Neutral Citation Number: [2012] IEHC 615

THE HIGH COURT

[2007 No. 95 M]

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

BETWEEN:

CC

APPLICANT HUSBAND

AND

NC

RESPONDENT WIFE

JUDGMENT of Mr. Justice Henry Abbott delivered on the 2nd day of March, 2012

1. The applicant husband and the respondent wife were married to one another on the 31st day of October, 1987 in a church in the County of K. At the time of the marriage, and at all times material hereto, the applicant husband and the respondent wife have been domiciled and ordinarily resident within the jurisdiction.

2. The applicant husband and the respondent wife have lived separate and apart from one another since 11th December, 2003. From that time until December, 2005 the applicant husband resided at TF, being the former family home of the parties. Since January, 2006 the applicant husband has resided at BH. Between 2003 and 2005 the respondent wife resided at BH. Subsequent to December, 2005 the respondent wife rented accommodation for some time and since April, 2006 the respondent wife has resided aT WH. There are four children of the marriage of the applicant husband to the respondent wife, namely; K., who was born on the 13th of October, 1988; D who was born on the 31st May, 1990; J who was born on the 14th November, 1991; and P, who was born on the 17th January, 1995.

3. By Order of the High Court made the 7th November, 2005, O'Higgins J (having delivered judgment on the 25th of July, 2005) granted the parties a Judicial Separation and made the following orders:

> "1. A Decree of Judicial Separation pursuant to section 3 of the Judicial Separation and Family Law Reform Act 1989 on the grounds set out in Section 2 (1)(f) of the said Act.
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> 2. A Periodical Payments Order pursuant to section 8(1) (a) (i) of the Family Law Act 1995 directing the applicant husband to pay to the respondent wife the gross sum of €36,083.00 per month for her maintenance; (to the intent that she shall receive €20,000 net per month free from any deductions), the first such payment to be on the 15th December, 2005 and each subsequent payment to be monthly thereafter into a bank account to be nominated by the respondent wife. The said payments shall be increased annually in accordance with any increase in the Consumer Price Index using the month of August 2005 as a base date; the first such increase to be payable on the 15th December 2006 and annually thereafter on the 15th December of each subsequent year. The period of the said Order shall be for the life of the respondent wife, subject to the provisions of section 8 (5) (a) and section 18(2) of the Family Law Act 1995.
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> 3. A periodical Payments Order pursuant to section 8 (1) (a) (i) directing the applicant husband to pay to the respondent wife the sum of €6,667.00 per month in respect of the maintenance of the four dependant children; the first such payment to be made on the 15th December 2005 and monthly thereafter into a bank account to be nominated by the respondent wife. The said payment shall be increased in accordance with any increase in the Consumer Price Index using the month of August, 2005 as a base date; the first such increase to be payable on the 15th December, 2006 and annually thereafter on the 15th of December of each subsequent year. The period of such Order shall be for as long as each child remains dependant, as defined in the Family Law Act 1995, [subject to the provisions of Section 18(2) of the Family Law Act 1995.]
>
> 4. A Periodical Payments Order pursuant to Section 8(1)(a)(ii) directing the applicant husband to pay the school fees of each of the four dependant children to the appropriate authorities in the relevant school or college for each child. The period of such Order shall be as long as the said child remains dependant, as defined in the Family Law Act 1995, and such child is attending such school or college for the purposes of second level or third level education, [subject to the provisions of Section 18(2) of the Family Law Act 1995].
>
> 5. The provisions of the Periodical Payments Orders set out at paragraph 2, 3 and 4 hereof shall be binding on, and enforceable against, the estate of the applicant husband and against his heirs, executors and/or administrators. Should the applicant husband predecease the respondent wife, the said heirs, executors and/or administrators shall ensure that any continuing obligation on foot of the said Orders (or on the foot of the said Orders as varied, if applicable) shall be discharged out of the estate of the applicant husband and shall secure the payment of such Orders on the assets of the Estate. For the avoidance of doubt, the applicant husband consents to the Order herein.
>
> 6. An Order restraining the applicant husband from reducing the value of his land assets in this State to a sum below €10 million after deduction of all borrowings and expenses of any kind. The Court directs the applicant husband to furnish to the respondent wife, on one month's notice, a certificate from his accountants confirming that the applicant husband has as of the date of such certificate land assets to a value in excess of €10 million after deduction of all borrowings and expenses of any kind. The respondent wife shall not be entitled to seek such a certificate from the applicant husband on more than four occasions in each calendar year.

7. An Order pursuant to section 8(1) (c) (i) directing the applicant husband to pay the respondent wife a lump sum of €3.3 million on or before the 15th December, 2005.

8. An Order pursuant to section 9(1) (a) of the Family Law Act 1995 directing the respondent wife to transfer to the applicant husband her shareholding in the company T Limited and to resign as Director of the said company.

10. An Order pursuant to Section 36 of the Family Law Act 1995 declaring that the respondent wife shall be entitled to the legal and beneficial ownership of motor car registration number xxxx and that she shall be responsible for all repayments in respect of the said motor car as and from the 15th December 2005.

11. An Order pursuant to section 14 of the Family Law Act 1995 extinguishing the share that the applicant husband would otherwise have been entitled to in the Estate of the respondent wife as a legal right or on intestacy under the Succession Act 1965 as amended.

12. An Order pursuant to section 14 of the Family Law Act 1995 extinguishing the share that the respondent wife would otherwise have been entitled to in the Estate of the applicant husband as a legal right or on intestacy under the Succession Act 1965 as amended.

13. An Order pursuant to section 15A (10) of the Family Law Act 1995 directing that the applicant husband shall not on the death of the respondent wife be entitled to apply for an Order pursuant to section 15A of the said Act.

14. An Order pursuant to section 15A (10) of the Family Law Act 1995 directing that the respondent wife shall not on the death of the applicant husband be entitled to apply for an Order pursuant to section 15A of the said Act.

15. An Order directing that the applicant husband shall pay the respondent wife's costs of these proceedings, to include reserved costs, when taxed and ascertained or as may be agreed between the applicant husband and the respondent wife.

16. The Court notes that the applicant husband and the respondent wife will be taxed as single persons as and from the 15th December 2005.

17. The applicant husband and the respondent wife shall have liberty to apply.

18. An Order pursuant to Section 10(i)(c) of the Family Law Act 1995 and Section 4 of the Family Home Protection Act 1976 dispensing with the consent of the respondent wife to any future sale of the family homes at the manor house at TF and dispensing with the consent of the applicant husband to any future sale of any future family home acquired by the respondent wife.

19. The respondent wife shall be entitled to remove her personal belongings and the children's personal belongings, animals and equipment from the family home. Personal belongings shall not include items of furniture, ornaments or paintings, save as may have previously been agreed in writing between the parties or as may have previously been determined by the Circuit Court. For this purpose this aspect of the matter is remitted to the Circuit Court.

20. The Court refuses a stay of execution in regard to any of the provisions of this Order."

4. The respondent wife appealed the judgment and consequential orders of O'Higgins J. by way of Notice of Appeal of the 13th December, 2005. The applicant husband cross-appealed on two issues only, being the quantum of maintenance and issue of costs by Notice of Appeal dated the 19th December, 2005. The applicant husband brought an application for an Order directing the respondent wife to return certain items of property to B which he alleged had been wrongfully removed by her. The respondent wife subsequently lodged a Notice of Appeal against the Order directing her to pay the costs of the Motion which had been brought by the applicant husband in this regard.

By way of Special Summons dated the 13th December 2007 the applicant husband sought a decree of Divorce pursuant to the provisions of Section 5(1) of the Family Law (Divorce) Act 1996. Therein, the applicant husband sought:-

1. A Decree of Divorce

2. An Order pursuant to the provisions of Section 18(10) of the Family Law (Divorce) Act, 1996

3. Further and other relief

4. Costs

The various appeals to the Supreme Court were struck out by agreement on the 5th March, 2009, on the basis that the respondent wife would be entitled to raise the issue of an alleged 1987 Marriage Settlement in the Divorce proceedings, without prejudice to the applicant husband's right to oppose such reliance, on the basis of any defence at law or on the facts available to him.

5. On the 16th June, 2009, the respondent wife filed a replying affidavit in the applicant husband's divorce proceedings. In that affidavit she set out the history of an application for Discovery of documents against Lloyds of London, which culminated in an Order made *Ex Parte*, on the 10th October, 2007, by the Court of England and Wales directing Lloyds to disclose to the respondent wife all documents within their possession relevant to the ownership of BE. Copies of the documents which were subsequently discovered by Lloyds were exhibited in the Affidavit. The respondent wife seeks a number of reliefs in the alternative. These documents shall be referred to as "the Lloyds discovery". These include the claim that she and/or the children of the marriage are the beneficial owners of the BE as a result of the marriage settlement of 1987 and/or a declaration that JC is the beneficial owner of the BE as a result of the settlement of 1988. Further and in the alternative, the respondent wife sought a property adjustment order directing the applicant husband to transfer into her sole name, the various parts of the BE and the companies attached thereto.

