. There were no children born to the parties and unfortunately, the applicant suffered a miscarriage of twins six months into her pregnancy in 1978, and this caused her extreme distress. The parties separated in December, 1995, intimacy between them having ceased some years before. The formal findings for a divorce decree, subject to proper provision, can be made in this case from the outset.

The Separation Agreement

2. The parties entered into a separation agreement on the 22nd August, 1996, ("the settlement") which was extensive and up to date in its provisions. In summary, the respondent agreed to pay the applicant a £100 per week for an initial 24 month period with a once off revision after that 24 month period, down to £50 per week, subject to CPI indexation and on the basis that the respondent paid for the applicant's VHI subscription, and that he provided a house for the applicant in the C.P. Limited estate, and an additional lump sum of £70,000. The settlement contained extensive waivers, releases and indemnities on a mutual basis, as would be expected where the financial affairs of husband and wife were intertwined to a considerable degree.

3. Of particular relevance to the issues in this case, the settlement provided for two "full and final settlement clauses" as follows:-

> "16. The husband and wife hereby agree that the within Agreement is in full and final settlement of all present and future property and financial claims which either of them may have against the other under the Married Women's Status Act 1957 or the 1976 Act or the Judicial Separation and Family Law Reform Act 1989 or the Family Law Act 1995 or otherwise or under any Act of the Oireachtas amending the said Act or Acts under the provisions of any other similar legislation of this or any jurisdiction.
>
> 17. It is agreed between the parties that this Agreement is intended as being in full and final settlement of all matters arising between the parties and, in the event of either party being granted a Decree of Judicial Separation as provided for in section 2 of The Judicial Separation Act 1989, the terms of this agreement shall be incorporated into the Order of the Court and, similarly, in the event of legislation permitting the granting of a Divorce being introduced and one or other party applying for such a Divorce, that again, in the event of such Divorce being granted, the terms of this Order shall be incorporated into the Order of the Court granting the Divorce."

Operation of Separation Agreement

4. The respondent did not increase the maintenance from £50 per week until 2002, when he increased the amount from £50 to €70. On an interim maintenance application in October, 2004 the respondent agreed to pay the applicant €1,200 per month pending the hearing of the application, and this sum was increased to €2,500 per month by the court.

Wealth Generation of Parties since Separation

5. The applicant continues to live in the house provided for her under the separation agreement but, by now has spent the proceeds of the £70,000 lump sum given to her and was not able to invest the same in any wealth producing activity. The respondent, on the other hand, was successful in completing the sale of his houses in the C.P. Limited development, and in recent years purchased a site on borrowed finance which, after commencement of this action and some time before the hearing hereof was sold for a sum in the region of €19,000,000. The respondent has a comfortable lifestyle and is in a position to pursue equestrian activities up to a high level. There was an undertone in the case that he may actually have earned considerable wealth from the equestrian activity, but at best this may only be represented by the value of the equestrian stock in the agreed statement of assets in this case. The applicant, on the other hand, claims that she does not enjoy the same lifestyle and incurred debts up until her maintenance was increased in July, 2007 by the court.

Issues

6. The applicant claims a decree of divorce and that provision be made pursuant to s. 20 of the Family Law (Divorce) Act 1996 (hereinafter referred to as "the Act of 1996"). The defence of the respondent is that proper and permanent provision was made by him for the applicant in the deed of separation which was intended to be in full and final settlement for the purposes of divorce, and he claims that the applicant is estopped from seeking any further property or financial relief in relation to her divorce. Ultimately an open offer was made during the course of the hearing on behalf of the respondent, by which he agreed to pay periodic payments estimated to be in the region of €54,000 gross, and provide a lump sum in the region of €800,000 to purchase a house which would be secured by way of insurance policy in place on his life for a term of fifteen years in the sum of €500,000. While the respondent has prospered in the last few years, he denies that his lifestyle could be described as lavish. A considerable amount of time was devoted in the hearing to probing in evidence the background against which the separation agreement was negotiated and executed by the parties.

