

**THE HIGH COURT
FAMILY LAW**

[2001 No. 108 M]

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

BETWEEN**G.B.****APPLICANT****AND
A.B.****RESPONDENT****AND****[2006 No. 8 M]**

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

BETWEEN**A.B.****APPLICANT****AND
G.B.****RESPONDENT**

Judgment of Mr. Justice Abbott delivered on the 15th day of March, 2007.

1. The applicant G.B. in the first proceedings (the wife) initiated judicial separation proceedings against A.B. (the husband) by way of special summons for judicial separation dated the 3rd August, 2001. They were married on the 11th August, 1973 in Ireland. The husband initiated divorce proceedings by way of special summons dated the 7th February, 2006. Both sets of proceedings were heard as a divorce action before this court.

2. The court is satisfied on the evidence that at the dates on which the proceedings under each code were initiated the husband and wife were domiciled and resident in Ireland, that for a period of four out of the five years preceding the divorce proceedings there did not exist between the husband and the wife a normal marital relationship and that there is no possibility of a reconciliation between them. The outstanding issue taking up the greatest part of the hearing was that relating to the proper provision for the parties within the meaning and for the purposes of the Family Law (Divorce) Act, 1996 in the event of the marriage of the parties being dissolved by way of decree of divorce.

History of the Marriage

3. At the date of the marriage the husband was an engineer in the P.T. company and the wife was a clerk/typist in the I.S. company. There were three children of the marriage A. who was born in November, 1974, J. who was born in May, 1978 and A.M. who was born in July, 1983. After the birth of A. in 1974, the wife worked only occasionally and was in receipt of disability benefit by reason of ill health with its origin in her childhood which recurred and presented difficulty associated with pregnancy. In the mid 1970s the husband was approached by the M. company and took up employment within it and was permitted to go to university to obtain further qualifications. The wife claimed that during this period the family income decreased and she went back to work for the M. company in the home, and later in the M. company premises by way of an assistant to the husband. The wife's employment with the M. company in this fashion ceased on the birth of her daughter J. in 1978. The M. company and the husband's employment with it prospered enabling the couple to move houses a number of times and ultimately to D.L. in or about 1989. At this time the husband was promoted by the M. company to its international management and this necessitated the relocation of the family in England. The costs of the relocation were borne generously by the M. company and arrangements were made for the education of the children in England. Accommodation in England, while of a high standard, did not greatly please the wife, as she missed her family in Ireland. She qualified as a florist and worked in a flower shop in England on a part-time basis. At this time the husband spent considerable amounts of time travelling abroad on business. In or about 1991 the husband purchased the Irish branch of the M. company and the family moved back to D.L. in Ireland which had been difficult to sell and had been retained while the family were in England. The husband's employment with the M. company ceased upon the purchase by him of their Irish branch and the wife opened a flower shop and subsequently found employment in a flower shop in Ireland after she had closed her own shop having found it too much of a strain for her. The husband founded a group of companies (which shall be referred to as the S.C. group) for the purpose of developing the former business of the M. company. The S.C. group prospered significantly and the husband remained as the principal shareholder and chief executive/main driving force behind it and remains so up to the present time. Of significance for the family history is the fact that the S.C. group and the husband became involved in a consortium formed for the purpose of bidding for a government concession (hereinafter referred to as the first concession) sometime in the mid 1990s. To participate in the consortium the husband and the S.C. group had to raise borrowings for capital to back the consortium and the wife came to understand that this money was borrowed on the security of the family home. The bid of the consortium was not successful and the wife became worried that the family would lose the family home by reason of the indebtedness. In or about November, 1995 the wife suffered a major stroke which she says was induced by stress but concedes that medical opinion was never able to pinpoint the cause of the stroke. However, during the course of the proceedings and hearing of the action the husband appears to concede that the stroke was caused by the stress occasioned by the worry about the family home being threatened by the indebtedness created by the failed consortium bid. In fact the wife in evidence conceded that the family home was removed as security prior to her stroke but says that she had not been told about this. After her stroke the wife was wheelchair bound and was hospitalised for various periods including a lengthy period dealing with her recovery in England. In or about 1997 the husband and wife bought a substantial premises (which shall be referred to as the S. house) which was modified to be a multiple dwelling catering for the individual needs of the husband and wife and their children with a swimming pool attached. The family moved into the S. house in about 1999, and, after that move, unhappy differences developed between the husband and wife.