6. On the 28th November, 2008 the respondent wife issued a notice of motion against the applicant husband seeking his attachment and committal for failure to comply with the maintenance provisions of the Order of O'Higgins J. On the 18th June 2009, the applicant husband sought an Order varying downwards or in the alternative, suspending the provisions of the order which directed him to make periodical payments to the respondent wife. He also sought an Order staying the execution of the provisions of the said Order which

required him to pay the respondent wife's costs in the original proceedings.

Developments after Separation

7. In the divorce hearing, the evidence showed that after the separation, following and during a very contentious process of removal of furniture by the wife, the wife and four children moved to a short succession of rental properties. This was justified by the wife on the basis that they were more centrally located in the country and further justified by logistical difficulties, cash and otherwise. Eventually W.H. was purchased with 29 acres in the southern region for over €3 million. During this time, the three eldest children continued schooling in England with the eldest, K. taking a year out and moving to a university in Dublin. The remaining years (of H.S. in Ireland for the youngest daughter, and the older children in boarding school in England), involved a gigantic schedule of delivery and re-delivery for holidays and mid-term breaks and sometimes even punctuated by weekends. The judgment of O'Higgins J. probably underestimated the pre-separation input of the husband in this rota by adverting to his role as being involved for school concerts and parents meetings and the like. The challenge of this transport malaise led, at least in some part, to K. taking a year out as a "father substitute" to help in this and other logistical activities. When W.H. was bought, the wife obtained a loan of over €2m and proceeded to embark on the process of repairing same, - an activity on which over €1m was expended without completing the work. The evidence in the divorce hearing showed clearly that Mr. L., (the wife's accountant), advised her, firstly, that the capital expenditure for purchase and renovation of W.H. was not sustainable nor was the borrowing associated therewith sustainable. Contemporaneously with these developments, the wife, on her own initiative (and relying on her own perceived knowledge of taxation law), came to the conclusion (notwithstanding very clear statements in the judgment and order of O'Higgins in the judicial separation proceedings) that she was not liable for tax in respect of her maintenance payments. Again, Mr. L., in evidence, expressly stated that he had advised her to the contrary, and notwithstanding, she continued to fail to make returns or any payments or any provision for payments for the tax element of her maintenance. As K. finished boarding school and moved on to university in Dublin, the wife and her family moved residence from W.H. to Dublin. Unfortunately, this move left W.H. vulnerable to severe frost damage. Apart from her strenuous activities in managing her children's lives, the wife was extremely busy in the planning and supervision of the renovation of W.H. (a listed building requiring constant attention to once-off detail), and also with her special venture before the High Court in London in which she obtained the 'Lloyd's Discovery' dealing with correspondence between Lloyd's representatives and the husband regarding claims by Lloyd's against him, as a name in respect of Lloyd's losses. These losses were discussed in some detail in the judgment of O'Higgins J. This venture cost the wife a cash sum in the region of Stg.£200,000. The foregoing paints a picture of very substantial spending which, in total, was completely unsustainable and it was against this background the husband complained in cross-examination. His evidence was that the wife had a completely extravagant and lavish lifestyle, exemplified by a bill for €90,000 for the family in one high class Dublin hotel in one year, and spending (on a boat) of €35,000. I am not inclined to penalise the wife for these last two items signifying lavish expenditure, as the same could be expected to be consistent with the type of lifestyle and income she had if she were dealing with other expenditures from her maintenance and capital sum with some degree of prudence. At least it can be said that in the context of the social and educational developmental aspects of the children's lives, this expenditure (which mainly related to equestrian and sailing events) was beneficial to them.

8. The husband's spending and over-spending by way of capital investment and repairs on both the castle and manor house were no less massive, but at least it could be argued that their unsustainability was not so striking by reason of the fact that until the Lehmans collapse of 2008, or thereabouts, the capital values of the property left in his possession by the judicial separation provided a buffer, and by reason of the fact that through judicious management of the day-to-day business and increase in prices of entry, he managed to increase the profits of the business end of his properties. While his borrowing was high, he had the buffer also of a very low interest rate of 2.14% on an interest only basis. However, the benefit of this low cost financing evaporated when the bank demanded "ballooning" of the loan repayments on a sum in excess of €7m to include capital repayments. The position of capital repayments, together with increasing costs, began to put pressure on the disposable net income available to the husband to maintain himself, in addition to providing a livelihood for his wife and children. In more recent times, the husband applied to court for variation of maintenance by reduction of same by reason of his inability to pay in response to applications by the wife to commit for contempt in failing to pay maintenance and for orders enforcing payment of maintenance. When the taxation of the costs of the judicial separation proceedings was complete, the husband failed to pay the same which amounted to a sum in excess of €600,000, and eventually the wife's solicitors applied and obtained an order of this Court under the Solicitors Ireland Act in respect of any sum recovered by the wife in these proceedings to cover such costs.

9. A situation has now been reached where the wife is massively in debt. This is highlighted by the fact that the Bank of Ireland have obtained an order of the High Court (Peart J.) dated the 16th November, 2011, appointing a receiver by way of equitable execution to recover a sum in excess of €4m subject to "this Court" making such allowance as is necessary for the wife, and an order restraining the husband by way of injunction from paying to the wife or any other person any sum prior to order of "this Court". This is against the backdrop of further monies owed (in the region of €700,000) to the Revenue Commissioners and miscellaneous running debts, all of which could total up to €7m if interest is taken into consideration by the time of this judgment, - without the wife having any significant assets at all.

10. Three outstanding issues arise in this case which are both important and unusual. These are as follows:-

> 1. The issue surrounding allegations of a trust or trusts affecting the land and assets of the applicant which became more focused in the divorce hearing than in the separation hearing by reason of the impact of the Lloyds discovery and evidence arising from it.
>
> 2. The influence of the order in the judicial separation proceedings on the provision to be made in these proceedings having regard to the provisions of s. 20 of the 1996 Act and the recent decision of the Supreme Court in *G. v. G.*
>
> 3. The order of the High Court (Peart J.) appointing a receiver by way of equitable execution on behalf of the bank together with consequences of insolvency of respondent wife.

Trust Issues

11. While the judicial separation proceedings commenced and were opened on the basis that the applicant husband was the owner of both BE and TF, it emerged during cross examination of the husband that there was a suggestion that a trust settlement had been prepared by the applicant husband and Mr. LR at the time of difficulties. It was implied in consultation with Lloyds which was in or around late 1990, and that the applicant husband had told his wife that the purpose of the document was for the purpose of submitting to Lloyds. The applicant husband gave evidence in court (O'Higgins J.) that he did not recall any marriage settlement or document being drawn up or signed but he subsequently accepted in evidence that a document had been signed but contended it was never lodged with Lloyds.

12. This denial of the lodgement of the documents with Lloyds has proven to be untrue, at least in regard to what will subsequently be referred to as "the 1988 settlement deed". This incident of seriously misleading the court has been blamed by the respondent wife for leading to a situation where O'Higgins J. found the wife's evidence in the judicial separation less credible to the extent that he favoured the husband to keep possession of BH, then occupied by the wife as the family home with the four children of the marriage. This outrage of the wife on this subject in turn prompted her to initiate expensive *ex parte* proceedings to obtain the Lloyds discovery. I am far from satisfied that this alone caused her to lose BH in the judgment of O'Higgins J. An examination of the transcript will show that during the hearing she agonised "aloud" about the issue and was not helped by the fact that when Mr. Durcan objected in Ms. Clissmann's cross-examination of the husband about the fact that Professor Sheehan had not addressed the issue of the family home in his s. 47 report and discussions. The cross-examination then veered off to challenge the husband on his drinking.

13. It is clear that an opportunity was missed here to put emphasis on the wife and children staying in the family home at BH. Indeed, no application was made on behalf of the wife to have the husband's girlfriend excluded from the B. complex at least on a temporary basis, from the B. complex, in order to allow the fostering of a better relationship of the children with the father and increase the possibility of the wife and children remaining in the family home at BH. I spoke to all the children, and I am satisfied as a result, that the situation would have been much improved had this type of interlocutory application been made and granted, and had the terms of reference of Professor Sheehan been more specifically scoped to ascertain the voice of the children in this regard.

14. In the evidence of the husband in these divorce proceedings he admitted that he had stated in evidence in the separation proceedings that no document was lodged with Lloyds and he now admits that the 1998 settlement deed was lodged with Lloyds.