Disclosure

7. Although the proceedings herein were commenced in 2004, the level of disclosure and vouching by the respondent left a great deal to be desired such that, on the 23rd November, 2007, the court ordered that full documents, disclosure and accounts be provided

under five headings, and that the respondent provide an up to date affidavit of means. Furthermore, the respondent was ordered to pay the applicant's costs for all applications including all directions and case management, reserve costs, the additional costs incurred and the accountant's costs in dealing with the application, commencing with the application to the High Court on the 28th February, 2007, up to and including the application of the 23rd November, 2007. This was the first time that such a composite order for costs was made against a party at an interlocutory stage of the proceedings, by reason of continued extensive and manifest lack of disclosure, and failure to furnish documents, identify property or furnish valuations. This order was made pursuant to the guidelines contained in the practice direction relating family law cases in the High Court. Matters of disclosure and connected vouching remained in an unsatisfactory state right up to the hearing, but were alleviated to a considerable extent by the accountants agreeing a reasonably detailed valuation report which itemised the respondent's net assets to be in the region of €21,000,000. Nevertheless the continued chaotic state of the case on the respondent's side has prompted me to make a further purposeful indicative costs order herein.

Factors to be Considered Pursuant to Section 20(2) of the Act of 1996

> *"(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 is at present in receipt of €2,500 per month in maintenance payments, in addition to €197.80 in disability benefit payments. By reason of her health it is not realistic to find that she is likely to obtain employment in the future. She has a house worth €250,000, a car worth €5,000 and a caravan worth €1,000. Her net asset position should be reduced by a sum in the region of €18,000 by reason of debt to bank and relatives.

As far as the respondent's assets are concerned, they have been detailed in a statement of affairs as of the 15th April, 2008 (contemporaneous to the hearing) in the round sum of €21,000,000. Annexed to the statement of affairs are notes 1 and 2 dealing with tangible assets in the region of €6,614,745 and an investment in Bulgaria valued at €7,694,744.

Three aspects emerge in relation to the respondent's assets as follows. Firstly, apart from the tangible assets in the sum of €6,614,745, cash held in trust by the respondent's solicitor and by M.G. solicitor, in the region of €1,750,000 and the two categories of livestock totalling almost €1,000,000, none of the other assets are manifestly liquid or matured. Secondly, the nature of the assets is such that, many may have fallen in value or perhaps be unsaleable in the light of the current world financial turmoil. Thirdly, the value of the assets is likely to recover or perhaps dramatically improve over a timescale of between one and three years over which, provision might be made in the case having regard to the fact that the commercial climate has turned against the anticipation by the court of the likelihood of financial institutions facilitating an immediate division of assets, following the order of the court. The respondent has no salary, and derives his income from capital gains realised on his various investments and disposals of property. He has no pension, as he regards his property activity as being his pension, and he has a term insurance policy covering himself and his current partner with whom he has a child and a step-child. These aspects have dictated the staged nature of the payments, matched by charging orders to ensure that the financing of the provisions herein is internal rather than being dependent on banking finance.

> *"(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 applicant is not likely to gain employment by reason of her health, although she would hope herself to gain some employment and the evidence shows that she has done some charity work as a shop assistant and could engage in some minor property-dealing facilitation. During the course of evidence there was some suggestion of the existence of a friend operating in the property business upon whom she might rely financially, but, as this was not put to her during the course of her evidence, and was not in fact developed in any realistic way, I ignore that prospect generally. The applicant's affidavit of means dated the 11th April, 2008, shows an annual estimated expenditure of €54,690 per annum. The respondent's financial needs, obligations and responsibilities are likely to be greater than the applicant's insofar as he has a dependent child and a step-child who, although now commencing work, may require some financial contributions from time to time. The respondent is living with the mother of his child. While his liabilities have been noted in the statement of affairs as amounting to €1,470,000 and are well covered by his assets, there is one pressing item of capital gains tax, being the residue of the tax arising from the disposal of the G. site at a price of €19,000,000. This ought, if possible, to be catered for in this judgment by leaving some cash reserves available after dealing with the immediate cash needs of the applicant.

> *"(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 was no issue in the case regarding the fact that the parties lived in reasonably modest comfort before their separation. Their social life seemed to revolve around the husband's equestrian activities although, this diminished for the applicant as the years went on. The networking in the family home involved around cooking and entertainment provided in a homely way by the applicant. This facilitated networking for the husband, but also provided a healthy, and varied (if perhaps mostly male) milieu for the applicant, the enjoyment of which was helped by the fact that she is an excellent cook. The applicant has on a progressive basis failed to match the standard of living enjoyed by her prior to her separation whereas the respondent continues to maintain the same lifestyle and enjoy the activity and success of the equestrian business. He has been able to continue his business networking, at which he is very adept, and this no doubt brings with it the additional benefit of personal satisfaction and enjoyment. Where the respondent has debts, they are business debts. The respondent's overdraft facility appears to have existed to sustain a lifestyle which he could not afford, at least in recent years. The applicant lives in the same accommodation now worth €250,000 and the respondent lives in accommodation worth millions.