4. In or about March, 2000 the husband departed from the S. house and has not returned to the family home since then. The S. house provided extensive accommodation which unfortunately did not suit the wife in her disabled state and the parties purchased a more suitable premises at C.G. for the wife and at G.R.S. for the husband. The parties now live apart in these two homes and intend to do so, the husband having formed a relationship with a new partner with whom he recently had a child. The S. house was ultimately sold and the three children of the marriage each have their own accommodation. One has a business which was provided with the financial assistance of the husband with the contributions of the wife being at a much lesser level and relating only to furnishing. The wife is maintained by the husband with a monthly payment together with payments in discharge of various outgoings

and the discharge of credit card bills. The wife in evidence says that she is not happy with the arrangements which she acknowledges to be appropriate in financial terms by reason of the fact that they are not established on a predictable basis, and often are dependant upon her making demand for payments to the husband's staff. The husband resides with his partner and their young child and the wife resides on her own although, one of her children lives nearby and she is visited by her three children on a regular basis most often at weekends.

The Health of the Parties

5. While the wife has recovered sufficiently from her illness so as not to be wheelchair bound, she has not fully regained the use of both legs and one of her arms is powerless. She walks with the aid of a walking stick and while she can do certain household chores, she needs the services of a home help for four days a week. Her chief worry is that she may fall and be unable to get up. In that instance she would need assistance and while she has been trained to deal with these situations she has experienced the difficulty of not being able to get up for a number of hours without assistance. In this regard she is fortunate that one of her daughters lives close by and she has a panic button to deal with such situations. The parties have bought a bungalow at C.G. which has been altered to the physical needs of the wife. She drives a car which is fitted with alterations on the steering wheel to facilitate automatic gear change and indicators. She clearly cannot obtain employment but she nevertheless endeavours to assist one of her daughters in her business especially at Christmas time, although she finds it tiring. She has a property in Portugal but cannot travel there unless she finds a companion, not for the purpose of being a constant help, but to cater for such emergencies as are frequently possible due to her physical condition. She had an underlying heart condition in childhood which gave rise to persistent difficulty during her pregnancies but this does not now seem to be a factor in the light of her now steady lifestyle. Neither is there any evidence of a likely disposition to further strokes. The most likely deterioration of her health arises from the possibility of a fall causing further injury either by impact or by inability to get up.

6. In summary her present position is that she can lead an independent life with home help and back up emergency support.

7. The health of the husband is excellent. He gave evidence that he takes exercise, observes dietary and lifestyle options conducive to health, and submits to regular medical monitoring. He obviously has a studied attitude towards optimising his health. He says that he intends to target retirement at 65. My conclusion is that he is likely to have good health for as long as it takes to realise the value out of his companies and that he will be able to face the inevitable strain which that brings.

History and present corporate structure of husband's business

8. In addition to acquiring the business of company M on his ceasing employment, the husband was later in a position to acquire some of the assets of his former employer company P. As a result, he developed two related businesses one of which became a manufacturing and research company, which, although never profitable, established valuable technology which had a significant disposal of value. In addition to those two streams of business he developed a successful and fast moving retail business in a newly emerging product (hereinafter referred to as the "first retail business"). Prior to the parties separating, the first retail business was sold for a very substantial sum in millions. The husband then set up an overseas trust. This trust in turn held 75% of the shares in BH Ltd with 25% of the shares being held by a trust of a partner with whom the husband set up his business on his cessation of employment with company M. BH company in turn holds an 80% share in a further company SC G and 77.6% share in a further company ST. The SCM company owns an 100% share in two further companies SWC (which carries on the successor of the initial business set up after the departure of the husband from the employment of the M company and FT and 100% of FT Ltd). After the separation of the parties in 2000 the research company was sold for a substantial sum in millions as also was a minority shareholding in a media company. The proceeds of sale of these companies and share were channelled, via the husband's discretionary trust, into the companies variously described to fund expansion and to provide for debt. Crucially, a substantial part of this revenue has been held in reserve to back a further application by the husband in a consortium of expert firms for a substantial government contract in a nature of a public private partnership with a amortisation life of 10 years on the basis of normal return on capital and labour. At date of hearing the concession had not been awarded but the court has since been informed by the parties that the consortium have been provisionally awarded the concession subject to a six months probationary period been satisfactory. This further development makes it more likely that the concession will in fact be awarded to the consortium. It also makes it more likely that the group as a whole will survive and prosper and a development which will better enable the husband to make provision for the wife in the short to medium term.