15. The wife stated in evidence in these divorce proceedings that documents had been signed by her husband in the registry of the church following their marriage, which had been witnessed by her mother, and that he had explained to her afterwards that this was a new will trust to take care of their future. She stated that her husband had shown her a copy of this document sometime between 1990 and 1992. In cross examination the respondent wife stated that the applicant husband had told her that a marriage settlement had been signed on the day of their marriage, that she had seen it and read the first few lines of it. The Lloyds discovery documents were admitted in evidence for the purpose of examining the various allegations and denials of husband and wife and, before examining same, it is appropriate to describe the only document which has emerged by reason of the Lloyds discovery or elsewhere in the case which could be described as a trust or settlement was that of the 20th October, 1988 ("the 1988 settlement").

16. The settlement is stated to have been made on the 20th October, 1988, stated to be the husband (being called the settler) of one part and the husband and the wife (being called the trustees) of the other part. The recitals recite that the settlor was desirous of establishing the trust in the manner appearing and under Recital B it is stated:-

> "To that intent the settlor has cause to be transferred into the name of the trustees the real properties details of which are set out in the schedule hereto and it is apprehended that the settlor may from time to time transfer or vest or cause to be vested in the trustees other monies, investments or property to be held upon the trusts hereinafter set out".

It is further recited that the settlor intended the trust should be irrevocable from the execution thereof and the trustees had agreed at the request of the settlor to act as trustees. The most important part of the operative part of the date of the deed is in Clause 3 thereof as follows:-

> "The trustees shall stand possessed of the trust fund and the income thereof in trust for the said (beneficiary) at such age or time as the trustees shall in their absolute and uncontrolled discretion from time to time before the vesting date (having due regard to the rule against perpetuity) by any deed or deeds revocable or irrevocable appoint and proviso No. (I) that "no such appointment shall be revocable after the vesting day"."

The first part of the *testatum* reads as follows:-

> "SIGNED SEALED AND DELIVERED by the said (husband)
>
> in the presence of E. O'R and in different writing (CAPITALS) Pall Mall, London."

It is admitted by the husband to have been signed by him. The execution of the document by the trustees is similarly witnessed by E. O'R. with the same capital letter address of Pall Mall, London as regards the first "trustee by the husband and as regards the second trustee by the wife". The wife in her grounding affidavit for these proceedings stated that it appeared that her signature appeared on the document. In evidence, she first denied that it was her signature but then conceded that it probably was. No original of this settlement of 1988 was produced nor does it appear that same was actually sealed or stamped in any way.

The Lloyds Discovery

17. The Lloyds discovery may be best abstracted in the first instance to the greatest advantage of the respondent wife by adopting her counsel's resume thereof and the allegations of a "settlement clause" in favour of the children of the marriage in general terms:-

A. letter of the 18th August, 1995, to Mr. Damerum of Lloyds in which the husband stated:-

> *"Following my marriage in October 1987, a marriage trust was created whereby I left a life interest in TF. TF was not required for Lloyds income purposes at that time…my son K. is the remainder man. As the life interest is personal to me, it would not be appropriate to apportion a capital value to the property."*

B. In a letter dated the 2nd November, 1995, Mr. Damerum of Lloyds sought certain information relating to his letter of the 18th August, 1995, from the husband in the following terms:-

"Schedule III

> *1. In your response to this item you stated that a marriage trust had been created giving you an interest in T. It will be necessary, therefore, for a certified copy of this trust to be provided.*
>
> *As you do not have an interest in this property the hardship scheme will require an independent valuation and a brief description of the property.*
>
> *2. In your letter, reference has been made to BCE owned by your father. Please clarify your interest in*

the estate. If this is of a reversionary nature, please provide copies of all documents that are relevant to your interest, including copies of any wills and trusts and/or an estimate of the value of any such interest.

C. By letter of the 16th November, 1995, the husband replied to Mr. Damerum relating to these issues as follows:-

"Thank you for your letter of the 2nd November, 1995. This letter is to respond to the further points which you have raised.

…

Schedule III

1. I have written to my solicitors to obtain a copy of the appropriate document (I do not have a copy) and I shall forward it to you as soon as received.

As you have requested the valuation, may I ask who is to pay for this? With respect, you must appreciate that such a valuation will be quite expensive.

2. I think the documentation to which you refer is covered by paragraph 1 above. My remainder man interest was the subject of the marriage trust as you know, I worked the farm and performed certain managerial duties for the estate.

D. On the 11th January, 1996, Mrs Y.L. Burch of Lloyds wrote to the husband. She had taken over as new case officer in the Hardship Scheme. She wrote that there was still documentation outstanding, and a few more points that needed further clarification which were as follows:-

"1. A copy of your marriage trust is still awaited from your solicitors. Please impress upon them the urgency of this matter as the Hardship Scheme has to work to very tight deadlines as it is now coming to a close. Please refer to our letter dated the 14th December, 1995."

At Item 4 of her letter she said:-

"In respect of the rented properties, namely 13C and the shop property at B, kindly clarify as to the ownership of these properties. Please submit a copy of the title deeds for each of these properties where applicable."

Ms. Burch queried construction of slatted house and fixed assets with a value of STG£267,300.00, and she sought clarification of the ownership of these properties with the relevant supporting documents such as title deeds etc. Specifically she stated that should these properties "be in any way connected with the marriage trust/settlement, then a copy of this document is very relevant and necessary before any proposal can even be considered. The trust document should give details of the above mentioned properties as well as any interest you have in TF and BCE."

C. In his letter dated the 19th January, 1996, the applicant husband replied to the letter of Ms. Burch and stated:-

"1. I enclose a copy of the marriage trust with apologies for the delay.

2. …

3. …

4. The flat premises at 13 is owned by my wife and myself as trustees for our children. The appropriate title documents is the marriage trust enclosed herewith.

5. Your reference to "slatted house should be 'Cattle House'" this is located on the farm and forms part of the marriage trust.

6. The land and buildings at TF and B, which is part of and owned by the marriage trust…

I hope that this answers the question which you have. You may better understand my situation if you are aware of the fact that my wife is a solicitor and that, upon marriage, she strongly requested that a marriage trust be created for the benefit of our children."

On the balance of probabilities, the best inference seems to be that the marriage trust which appears to have been transmitted with the applicant husband's letter of the 19th January, 1996, may be the "1988 settlement deed". The applicant husband stated in evidence on the 22nd February, 2010:-

"The only thing signed in 1987 [the date of the marriage] was my will, which was prepared by Goodbody's, signed by me in the church on the day of our wedding, there was never any 1987 settlement."

And further stated:-

"There is no 87 marriage settlement. This is why nobody has a copy or a photocopy because there never was an '87 marriage settlement. My wife is getting confused with what was signed in the church which was a will and then this '88 deed. There never was a marriage settlement; I don't know how many times I have to say to you."

This evidence was in stark contrast to the assertions of the applicant in letters of 18th August, 1995, and 19th January, 1996.

18. As regards the marriage settlement of 1988, the evidence of the applicant was variously described as follows:-

"I do recall going to a lawyer not far from C, and this deed was drawn up to distance TF from Lloyds."

And

> "The deed was – I mean – for want of a better word – if I can recall, was a document to be kept in the bottom drawer and furnished to Lloyds if the pressure was coming on that they were going to repossess TF. There was no intention of that document ever being used for anything else, and it was never used for anything else."

19. Under cross examination the applicant said:-

> "I am telling the court I don't know who drew up the deed on the back of it, there is no address of who did it, or did not do it, but my wife and I would not have drawn up that on our typewriter."

He further stated that the 1988 settlement deed was prepared:-

> "In 1995 to comply with the deadline for Lloyds."

20. Under cross examination the applicant stated that he presumed that the marriage trust allegedly enclosed with the letter to Ms. Burch dated the 19th January, 1996, was in fact the marriage trust suggested to have existed by the wife, he stated:-

> "I presume what is sent on was a copy of the deed dated 1988."

When it was pointed out to him that the 1988 deed is not a deed which provided for the benefit of his children but only for the benefit of his son, K.C., he responded:-

> "I agree. But what name we put on the deed, I don't – it was variously described as different things at different times."

When pressed to say definitely whether it was the 1988 deed, he responded:-

> "Well, it's the only deed that has come out in your expensive procedure."

21. The applicant husband became irate about being persistently asked questions about the 1988 deed. He also accepted that the "1988 settlement deed" would have been signed in B, although E O'R his former secretary (who appeared to have witnessed the deed), did not live in Pall Mall. He thought that he might have "written" in Pall Mall on the deed. He also accepted that parts of the document, called the 1988 settlement, had a different type face (it appears that the last two paragraphs leading on to the testatum are different). When it was put to the applicant husband that his wife knew nothing about the document until she discovered it, he said:-

> "I have already said in 1994/95 we consulted with Mr. LR (an English adviser) and with P. McC., and I don't know what typewriter or whatever the document was drawn up with but it was not drawn up with what I would call an amateur because we did not have a typewriter or whatever to do that sort of typing. It was done by, as far as I can recall, I would assume it was done by P. McC's office, signed then by my wife and I witnessed by E. O'R. dated by me."