> *"(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,"*

The applicant is currently 53 years of age and the respondent is 55 years of age. They lived together from their marriage in 1977 to their separation in 1996, a total of nineteen years. It was, therefore, a long marriage.

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

The applicant has a history of mental health problems, was hospitalised from time to time and was prescribed medication. The evidence of her general practitioner, who also had the benefit of treating her in hospital from the early years, is that she has had a number of psychotic episodes which have necessitated hospitalisation for periods from four to twelve weeks. She was last

hospitalised three years ago for a period of two months, and this was a particularly severe episode characterised by delusions and paranoia. She is not currently taking any medication. Apparently after a period of taking medication she ceases doing so and this may well increase the possibility of a recurrence. There is a possibility that she will suffer the occurrence of further episodes of illness in the future. Her other physical health problems of arthritis in her hands, chest infections and sinus problems, are no more than what might be expected for her age and would not necessarily curb her employment in several activities. The medical evidence is that while the applicant herself might wish and expect to take up employment in the future, this may not be realistic, as part of the problem of her mental illness is that she might be too ambitious for herself, in terms of employment capacity. These problems, which are associated with bad handling of the albeit modest capital sums already in the possession of the applicant at the time of settlement, dictate that a partially paternalistic approach to provision should be taken.

> *"(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,"*

There is no doubt that the primary driving force behind the generation of assets for the parties in this case has been the respondent, both from the point of view of contributing a modest basic piece of residential and agricultural property to the marriage, in addition to a salary in the initial business in which he was involved, and then through the flair and hard work given to his development and building work. He was also a good networker. However, even in relation to these activities, the applicant complemented him insofar as in the early years of the marriage, she took on the responsibilities of guaranteeing loans for property purchases and business ventures and taking on the nominal ownership of properties, and thereby kept the respondent out of view of creditors and in particular, a sizeable creditor who had a judgment against him. It is notable that by the time of the separation all this commitment in terms of "fronting" the respondent as an owner and controller of assets gave rise to the necessity for extensive releases and indemnities from and for the benefit of the applicant, and also an indemnity in respect of litigation arising from her paper title. In addition to undoubtedly providing a base for the respondent's social activities within the house and outside it through his sporting and equestrian activities, the applicant variously acted as a courier, "taxi" service, farmhand and continuously in the earlier years of the business at least, as a book-keeper for the business. She also undertook and acted as a telephone address for a curious foreign enterprise which apparently did not progress very far. These various activities show how adaptable she was and what a trusted supporter she was of the respondent. In the latter years of the marriage she assisted in planning and choosing furniture for a nursing home which ultimately did not prove to be very successful. The shape of the respondent's business activities did not change greatly from the time of the separation agreement until his bonanza with the sale of the site for €19,000,000, having purchased it at a comparatively modest figure of €300,000. The fact that the applicant cared for the domestic and household needs of the respondent for nineteen years as a homemaker is also sufficient to establish that the applicant is entitled to a substantial share in the assets by way of provision, so that there is not any invidious discrimination against the applicant for this work especially as she had to forego a modest but salaried nursing career in England by reason of her marriage.

> *"(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,"*

The reality of the frenetic business existence of the respondent was that, even without children, the applicant had to devote herself to the home with the attendant business responsibilities. She therefore sacrificed continued modest employment possibilities, which if pursued in England would have resulted in significant earnings over the years and would have resulted by now in a significant partial pension entitlement. This lack of entitlement is something which the applicant now feels keenly as she is well into her middle years and is apprehensive about care for her old age and possible nursing home and medical expenses associated therewith, not to mention recurrence of medical expenses through repeated episodes of acute mental disease.

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

The applicant is currently in receipt of a sum of €197.80 per week in disability benefit. This is not necessarily a long term benefit and there is no evidence that it would be transformed into a long term benefit.

> *"(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,"*

While the applicant complained of certain conduct of the respondent, the complaints highlight nothing in this area which is at a level to pass the "gross and obvious" test and hence is not a factor to be taken into consideration. Ms. Clissmann in her submissions correctly conceded that this aspect of the case would not be pursued.