The Law relating to Establishment of a Trust

22. There was no disagreement between the parties in relation to the respondent's outline submissions in relation to the three principal means by which a donor may transfer beneficial ownership and benefit to his or her intended donee which are as follows:-

> 1. Outright gift to the donor to the donee.
>
> 2. Transfer by settlor of trust property to the trusts to hold and administer for the benefit of the beneficiaries.
>
> 3. Declaration by settlor that he holds certain property of his own on trust for the benefit of the beneficiaries.

The trust must be completely constituted insofar as the three certainties of:-

> (a) Intention.
>
> (b) Subject matter, and
>
> (c) Objects or beneficiaries are certain.

This case highlighted a lack of clarity in the case law relating to the question as to whether the property which forms the subject matter of the trust must be fully and validly transferred into the ownership of the trustees for those trustees to administer the property for the benefit of the beneficiaries.

23. The parties in these proceedings have taken two sides in relation to the effect of the authorities in relation to this proposition. The applicant husband, on the one hand, asserts that the property which forms the subject matter of the trust must be fully and validly transferred into the ownership of the trustees for the trustees to administer the property for the benefit of the beneficiaries. The respondent wife in her submissions submits that, in relation to the 1988 settlement deed, the three certainties had been met. She submits that the case *T. Choithram Int'l SA, v. Pagarani* [2001] 1 W.L.R., is authority for the proposition that while the donor in that case had not vested the gifted property in all the trustees of the foundation, he could not resile from his declaration that he was giving, and had given property to the trust which he had established and of which he had appointed himself to be trustee, and such property was therefore vested in the donor as trustee of the foundation and the gift was completed. The contrasting positions of the applicant and respondent are set out in the judgment of Lord Browne-Wilkinson at p. 10 of his judgment in the Privy Council at p. 11, paras. d, e, f and g as follows:-

> *"The judge and the Court of Appeal understandably took the view that a perfect gift could only be made in one of two ways, viz (a) by a transfer of the gifted asset to the donee, accompanied by an intention in the donor to make a gift; or (b) by the donor declaring himself to be a trustee of the gifted property for the donee. In case (a), the donor has to have done everything necessary to be done which is within his own power to do in order to*

transfer the gifted asset to the donee. If the donor has not done so, the gift is incomplete since the donee has no equity to perfect an imperfect gift: Milroy v Lord 4 De GF & J 264; Richards v Delbridge (1874) LR 18 Eq 11; In re Rose; Midland Bank Executor and Trustee Co Ltd v Rose [1949] Ch 78; In re Rose; Rose v Inland Revenue Comrs [1952] Ch 499. Moreover, the court will not give a benevolent construction so as to treat ineffective words of outright gift as taking effect as if the donor had declared himself a trustee for the donee: Milroy v Lord 4 De GF & J 264. So, it is said, in this case TCP used words of gift to the foundation (not words declaring himself a trustee): unless he transferred the shares and deposits so as to vest title in all the trustees, he had not done all that he could in order to effect the gift. It therefore fails. Further it is said that it is not possible to treat TCP's words of gift as a declaration of trust because they make no reference to trusts. Therefore the case does not fall within either of the possible methods by which a complete gift can be made and the gift fails."

24. The judgment then immediately proceeded to distinguish the facts of *Pagarani* from the two main options described in the foregoing paragraph and quoted above as follows:-

> *"Though it is understandable that the courts below should have reached this conclusion since the case does not fall squarely within either of the methods normally stated as being the only possible ways of making a gift, their Lordships do not agree with that conclusion. The facts of this case are novel and raise a new point. It is necessary to make an analysis of the rules of equity as to complete gifts. Although equity will not aid a volunteer, it will not strive officiously to defeat a gift. This case falls between the two common form situations mentioned above. Although the words used by TCP are those normally appropriate to an outright gift—'I give to X'—in the present context there is no breach of the principle in Milroy v Lord if the words of TCP's gift (i.e. to the foundation) are given their only possible meaning in this context. The foundation has no legal existence apart from the trust declared by the foundation trust deed. Therefore the words 'I give to the foundation' can only mean 'I give to the trustees of the foundation trust deed to be held by them on the trusts of foundation trust deed'. Although the words are apparently words of outright gift they are essentially words of gift on trust."*

25. In *Milroy v. Lord,* referred to in the *Paragani* case, a settler executed a voluntary deed purporting to transfer shares in a bank to be held on trust for the plaintiff. Such a transfer could only be properly effected by registration of the name of the transfer in the bank records. While the trustee held power of attorney to act on the settlers behalf, he failed to register the transfer. The Court of Appeal held that no enforceable trust in favour of the plaintiffs had been created. In that case Turner J. at p. 264 stated:-

> *"in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may, of course, do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift."*

26. In *McArdle v. O'Donohue* (Unreported, High Court, O'Donovan J., 8th June, 1999), it was held that in the absence of stated intention by the settler to constitute himself a trustee of the trust property, and where there has been no effective transfer to trustees of the would be trust property, equity would not construe the ineffective transfer of a declaration of trust by the settlor. In *McArdle*, a testator had intended to settle £200,000 invested in a bond upon his adopted daughter and her children, but prior to his death he had never taken any steps to transfer the monies into the trust fund which he created. O'Donovan J. quoted with approval the statement of principle of Johnston J. in *Re Wilson* [1933] I.R. 729:-

> *"A gift is a gift, and, of course, if a donor, while expressing an intention to give something and taking certain steps in the direction of giving it, has not gone the whole way, the expectant donee has no equity to compel the completion of the gift. This is good sense and good law."*

27. In an older Irish case, *West v. West* (1882) I.R. 121, it was held that a failed transfer should not be treated alternatively as a declaration of trust.

Motivation in relation to Trust

28. Sometimes the motivation of the donor in making a trust or executing a conveyance or transfer is examined by the courts. For instance in *Roberta Parkes v. David Parkes* [1980] ILRM, it was held that the court should not assist a purchaser who has placed property in his wife's name dishonestly and by means of an illegal act performed for the purpose of evading the law (in that case the requirement of a higher rate of stamp duty for a British subject and the doubt and delay dealing with the obtaining of consent of the Land Commission to the sale pursuant to s. 45 of the Land Act 1965). Costello J. on p. 142 stated:-

> *"There are, it seems to me, four general principles of law which are relevant to the facts which I have just outlined. The first is that where a person buys property and pays the purchase money but takes the purchase in the name of another, who is neither his child, adopted child or his wife there is a prima facie no gift but a resulting trust in favour of the person paying the money. The second principle is that where a person in whose name a purchase is taken is the wife, child, or adopted child of the person paying the purchase money there is a presumption that a gift was intended. Thirdly, however, the presumption in favour of a wife, child or adopted child may be rebutted by evidence which establishes that a gift was not intended.*
>
> *The defendant relies on these principles and claims that his intention was that no gift was to be effected, the plaintiff holds the lands as trustee for him. But the plaintiff's counsels ripostes with a fourth principle which is claimed a court applying equitable principles should apply in this case. Put shortly, it is that a purchaser will not obtain relief in equity by setting up his own illegality or fraud. This is the crucial point of law in this case, and I will now consider the cases which it is claimed illustrate to justify its application to the facts I am now considering."*

29. Costello J. (as he then was) went on to consider *Gascoigne v. Gascoigne* [1918] 1 K.B. 223, in *Re Emeries Investment Trust* [1959] 1 Ch 410; *Tinker v. Tinker* [1970] P. 136; *McEvoy v. Belfast Banking Co Ltd* [1934] N.I. 67 [1935] A.C. 24.

30. In *Midland Bank Plc v. Wyatt* [1995] 1 FLR 696, it was held according to the head note, *inter alia:-*

> *"On the facts, taking into account the subsequent conduct of the defendant where relevant, it was clear that when the defendant had executed the trust deed he had no intention of endowing his children with an interest in the property but regarded it as a safeguard to protect his family from commercial risk. Even if the deed was executed without any dishonest of fraudulent motive, but was entered into the basis of mistaken advice, the transaction was not what it purported to be and was therefore a sham and, accordingly, was void and unenforceable."*

31. In "*Equity and the Law of Trusts in Ireland",* Hillary Delaney (2nd Ed.) on p. 81, it is stated (in relation to *Wyatt*) in relation to the effect of this case on Irish jurisprudence:-

> *"If this approach is followed in this jurisdiction, it opens up the possibility of the courts looking behind a whole range of trust declarations, with a view to examining the settlors motives in such cases."*

Statute of Frauds

32. Section 4 Statute of Frauds (Ireland) 1695, provides as follows:-

> *"All declarations are creations of any trusts or confidences of any lands tenements, or hereditaments, shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of non-effect."*

Section 2 Statute of Frauds (Ireland) 1695, provides as follows:-

> *"No action shall be brought…whereby…to charge any person upon any agreement made under consideration of marriage, or upon any contract of sale of lands, tenements or hereditaments or any interest in or concerning them…unless the agreement upon which such actions shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised."*

33. *Feltham* [1987] Conv. 246 has explained that the law of equity does not allow the Statute of Frauds itself to be used as an instrument or "engine" of fraud.

> *"Again one must distinguish between cases where A has led C reasonably to assume that she is to have a beneficial interesting Blackacre and C has acted in a way in which she could not reasonably be expected to act unless she was to have an interest. In such a case C is not a mere volunteer.*
>
> *But if the contest is between A who has changed his mind and C who is a mere volunteer, it is not clear why equity should interfere in favour of C when A has neglected to satisfy the requirement of form necessary to perfect his bounty. Indeed, intervention appears to defeat the policy stated behind the mandatory requirements of form.*
>
> *Such requirements have been analysed to have (a) a ritual or cautionary function, requiring a donee to pause and give due consideration to the transfer, (b) a protective function, safeguarding against undue influence and impositions, (c) an evidentiary function, providing reliable evidence of the creation of the trust as a guard against false claims, a guide to the location of beneficial ownership which constitutes a link in the chain of beneficial entitlement and the source of knowledge of the details of the trust, and (d) a channelling function, standardising transactions in an effective way."*

34. An example of the application of the Statute of Frauds arises in the case *Rudkin v. Dolman* (1876) 35 L.T. 791, where A conveyed a number of freeholds to B., as he anticipated heavy company liabilities. The purchase deed stipulated certain consideration but B paid no money. A received the rents until he died (intestate). B executed a formal trust declaration that the purchase money was C's money (C being A's wife) and that B's name was only used in trust for C. Notwithstanding this, a later contest between C's devisees and A's heir was resolved in favour of the latter; it was held that the land had always remained A's during his life, the money was his and there was no declaration of trust. The Statute of Frauds had not been satisfied and there was a resulting trust in favour of A.

Decision Re Trusts

35. The "1988 settlement deed" does not, in my opinion, create a trust. This is because no steps were taken to vest the trust property in the trustees, the applicant and the respondent. There is no suggestion that although the applicant had legal title to TF and B, that by reason of his holding such title constituted him a trustee under the 1988 deed. I accept the authority of *Milroy* and *Lord* in relation to this proposition. While Ms. Clissmann argued that *Paragani* would lead the court to adopt the position whereby it would assist in perfecting the 1988 trustee arrangements, I am of the view that *Paragani* may be distinguished on its facts from the present case insofar as :-

> 1. There was an existing trust foundation well known to all concerned.
>
> 2. There were minutes of meetings relating to the intention of the donor in relation to shares.
>
> 3. There was evidence of the donors frequent conversations in relation to his intentions to benefit the trust foundation concerned.
>
> 4. The charitable record and intentions of the donor in *Paragani* were well known throughout the world.
>
> 5. None of these aspects were present in the history of the dealings of the applicant and the respondent in relation to the estate – quite the contrary – there were no trust accounts, there were no minutes of any meetings, no evidence was called from any quarter in relation to the witness who allegedly signed the deed or the solicitor (McC) who allegedly prepared it and the TF and B had at all times been dealt with by the parties as if it were their own assets by working same, spending the profits, borrowing massively, using same as a security even to the point of financing the capital provision for the wife after the judgment of O'Higgins J.

36. I am satisfied that the intention of the applicant at all times was to keep the "1988 settlement deed" "in the drawer" to use same as a smoke screen against any claim from Lloyds or other creditors. The respondent wife may not have been so involved thoroughly in

this scheme, but nevertheless by her actions and acquiescence in the various negotiations that were going on, and by her ambition, evidenced in the judgment of O'Higgins J. of having at the end of the day an arrangement in mind whereby the applicant and herself would be joint tenants of the properties concerned, are indicative of the lack of any real intention on her part to constitute a trust although she would be glad to take the benefit of any arrangement whereby the assets of the family could be protected against creditors.

37. Whereas Ms. Clissmann argued very forcibly that the applicant (husband) could not claim the benefit of his potentially illegal ruse to use the 1988 settlement deed as a protection from creditors without admitting the entitlement of the person beneficially entitled under the terms of the deed by reason of the reasoning of Costello J. in *Parkes v. Parkes*, and while I am also satisfied that the decision in *Wyatt* (not referred to in the submissions) would not radically alter the applicability of *Parkes v. Parkes* thinking of this case, the illegality of the acts and illegal motivation for the vesting of the property in the beneficiaries in *Parkes* and *Wyatt* were matters which related to a vested interest. In the *Parkes* case Costello J. was not prepared to allow a divesting by reason of the fact that the person causing the vesting did so illegally. This proposition is entirely different from any applicable principles in this case as in relation to the "1988 settlement deed" there is, in fact, no vesting unless the court (with the aid of *Paragani* type principles and going against the authority of *Milroy* and *Lord* and the judgment of O'Donovan J.), were to assist and complete the vesting. If that were the outcome, then the court would have assisted the illegal purpose or at least bad faith of the husband to put the family properties outside the reach of creditors such as Lloyds. Under no circumstances could the court use any principles of equity to achieve such an illegal subterfuge. Accordingly, I hold that the "1988 deed" has no effect. While the beneficiary KC, in the "1988 settlement deed" appeared in court as a notice party in relation to the issue and was represented by solicitors, he indicated to the court that he did not wish to participate in the proceedings. KC did not further participate in the proceedings but during the course of the submissions in this case, the court was informed by Mr. Durcan, counsel for the applicant, that KC had written to his solicitors claiming that he had now decided to claim a vested interest under the 1988 settlement deed as he had now reached twenty one. The claim by the respondent and any claim by KC, the notice party, is accordingly dismissed in relation to the 1988 settlement deed.

The 1987 Marriage Settlement
38. While the evidence in relation to the 1987 marriage settlement was confusing (to say the very least), the basic description of it is that it was executed sometime after the marriage, sometime in 1990. Thereafter, the respondent saw part of it and was aware that the trustees thereof were the husband applicant in this case, and Mr. LR. She relied for a description of the beneficiaries on her own evidence and of the evidence in the Lloyds discovery containing indications by the husband that the children of the family were to benefit. These scraps of evidence, even if they are to be cleansed of evidential conflicts, are not sufficient to give the certainty of content and purpose for a marriage settlement. Neither do they satisfy the requirements of the Statute of Frauds to have a note or memorandum sufficient to evidence same, in particular in relation to the appointment of the alleged trustees, the applicant and Mr. LR as was submitted on behalf of the applicant by Mr. Durcan. There is no question of the Statute of Frauds being used an engine of fraud in this instance, as there is no part performance evidence relating to the 1987 marriage settlement, as exemplified by the quote from *Feltram*, nor is there a surrounding context of action and reaction to its existence along the lines of *Paragani*. Accordingly, I dismiss the applicant's claim in relation to the 1987 marriage settlement and I note that whereas the other children were joined as notice parties, they withdrew their claims under this heading having been separately advised, and in the case of the youngest child who is under 18, her withdrawal was approved by Clarke J. independently of this Court.

Influence of Judgment of O'Higgins J.
39. In his submissions Mr. Durcan drew the attention of the court to the recent decision of the Supreme Court in relation to *G. v. G.* regarding the weight to be placed by the court in divorce proceedings on a prior agreement of a documentary nature between the parties. He argued that the force of the *G. v. G.* decision should equally apply to a fully considered and well reasoned written decision of the High Court such as that of O'Higgins J. in the judicial separation proceedings between the parties.

40. Mr. Durcan submitted that it was clear from the terms of the judgments of O'Higgins J. and the very terms of the order made by him that the provision being made by him was not merely of a short term nature pending a divorce application but rather was intended to constitute a long term arrangement. I fully agree that this is so. Further, in his written submissions and repeated in his oral submissions, he argued that it would be arbitrary and unfair if the principles set out in *G. v. G.* are applied in divorce cases where there had been a prior separation agreement or order for judicial separation by agreement, but not in divorce cases where there is an order for judicial separation following a contested hearing. He asserted very forcibly that such a state of the law would prove a positive disincentive for litigants to settle judicial separation proceedings lest they prejudice their position in divorce proceedings. He said that such a result could never have been intended by the Supreme Court and the judgment of Denham C.J., should not be construed as to bring this about unless there is no alternative.