> *"(j) the accommodation needs of either of the spouses,"*

The applicant's aspiration of living a small distance out the country from the town where she now lives with enough ground to raise chickens and perhaps a "banbh" (piglet) is a reasonable one having regard to the fact that, in recent years at least, her life was not easy and due to the fact that she feels somewhat oppressed by the numerous relations of the respondent who live in her vicinity. While her doctor feels that living in isolation (especially in the event of the demise of her mother) may not be helpful in the event of the onset of another psychotic episode or episodes due to the lack of interaction with likely help and support systems which naturally arise in the urban environment. I consider that in the event of provision being available in the case, that the court should allow the applicant to make her own choices in this regard, having regard to the fact that the court should not unduly trammel the applicant's rights under the Constitution and indirectly arising from the European Convention on Human Rights. As in *S. McM. v. M. McM.* [2006] I.E.H.C. 451. (Unreported, High Court, Abbott J., 29th November, 2006), it is appropriate in this case that a capital lump sum is provided, as I stated in that judgment "to ensure security in relation to nursing care in her old age". The respondent's accommodation needs seem to be well catered for and he is in a position to cater for the accommodation needs of his current partner and their child, together with his stepson.

> *"(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,"*

Does not arise in this case.

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

The needs of the respondent's partner and her two children are likely to be well catered for by assets remaining in the hands of the respondent under this judgment.

A Full or Partial Estoppel from Settlement?
8. In crude outline, the closing submissions of Mr. Hegarty, counsel for the respondent, were that the case could be dealt with on the basis of continued maintenance secured by an insurance policy and/or converted into a capital sum calculated on an actuarial basis. This keeps faith with the initial defence made that the settlement acted as an estoppel, at least in relation to the provision of any further capital sum not associated with reasonable maintenance. The conditions in which a previous settlement between spouses in a divorce case should be taken as approaching estoppel is in my opinion succinctly set out in the judgment of O'Neill J. in *K. v. K.* [2003] 1 I.R. 326 at p. 345 as follows:-

> "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 and 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 circumstances, the separation deed having been entered into at a recent date and with the benefit of appropriate advice, *prima facie* contained 'proper provision'".

The force of this comment would be even greater where the prior settlement had a full and final settlement clause and where resources were ample. The settlement in this case is now twelve years old and was eight years old or so at the time of initiation of proceedings herein. In the intervening periods there occurred what may well be a rare secular (as distinct from merely cyclical) change in circumstances known as the Celtic Tiger, associated with booming economic activity and rocketing property prices – surely a material change of circumstance (apart from the lapse of time) which would defeat Mr. Hegarty's argument in favour of near estoppel. Apart from these considerations the settlement was not reached in the context of ample resources, even by the standards of 1996, and was associated with ongoing maintenance (always an indicator against outright full and final provision). Hence, I hold that whatever weight is to be given to the settlement in this case, it should not operate so as to have the effect of an outright defeat of the applicant's claim for more provision in the sense of an estoppel or near estoppel.

Setting aside settlement?
9. Considerable effort in terms of forensic inquiry and legal argument was made by Ms. Clissmann, on behalf of the applicant, to have the settlement herein not so much set aside, but parsed and analysed in terms of it being initiated in anger and concluded in an atmosphere of duress and lack of disclosure. It was clarified from the outset that a formal application to set aside the settlement was not being made, but the thrust of the approach was to ensure that the weight given to it by the court would be minimal. I consider having regard to the course of this type of case that this latter approach is of little help, unless it is designed to meet the type of estoppel or near estoppel effect envisaged by the passage quoted from the judgment of O'Neill J. in *K. v. K.* [2003] 1 I.R. 326. As the respondent in this case was contending for such an extreme approach in regard to estoppel or near estoppel, it was entirely appropriate for counsel for the respondent to take all steps to meet it in the case. However, (as I noted in *S.J.O.D. v. P.O.D.*) property has passed, payments made and other arrangements have been put in place for a long time past. It seems to me that many resources and costs have been wasted in family law cases arguing needless issues regarding the genesis of settlements of some antiquity. In the future, courts might well consider isolating the issue at an early stage of the preparation of the case and encouraging the parties (at the risk of a costs penalty) to eliminate it in the course of case management or even to deal with it as an isolated issue which might be well appropriate for the much neglected case conferencing system of the practice direction and case management in the High Court, or through the discreet intervention of a purposefully directed mediation by an experienced lawyer qualified as a mediator.