41. He then went on to examine in detail the format and wording of the judgment in *G. v. G.* It was asserted that there were significant indications in the language used by the Chief Justice in *G. v. G.* to the effect that, a prior judgment in judicial separation proceedings made by the court such as that exemplified by the judgment of O'Higgins J. would be as binding as a prior written agreement as found to be in the *G. v. G.* case.

42. I consider that unless the parties have acted on foot of a court judgment by way of agreement rather than compulsion, the court judgment (as made operative by part or whole performance by happy and willing participants) should not be given the influential force overall, such as was attributed by the Supreme Court to an agreement documented by the parties especially of long duration. While Mr. Durcan's arguments are forceful, it must be remembered that to concede their validity would give rise to a rash of appeals of separation orders to "preserve the situation". It was a particular development of the G. decision that weight was to be given by an agreement of long duration, as the older agreements were in many cases found by the courts to have been flawed, as being underwritten by pre 1995-1996 legislation or by falling into desuetude and not representing any reality for the parties. Clearly, what the Supreme Court had in mind were agreements made between the parties which were acted upon and which constituted the driving force of their lives in active and binding way up to the date of the divorce. The position is otherwise in relation to a court judgment if the parties have never accepted same and regard it as something which has been forced upon them. Ms. Clissmann referred to a very valuable analysis in a judgment by Birmingham J., *MB v. VB* in relation to such a situation. I follow same for the purpose of obtaining a guide in relation to the binding effect of the judgment of O'Higgins J. in relation to this case on the basis of *G. v. G.* principles. In the case of *MB v. VB*, (Unreported, 19th October, 2007), Birmingham J. was dealing with a case where the parties had married in 1968 and had children, but none of which were still dependent. In matrimonial proceedings between the parties in 1988 the wife was granted maintenance for herself and the then dependent children. A declaration was made that each spouse ws entitled to a 50% beneficial interest in the family home and adjoining mews. The husband submitted that the court should have regard to the provisions of the 1988 Order by analogy in which the court would have regard to a separation agreement pursuant to s. 20(3) of the 1996 Act. Birmingham J. took the view that the analogy sought to be made with a separation agreement and the need to have regard to same was "*far from a perfect one*". He said:-

> "The relevance of a separation agreement is that it gives an indication of what appears to have been a shared

understanding as to what the appropriate arrangements would consist of at a particular time. As O'Neill J. has pointed out in *MK v. JK (otherwise SK) (No.2) (Divorce, Ample Resources)* [2003] 1 I.R. 326, the significance of a separation agreement may depend on when it ws entered into, in that a very recent agreement might provide *prima facie* evidence of what was regarded by both sides as constituting proper provision. On the other hand, the relevance of an agreement which has been entered into in the distant past would be much less. It seems to me that there is a significant divergence between a Court Order, even a Court Order that was not appealed by either side as is the case here, and a separation agreement. In the case of a Court Order, either or both parties may regard the Order as entirely inappropriate and may have been dissuaded from appealing only by the costs that they would have been likely to incur."

43. That is not to say that any judgment of a court, even if not agreed to by the parties, does not have some relevance to subsequent divorce proceedings. It must be realised that such a judgment although falling short of binding effect in the *G. v. G.* sense, does constitute a very significant subset of the vast if not infinitesimal matrix of facts and dynamics of a particular case. I point out the practical influence and relevance of such a non-agreed decision as follows:-

1. The hearing itself and the decision of the court in the judgment may provide a template of evidence against which the test of the credibility of the rival witnesses in the divorce proceedings may be made.

2. The performance and dependability under compulsion of court order of the parties in relation to payment of maintenance and handling capital allocation can be used as a test by which the quality of stewardship may be assessed – and this has been identified in *G. v. G.* as being of major significance and is certainly of major significance in this case.

3. Any contempt or abuse of process by either party may be combined with other circumstances of the case arising in the divorce proceedings to entirely disqualify a party from defending their case or otherwise being appropriately dealt with so as to enable the court to exercise its implied power to control its procedure and ensure that its orders and procedures would be respected.

4. Providing a framework "cloud" within the matrix of facts and dynamics confronting the parties and the court to assist the debate and discussion on practical structures available to solve the conflict between the parties in much the same way as the modern open offers (while hardly ever fully accepted by courts dealing with them) which may provide enormous assistance to the courts in identifying possible parameters of decision making, and to prevent the divorce court from straying too far from the proper focus of the proceedings by an unguided adventure into the vast matrix which, (though justified by principle), could serve the interests of neither party.

44. Considering the influence of the previous judgment in such a way identified by the foregoing points, does not and would involve any statutory intervention in the same manner as the *G. v. G.* principles. I acknowledge the submissions of Ms. Clissmann carefully set out in relation to the fact that the respondent made her career as a home maker and mother for four children with intensive schooling and university activities and involvement in the businesses of B., and that it was clear that the financial resources of the parties would permit a clean break as there were sufficient capital and assets to allow for same, and that the case ought to be distinguished from *G. v. G.* in this respect. However, if the court were free to convert the life long enormous maintenance payments made by the order of O'Higgins J. into the capital lump sum payment, there is no doubt that there could be a clean break in a manner quite consistent with *G. v. G.* and it would not be necessary to distinguish this case by reason of the stellar behaviour of the respondent in relation to the children and her responsibilities as a mother. However, as will be seen later in this judgment this outcome (of a clean break by reason of ample resources) is not now possible, notwithstanding that I hold that in this case the respondent in particular never agreed with the judgment of O'Higgins J. in relation to the allocation of capital assets or occupation of the family home.

Equitable Execution Order

45. The order appointing Brendan Moriarty solicitor as receiver by way of equitable execution by order of the High Court dated 16th November, 2011, notes that Bank of Ireland Mortgage Bank obtained a judgment against the respondent on the 20th July, 2011, for the sum of €2,769,831.51 together with €309.63 for costs, and that the judgment remains entirely unsatisfied with the exception of a single payment of €130,000.00 received from …Insurance and that Brendan Moriarty be receiver by way of equitable execution in respect of the amount owing on foot of the said judgment.

46. The order proceeds as follows:-

"2. The Solicitors for the defendant be directed to relist the within application before the court upon notice to the plaintiff's solicitors within seven days of the making of any order in the defendant's family law proceedings for the purpose of the court determining what, if any, order should be made in the application in relation to any financial or other award for the benefit of the defendant in her family law proceedings.

3. (The applicant husband) in the divorce proceedings) as notice party be bound by the order referred to at paragraph 1 above and be restrained from making any payment or transfer to the receiver OR TO ANY OTHER PERSON (my emphasis) consequent upon any order made in the defendant's family law proceedings pending the relisting of the matter as provided in paragraph 2 hereof and further order of liberty to apply and the court doth reserve the question of costs."

47. The making of this order raises and brings into focus certain strategic issues in relation to the extent to which the applicant husband in this case should be ordered not only to make provision for his dependent wife, but also to pay the bank under this order and also other creditors the sums which the wife owes by reason of her bad stewardship. Ms. Clissmann in oral submissions in a desultory way suggested that the husband was liable for the debt as necessaries for which the wife could pledge his credit, and pointed out that the practice of the court when making provision to deal with the debts of the parties by subtracting them from the total assets and then distributing the net assets appropriately – the end result being that the debts would be cleared. I have looked at the treatment of the liability of the husband in law for the pledging of his credit for necessaries by his wife, both in the publication of the Family Law Practitioner "*Maintenance, Taxation and Taxation of Family Proceedings*" (Round Hall & Geoffrey Shannon) (2001) and to Shatter's "*Family Law*" (4th Ed.) dealing with the subject from which the following principles emerge.

1. A husband is liable for credit pledged by his wife while living with him, where that credit is for necessaries for the wife and the household.

2. Where the husband is legally separated and the wife is living apart from him, the principle of pledging of credit for

necessaries does not apply except in special circumstances as instanced below.

3. Where a husband initiates proceedings for divorce or separation in circumstances where the wife has no or insufficient assets, the defence of the proceedings in these circumstances may be regarded as necessaries for the husband although the wife may not be living with the husband having been separated.

48. This principle has been recognised in the English courts for some time and demonstrated by the practice of having interim awards for costs made in respect of impecunious spouses. I have seen the jurisdiction invoked once and then only sparingly in respect of the costs of a wife to have her Irish solicitor travel to a distant location to brief her foreign solicitors at the initial stages of a foreign divorce where the Irish court had dealt with judicial separation proceedings involving the wife and her husband, which were overtaken by what might be roughly described as a race to jurisdiction involving the Irish and foreign courts. By the time the High Court made this order it recognised in my ex-tempore judgment that the practice of interim cost orders had been restricted severely in the English courts by reason of the fact that the same were overused or even abused. However, it is of considerable relevance to the order of Peart J. that I am now holding in relation to the fees owing to the wife's solicitors in respect of these divorce proceedings and the judicial separation proceedings that they were and are supplied on foot of the wife's pledging credit for such necessaries by the husband to such solicitors.

Dilemma

49. The question arises: does the court in this case leave open the possibility to pay the wife enough to pay off the bank and other creditors including the Revenue Commissioners so that the order of Peart J. will not have any impact on her situation on the basis that the court may, in considering overall provision, allow a reduction in other provision by reason of the significant liability of the husband to pay for bank debts of the wife, which by no stretch of the imagination could be regarded as necessaries for which his credit might ever have been pledged? Mr. Durcan submitted that on the basis of the principles arising in the *XY v. YX* case dealing with provision to be made out of the assets of an insolvent "NAMA bound husband" would apply in such a case. I disagree. The *XY v. YZ* may be distinguished by the two following features:-

1. In *XY v. YZ* the creditors, bankers and ultimately NAMA were not pressing or likely to be pressing to the extent that immediate judgments or foreclosures were likely as long as the insolvent husband could "parry them" by suitable "plans" to manage and liquidate the assets so as to bring about an orderly disposal and liquidation of same, which perhaps on an optimistic view could save some of them.

2. In *XY v. YZ* the insolvent person was effectively the provider, whereas in the instant case the insolvent person is the claimant (wife).

50. I consider that since the normal practice of the court making provision would have the effect of clearing the dependent spouse's debts, it is the appropriate course to take in most cases and the court must consider doing same in this case. To do otherwise by making provision so that the creditors, like the bank, seeking the benefit of the order of Peart J. would be denied their entitlement which they earned during the normal course of their business by the artificial creation by the court of some ingenious scheme in the face of ample assets on the part of the husband, would, in my view, be contrary to public policy insofar as it would place the courts in a bad light in the public mind and undermine banking confidence. However, just because this course represents the common and traditional approach of the courts as exemplified by the courts ensuring that overspending of credit cards in luxury departments stores is rectified for the dependent spouse, it does not mean that there should be principles set out limiting the practice in appropriate cases. This is a case where I consider the unfortunate outcomes arising by reason of the profligacy of not only the wife but the husband, coupled with the disastrous fall in property value since the Lehman Brothers collapse in 2008 and the sluggish trading environment have conspired to create a situation, where, if the court were to take the traditional approach of making provision, which effectively would enable the wife to pay off all her creditors and have some provision for herself over and above, could demand such capital allocations out of the assets now wholly owned by the husband. There would be a disorderly liquidation in a hostile market, which could diminish the assets so much, and disrupt the business, that in the end of the process, the assets of neither party left after discharge of creditors could sustain them.

51. A moral dilemma is posed as to what is the appropriate course to take in order for both parties to survive financially. The only authority which I have obtained to assist in this dilemma is the judgment of this Court in *K. v. K.* [2008] IEHC 341 (Abbott J.), dealing with variation of an order of McGuinness J., when she was judge of the Circuit Court. During the course of the execution of that judgment it was decided that the family home would not be sold and assets divided between wife and husband where the husband had been guilty of lack of stewardship insofar as he remained on social welfare in circumstances where he could have developed his career, and where if the court were to compel execution of the order as made by McGuinness J. or effect a distribution of the assets, it would effectively leave the wife (who had been a very good steward of such family assets in her control) in a position where she would fall into the social welfare net and especially the public housing net so that neither party would be sustaining. It was held that it would neither be in the public interest or in the interest of the family at large that the husband would fritter such a provision as to leave the wife without a home.

At para. 15 of the judgment it is stated:-

"The "proper provision" to be made for the separating parties pursuant to s. 16 of the 1995 Act as amended, is to be informed by the test of justice as required by s. 16(5) of the Act of 1995. Hence, I conclude that the test as to whether a change, or changes, in circumstances ought to ground a strategic application going outside the limited circumstances envisaged by s. 18 should be that, ("other things" being equal) if they were of such fundamental nature that it would be unfair and unjust to ignore such change or changes. The "other things" to be considered before this necessary condition for a further strategic order to be made after a separation order may be made sufficient, must, I conclude, be guided by the statutory framework set out in the provisions of s. 16(1) and (2), with the final overriding test of fairness and justice contained in subsection 5."

The income of the parties is taken up in their own survival.

"The standard of living enjoyed by the parties, now or at any relevant time, is not high, but they survive. By reason of the fact that I do not consider that any possible allocation of resources will put the respondent/appellant in a position where he can purchase housing for himself, there is a risk, having regard to the track record of the respondent/appellant, that any lump sum over and above that to which he is already entitled, under order of the court, might well be frittered away in a short time without any lasting benefit."

52. I have taken the view that *K. v. K.* applies to this case in the light of the unfortunate events caused by the parties and imposed

upon them by the recession. I accept the solution proposed by Mr. Durcan that the provision to be made by the court for the wife should be for necessaries such as the house now being rented in England for her by the husband, and for other necessities of life to be paid for by the husband in the first instance. The assessment of this Court of such necessities may be examined by the court dealing with the further execution of the order of the High Court (Peart J.) appointing the receiver by way of equitable jurisdiction, as it is not my intention to accept or take over the administration of the order of the High Court (Peart J.) and deal with the issues of necessity in the provision. To do so would necessitate joining the Bank of Ireland as a party to argue such issues and, to argue such issues as the bank in these circumstances have no standing or interest to be joined as such party in divorce proceedings. In line with the distinction between this case and the *XY v. ZY* case, the court has found it appropriate and expedient to join creditors of asset holders who are liable to have them taken by the court for provision of dependent spouses in divorce proceedings where there was a likelihood that decisions reflecting the approach taken in the *XY v. YZ* case as in certain other cases before the court.

53. In this context, it is notable that during the hearing of this case, an adjournment was afforded to the parties to see if any compromise of the indebtedness of the wife to the Bank of Ireland could be obtained, and also whether other creditors might compromise so that the Court would have the scope to make such provision to facilitate such compromise and also make a provision which would not condemn the wife to en existence of being pursued by creditors, by receivers or, worse again, by bankruptcy. I had in mind (without the consent of the husband) to investigate whether the sale of some of the non-essential assets of the husband's enterprise such as T.F. and outside residential property could be disposed of to ensure payment of such a reduced compromised sum and costs. No such compromise emerged, and it is of singular importance to bankers and creditors in the future to take the opportunity to positively negotiate sensible compromises with hopelessly insolvent spouses in circumstances where there is a risk (as in this case) that the Court, in making provision under the 1996 Act and the Constitution, must resolve the dilemma posed by seeking to ensure the financial survival of the family to such an extent that it may support both spouses with provision under the Constitution at a level which, at least, takes them out of the Social Welfare net.

Conduct amounting to contempt and abuse of process by husband

54. I accept Ms. Clissmann's submissions that the following conduct of the husband amounted to contempt/abuse of process during the course of the proceedings:

> (i) Concealing existence of the 1998 Settlement Deed and the fact that it was sent to Lloyds, (as the Lloyds discovery shows) and as the husband admitted in the divorce proceedings when the husband was giving evidence in the judicial separation.
>
> (ii) Unilaterally reducing maintenance for the wife without permission of the Court.
>
> (iii) When defending application of the wife for committal for non-adherence to the court order, the husband concealed and understated his income as was demonstrated by the figures subsequently produced.
>
> (iv) The husband also misrepresented the situation in relation to B.H. tax claw back when giving evidence in the judicial separation proceedings.
>
> (v) He also indicated that he would not be able to take up residence in B.H. until 2009, which, in a less serious way, was a misrepresentation of what actually occurred. He misled the Court of O'Higgins J. in the course of judicial separation proceedings in respect of the marriage 1998 Settlement Deed insofar as he said that the same was not submitted to Lloyds.
>
> (vi) He reduced K.C.'s and C.C.'s maintenance during their gap years. He refused to pay €628,938.00 certified as being the tax costs since 23rd November, 2009 in circumstances where he could have, through proper monthly budgeting or profiling of expenditure, accumulated that sum within the budget of the business being conducted by him without undue detriment to other inputs into the business.

55. Ms. Clissmann, in her submissions, referred to Halsbury's' *Laws of England'*, 3rd Ed. (Lord Simons, Vol. 8, p. 22) which deals with contempt court in divorce litigation as follows:

> "Non-compliance with orders of the divorce court for payment of costs and alimony is still contempt of court and the court may refuse to permit a party in contempt to take a further part in the litigation".