10. In any event, while I hold that the evidence showed that the settlement in this case may have been conceived in conditions of difficulty, if not rage, and was accompanied by threats from the respondent that if the applicant did not take what was on offer she would get nothing, the negotiation progressed with the applicant taking independent advice from an experienced family lawyer who led the way to the production of a draft settlement and correspondence pressing the matter to a conclusion. While the settlement was concluded between the parties on the final negotiation of a third solicitor, who at the final stages could be said to be acting for both parties, I do not think that this dubious practice impinged adversely on the case. I do hold that there was lack of disclosure, principally arising from the approach of Mr. L. which was that of a traditional accountant acting for a company in the commercial revenue sphere, where accountancy conventions/practise at the time dealt with the accounts of C.P. Limited (which was the main asset of the family) in a static way based on historic cost and not taking account of items generally known as intangibles, such as the state of the order book, planning for potential for land and upward revision of valuations having regard to the market. I am satisfied there was no malice on the part of the respondent directly or vicariously through Mr. Loftus, as Mr. Loftus candidly expressed the view in evidence that if a question was asked outside the usual run of accountancy activity, he felt that he should not answer it. He, therefore, showed that the additional duty of disclosure in family law cases was a discipline with which he was not familiar. It would seem to me that the best manner of describing any lack of information arising from this lack of disclosure would be under the category of information deficit loss (I.D.L.) as identified in *S. J. N. v. P. O. D.*. While this is difficult to quantify, I do not see the need for identifying it in discrete quantitative terms as in *S. J. N. v. P. O. D.*, as the same need for transparency does not arise given the relevant antiquity of the settlement in this case. In the negotiations there may also have been a failure to take into account the nursing home (of which the applicant was, in any event, aware) and perhaps some other property identified by Ms. Clissmann (of which, in all likelihood, the applicant would also have been aware) Equally on the applicant's side there was a sum of £8,000 in a TSB account which was also not taken into account for the purpose of the statement of affairs for the settlement. The relevance of these conclusions goes not to the issue of setting aside the settlement, but to assess whether the parties, and in particular the applicant, stewarded the resources actually obtained in the settlement.

Structure of the Provision to be made
11. On the basis of the valuations in *T. v. T.* [2002] 3 I.R. 334, upon which the court is directed to operate, this must surely be an ample resources case. However, the court has identified the moral hazard of poor stewarding by the applicant of resources in the past, which is likely to be repeated in the future. The court's view on this is strengthened by the failure on the part of the applicant to take care of the credit position under social welfare payments as might secure her disability benefit into a more long term social welfare benefit, and the lack of evidence in relation thereto. The imperative to prevent the type of moral hazard which is identified in *F. v. F.* (but not described in such explicit terms as it was in *C. v. M.*, Unreported) indicates that insofar as maintenance is concerned, the court should use the availability of ample resources to direct that an annuity, adjustable in accordance with the costs of living index at appropriate periods, be purchased in the first instance for the applicant. On the same basis, to cater for the additional expenses of old age, a nursing home and associated medical expenses, a separate pension fund should now be invested on her behalf to mature so as to provide a further annuity or fund from age 65 onwards. In my view, recourse to the annuity method of

securing maintenance is further mandated and justified by the respondent's track record as a successful entrepreneur, who has been careless in relation to the keeping and furnishing of records and has a strong psychological bias against making any further provision for the applicant. Furthermore, given the current market difficulties and the nature of the respondent's investments, at home and aboard, being immature and illiquid, the realisation of the assets to pay the applicant in the short term will be most difficult.

12. In view of market difficulties, the prospect of the respondent using bank finance to assist in the immediate provision of capital lump sums for the purchase of annuities, houses or otherwise, cannot be guaranteed. Hence, a staged payment system is to be devised in this judgment, backed up by security for such payments, to be made under the various stages on fixed assets within this jurisdiction. The court will further define what payments are to be designated as maintenance, lest there is any outstanding difficulty with the security provided in this jurisdiction. The Brussels I Regulations are required to enforce same elsewhere within the European Union. In the first instance the court will rely upon the sum of €1,750,000, in cash, now in the hands of the respondent's solicitors, either in trust or otherwise, which is available for immediate disbursement. Rather than engage in a forensic exercise deciding on the differences between the approach of the two actuaries, Mr. T. and Mr. B., the court shall allow the purchase of an annuity up to the value of the required maintenance, being the way of the market determines whatever issues have arisen between the two actuaries on their helpful, (if substantially contradictory) evidence.