She referred to *Leavis v. Leavis* [1921] p. 299, where it was held by Hill J. that the enforcement of orders in a divorce is regarded by the court as important to the administration of justice because a wife should have the costs of litigation provided for and not left destitute, and he held that it was a matter for the discretion of the court as to whether the provider should be heard by the court at all in that event. She also referred to a number of English cases in her written submissions. However, this Court has already dealt with the issue as to whether the court may refuse to hear a defaulting provider who has committed contempt or abused the process of court by misleading the court in the cases of *U. v. U.* (Unreported, Abbott J, 2nd June, 2011) [2004 No. 63M] and similarly subject to final approval in *L.E. v. U.F.* a judgment delivered on 15th April, 2011 (Abbott J.). In *U.v.U.,* the court dismissed *in limine* an application by the respondent provider for variation of an order granting a decree of divorce on 11th June, 2007. In paras. 12 and 13 of that judgment as follows:

> "12. Having set out the reasons for the decision to dismiss her husband's application to call Mr. Grant *in limine*, the question remains in relation to what course the disputes between the former husband and wife in this case will take. Ms. Coughlan has suggested that the way is now cleared for her to proceed to apply to have the husband committed for contempt, but she is also, and possibly more practically, interested in having assets identified and sold which can satisfy her monetary claims arising from a divorce decree as in the case (for example) of an unencumbered property in Spain, and similarly, unencumbered property at S.
>
> 13. However, the position is not as simple as that. Even where the court makes a decision such as has been made on 22nd July, 2010 in this case (dismissing *in limine*), the constitutional and statutory imperative on the court to make proper provision for parties in the case of a divorce continues to knock on the door of the court to allow the defaulting party to come into court on better terms more acceptable to the court which will ensure that the litigation misconduct will not occur again. The question arises - what are the practicalities in this case arising from such a principle. During the course of submissions and discussions, Ms. Coughlan suggested that unless the husband radically changed his approach to litigation, she could proceed to have him committed or his property sold without further ado. To avoid this outcome and regain the protection of the constitutional and statutory imperative to the court to make proper provision, not only for the wife but for the husband, the husband in this case must make some

tectonic gesture and assurance to the court in relation to his future conduct, backed up by a programme of action to allow the court to open the door again to the prospect of a variation."

56. In the case of *L.E. v. U.F.* referred to above, the response of the court to the same type of application in relation to an application for variation was to allow the application for variation by reason of the steps, including the engagement of a new legal team and the supply of some information on condition that unless further information was obtained, the application to dismiss *in limine* which had been stayed pending the production of further information, would succeed.

57. Having regard to the foregoing, I conclude that the court is coercively bound to protect the administration of justice in this and other cases and to take some steps against the applicant husband. I am satisfied that the most practical reaction to the situation may be met by an order that the husband pay into a joint account of his solicitors and the respondent's solicitors the costs taxed and owing (and in respect of which an order under the Solicitors Ireland Act has been obtained) and that such monies shall be paid out on the basis that they are monies owed by the husband to the respondent's solicitors directly on the basis that the said costs arose by reason of the implied pledge of the husband's credit for such necessaries, and that similarly, pending agreement what taxation of the level of same that the costs of these proceedings estimated provisionally at €1m to include VAT should be paid into a similar account on the same basis, and that the order for divorce in these proceedings would not issue or be granted until the said sums have been paid as directed. However, in this regard, I exclude the costs of the *ex parte* application for the Lloyds discovery as costs in the proceedings and by reason of the unnecessary delay by the respondent wife in her report of the case and in particular during the course of her evidence by reducing the same by two days of the hearing.

Consideration of Provision pursuant to S. 20(2) of the 1996 Act

Husband's Assets and Liabilities
58. According to Mr. Browne's assets and liabilities report the assets are as follows:-

B, C and S: € 8,750,000.00

BH and lands € 4,300,000.00

B commercial & residential € 227,000.00

Miscellaneous fishing etc € 50,000.00

Forestry € 1,500,000.00

Total €16,827,000.00

TF €2,900,000.00

The total value of these assets amounts to €19,720,000. In addition, there is 13c N Road, valued at €225,000.00. Taking into account the husband's AIB loan of €7,314,498.00 and realisation costs and capital gains costs, the net value according to Mr. Browne of these assets, having taken into account all dates, was €11,351,885.00.

59. Mr. LW, the wife's accountant, at p. 452 of his report and having regard to the valuation and evidence of Mr. Shelly, has put a figure on the valuation of the property assets of the husband of €29,284,000.00. Mr. LW shows the net value of the husband's total assets, including his companies, business and pension's life policies to be €24,161,096.00. The current estimate of the money owing by the wife to the Bank of Ireland Mortgage Bank is €2,640,141.14. She also has debt to the Revenue which could be in the region of €700,000.00 with penalties and accrued interest. She also has bank debts including a Mastercard debt of €161,000 or thereabouts. Her costs including her costs in the judicial separation proceedings are in round terms €1,500,000.00. Her total indebtedness is thus a figure which may well approach €5,000,000.00. According to Mr. Browne's calculation the husband's income before maintenance and family costs is estimated to be €192,677.00. Mr. LW's projected figures showed that the husband would have a profit for the year of 2010 after directors remuneration and taxation and available to pay down debt of €1,526,043.00. In relation to the capital sums I prefer the valuation method employed by the husband's valuer who applied indexation having regard to the recession to the values carefully considered by O'Higgins J. in the judicial separation judgment, and I find that the evidence of Mr. Shelly did not have convincing comparables, and did not have regard to standard professional valuation methods used on behalf of the husband but took an intuitive approach. The only exception I would apply to the rejection of Mr. Shelly's evidence is that in the event of the property being sold as a business on the world market, there might be an additional capital value to be added to the property in the event of a special purchaser coming along who might put a brand or trophy value on the property and be in a position to operate synergies between the business of the purchaser and the web internet potential of the business to project the brand. This is only speculative and added as a proviso to be taken into consideration to at least allow a disposal of the property to be addressed to that sort of market to see if there is any reality to it. The disposal income figures of Mr. Browne I consider are somewhat too low, but are on the side of the calculations indicating where the husband has a capacity to pay his own and wife's income having regard to the fact that certain expenses and consultants income and expense may be reduced as a cost to the business and on the basis that I have considered and discussed with the parties during the course of the hearing, that the income from BH might be intensified to allow more summer opening time than at present to put available a sum of €25,000.00.

60. In determining the style of provision for the wife in this case the court has been decisively influenced in the first instance by opting away from the high valuation of the husband's assets of €29,280,000.00 proposed on behalf of the wife to the lesser figure of approximately €11,000,000.00 proposed on behalf of the husband insofar as the €29,000,000.00 would allow the court to take the standard approach and direct disposal of assets to cover the wife's debt and leave at the same time very substantial assets to provide for continuing maintenance or a capital payment in lieu thereof without totally destroying the income generation capacity of the husband. Taking the lower figure of €11,000,000.00 it is found that in order to cover the wife's debts and liabilities of up to €5,000,000.00 it will be impossible to realise enough assets such as PF which are non-essential to the business which would cover same, and in any event, with the very poor margin of error there is no confidence in the court that even current valuations of Mr. Browne and saleability could be realised.

61. That conclusion leaves the court in the position where it must notwithstanding the bad stewardship and churning of the assets of the wife against the very sound advice of Mr. LW, decide that the wife is to be provided for by way of the payment for housing and utilities by the husband. Having regard to the fact that the rent of the house in England is in the region of €36,000.00 per year, this is the necessary value of that item. Other necessities should not be over €50,000.00 and accordingly, I direct that the husband discharge and furnish pocket money to the wife in respect of a further €50,000.00 per annum in addition to paying the rent of the

house.

62. The maintenance to the children should continue as before, as they should not be visited by the lack of stewardship of the wife or the misfortunes the family have suffered economically with the recession. The husband should pay the costs and the wife's maintenance if for life and counsel are requested to address the court in relation to the protection of the wife's claims against the estate of the husband. On this outcome the husband's income is almost completely taken up by the provision for wife and children, albeit to a great extent on a "necessaries basis", await better times and tide himself over with disposal of smaller properties the proceeds of which the bank or any assignee in bankruptcy of the wife has no entitlement as he is entirely beneficially entitled to same. In the event of the husband not providing the provision as outlined in this judgment, then as an incentive to him to do so within six months of this judgment, the entire assets of the husband are to be sold and out of same the wife's liabilities are to be paid and thereafter the balance of the proceeds after discharge of husband's debts are to be paid equally between the husband and the wife on the basis that the wife continue to be responsible for the children until they are fully educated or 23 years of age, and a pension adjustment order be made in respect of the husband's pensions as to 40% hereof to the wife and 60% to the husband.