Weight to be attached to the Settlement

13. The court is required to consider the settlement and to give it such weight as is appropriate, given that it has neither set it aside, nor treated it as an instrument of estoppel or near estoppel. I attach weight to the settlement in the following manner:-

1. The settlement with its full and final clause and downward modulation of maintenance after a period, the allocation of a house and £70,000 cash, together with a *de facto* accompaniment of cash in the TSB account, indicates that its purpose was to enable the applicant to make her own way financially to a very substantial extent. In spite of this, the £70,000, in addition to the TSB account of £8,000 was spent on items of consumption. I have some sympathy with the fact that initially, replacement of her car and expenditure on other consumption items to allow settling in would have been necessary. However, it would seem to me that there was ample opportunity for the purchasing of another, similar house at £50,000 value or perhaps even a house with modest gearing for investment purposes, while still allowing for some initial consumer expenditure to allow for a settling in period. This would have been a reasonably conventional investment for the time and would not pose too many entrepreneurial challenges, nor indeed challenges to the general capacities of the applicant notwithstanding her occasional indifferent health. In the time which has elapsed, this type of arrangement would have in fact allowed further expenditure on consumption after catering for mortgage expenses, if any.

2. The failure of the applicant to maximise the resources in circumstances where she might be expected to do so points to the occurrence and risk of the type of moral hazard identified by the court in my judgment in *C. v. M.,* Unreported, referred to in Mr. Hegarty's submissions. In considering the provision to be made in this case the court should, in the light of the foregoing conclusions, not only take into account under subs. 2(a) of s. 20 of the 1996 Act, the value of the assets now remaining or resulting from the settlement such as the house, now occupied by the applicant, but also (and subject to the overall consideration of the necessity to provide for basic needs as in the type of case highlighted in the judgment of this court in *F. v. F.*, Unreported), the asset value of the settlement which now exists, assuming a reasonable level of prudence and responsibility from the applicant at the time of the settlement and throughout the period since then. Having regard to the value of the house now being €250,000, I consider that it would be entirely reasonable to expect a proper economic response to the initial value of the settlement to have resulted in a portfolio of property of value €1,000,000, which after allowing for reasonable gearing on 1996 levels and capital gains tax would net out roughly at €750,000. This figure might well have been greater had the applicant's health issues not effectively prevented her from upgrading and registering her nursing skills so that she could obtain a secure pensionable job in Ireland.

Taking out a net value of €14,000,000 for the proceeds of the last sale of the G. lands, the assets which were left to the respondent amount to a sum in the region of €7,000,000, and this most likely fairly reflects the manner in which the business grew from a position where the applicant had the most direct contact with it.

Out of the €1,750,000 in the hands of solicitors, the respondent shall buy such annuity revised in accordance with the costs of living index for the life of the applicant as investment the sum of €600,000 shall provide, €300,000 shall be paid to a reputable pension provider to invest in such funds on the advice of Mr. Shane Brown, directing the applicant to provide a pension at age 65 and to take the benefit as advised by Mr. Brown of any current depression in equities with appropriate prudent directions from him in relation to moving towards more stable investment as he or the pension company advise on a staged basis on the applicant's approach to 65, and €100,000 to be paid to the applicant's solicitors in part payment of their costs in view of their continued involvement in the administration of this order. The balance of the said sum of €1,750,000 as shall not have been paid shall be paid to the respondent in addition to any sum previously paid out by leave of the court. Such sum as may have been paid out of court to the applicant on a reciprocal basis to the funds which may have been paid out the applicant from the sum of €1,750,000 shall be taken as a credit to the applicant in relation to any sums ordered to be paid in the part of the order following.

3. Until the payment of maintenance of €54,000 per annum (increased annually on the basis of the cost of living index) is fully payable by way of annuities purchased in the manner provided for in this order, the respondent shall pay the applicant such part of the said sum of maintenance per annum as is not provided for by such annuities as are purchased for the applicant, under the foregoing provision, and the said payments shall cease upon the full extent of the said maintenance being annuitised in accordance with this judgment.

4. The balance of the maintenance not annuitised shall be annuitisied by the respondent by expending such funds as are necessary to attain such full annuitisation of the maintenance, as adjusted in accordance with the cost of living index, on or before the 1st December, 2011.

5. The respondent shall pay a lump sum of €1,000,000 to the applicant on or before the 1st December, 2011, for the purpose of enabling her to establish accommodation which said accommodation shall be within two miles of the town in which the applicant now resides on a road route served by public transport, which said accommodation shall be insured against fire and theft and in addition in respect of occupier's public liability including the use of the premises for animals of some kind, envisaged to be kept by the applicant. The said sum for the provision of a house shall be capitalised maintenance for the purpose of maintaining the applicant in the proper accommodation of her choice, within the meaning and for the purposes of the Brussels I Regulations.

6. The respondent shall continue to pay the VHI expenses of the applicant and on or before the 1st December, 2011, shall

provide in a joint account kept by the applicant and the respondent, the sum of €65,000 for the purpose of automatic payment of the said VHI on the basis of a direct debit mandate signed by the parties hereto with instructions by the parties to the bank that no withdrawals by either or both parties shall be permitted from this account, save by order of the court.

7. The respondent shall keep in place the policy of insurance of €500,000 held in trust for the benefit of the applicant, and continue the payments thereof until all maintenance has been annuitised and payments due to the applicant under this judgment made, provided that the respondent shall be entitled to retain such policy for his own use after the requirements of this judgment are fulfilled thereby in relation to the applicant's entitlement.

8. Until all payments have been made and annuities in lieu of maintenance payments purchased, the balance of maintenance payments and other payments due under this judgment shall be secured upon the respondent's home, and such other fixed assets as are set out in the agreed statement of affairs or as shall be designated or agreed by the parties, or as shall be fixed by the court in default of agreement.

9. The respondent shall on or before the 1st December, 2011, pay in addition to the foregoing sums, a sum of €600,000 to the applicant for her own use and benefit absolutely.

10. In addition to the order for costs already made during case management, an order shall be made on an indicative manner subject to arguments by the parties hereto in relation to modulation thereof that, the respondent pay half the additional costs of the applicant in this case when taxed and ascertained.

11. A blocking order pursuant to s. 18(10) of the Family Law (Divorce) Act 1996 shall be made and such orders as are necessary to mirror the formal orders contained in the deed of separation/settlement. The parties are at liberty to address the court in relation to such further orders of a formal nature as are necessary to carry out the intention of this judgment, and in relation to the final form of the order.

Fairness and Justice having regard to the Judgment Proposed and the Primary Settlement.
14. Section 20(5) of the Act of 1996 provides that before provision in a divorce case is finalised it should be examined by the court as to whether it is in the interests of justice to do so. In an ample resources case such as this, the yardstick to be applied in accordance with *T. v. T.* [2002] 3 I.R. 334 is equality, with the added guide that a percentage lower than 30% of the assets should be at the lower end of the scale.

My calculation of the approximate capital value of the provision proposed in this case is as follows:-

A.	Notional allowance of €750,000 arising out of capital allocation and settlement including value of family home	€750,000
B.	Estimate of Mr. Tarrant for purchase of annuity to pay maintenance	€2,000,000
C.	Investment of alternative home	€1,000,000
D.	Lump sum, (to include €100,000 advance for costs and €300,000 for pension)	€1,000,000
Total.		€4,750,000

This sum represents over 50% of the assets of the respondent (and of both applicant and respondent combined) if the net proceeds of approximately €14,000,000 from the sale of G. are taken out of the assets, but considerably less if the proceeds of the G. sale are included. It would appear to me to be fair and just that the G. sale proceeds should not be taken in their entirety as a basis for calculating a percentage division due to the fact that the G. sale took place many years after the separation, and in many respects was a stand alone event separate from the pattern of business, which evolved from the involvement of the applicant therewith during her marriage, and by reason of the fact the case may be distinguished from the series of cases characterised by *K. v. K.* [2003] 1 I.R. 326 or *G. v. C. G.* and the cases decided by me in *S. J. O'D. v. P. O. D.* [2008 IEHC 468] (unreported High Court, Abbott J., 26th May, 2008) and *McM. v. McM.* (Unreported, High Court, Abbott J., 29th of November 2006), where there was a continued involvement by the wife or husband in the care of children after the settlement, and sometimes up to and including the date of divorce. Accordingly, I confirm the proposed order to be the judgment of this Court subject to the refinements invited from counsel.