9. Apart from the above related companies the husband has a 50% share in a free standing company which is a new retail company dealing in further advanced equipment. While in equity structure terms this retail company (the second retail company) is effectively free standing, it is related to the husband's groups of companies by reason of the fact that it is not profit making at its early stages of development and is significantly funded by loans which the husband described in evidence as quasi equity from the husband's group of companies. All companies are controlled by the husband within the constraints of being sensitive to the needs of significant dependable and trusted minority investment and business partners. The success of the consortium bid for the government PPP depends on the husband retaining his share in the project without sale or dilution.

10. A number of salient features emerge from an examination of the company holdings and business interests of the husband as follows:

1. Notwithstanding the investment of considerable funds from the company's sale described above the entire group is valueless from the point of view of a present sale by reason of the indebtedness of the group and the complicated inter company relationships woven by indebtedness.
2. As regards the group of companies outside the second retail company the prospects for same are good in the event of the group been associated with the successful PPP, not only by reason of the administrative input of the group and the husband into the business of the consortium and whatever normal profits may accrue over the ten year life of the consortium project to the group, but also, by reason of important spin off effects on other parts of the group resulting from the fact that they are preferred suppliers of specialist equipment to the PPP in the event of its success in obtaining the PPP. In the absence of the gaining of the PPP by the consortium the prospects for the group outside the second retail company are much poorer with the likelihood being that retrenchment and rationalisation involving job cuts are likely and drastic action may be needed to shore up the capacity of the group to underwrite the lending to the fast growing second retail group.
3. In the event of the government decision not being obtained by the consortium, the only likely source of capital generation within the group would be the sale – letting of commercial property on the site of the old P. company, and then only after planning permission has been obtained in accordance with current zoning status.
4. Notwithstanding the value and competency of the various investment partners, the continued management and

leadership involvement of the husband in the group and the second retail company is essential for the success of the company of the group, and the second retail company, at least in the medium term until they are established and out of their development illiquid phase.

6. It is most desirable to the point of being a condition sine qua non to the provision to be made by the Court that the ownership of the group share structure either directly or indirectly by way of trust arrangement would not be changed. It was suggested by counsel for the wife that the reluctance of the court to interfere with the Group structure indicated during the hearing to depart from this tentative view could be met by a change in the ownership higher up the corporate structure at the level of the husband's trust. This suggestion was not worked out in detail as to its effects, and I am strongly of the view that such a change of ownership should not occur. I form this view because I believe that the husband to be a trustworthy witness in that regard for the following reasons in order of weight.

(a) On being questioned regarding the spin-off effect of the government concession, if obtained, on the company which wholesales equipment within the group, the husband agreed that that effect would be very significant in terms of covering of overheads and profitability for a company which of late has suffered a deterioration in profits and apparently struggles to keep one of its long-standing and main customers. This dynamic aspect of the onset of the PPP concession business was not a matter which was dealt with on the "balance sheet" type forensic examination of both accountants in the case, which indicated that the effect of the PPP itself would be to create nothing more than a normal profit and amortisation of capital costs over a period of ten years.

(b) The husband was otherwise a truthful witness.

(c) The wife in her evidence said that she trusted her husband to provide for her and that he was an honest man.

(d) The husband has provided well for the wife in quantitative terms of income and accommodation since their separation even if the wife in her evidence took issue with the qualitative provision.

(e) Throughout the period of the growth of the corporate structure referred to in these proceedings as the husband's group, and the second retail company, the husband has taken in minority shareholders in his various companies. The relationships between the husband and these minorities shareholders partners and fellow employees has remained stable and trusting throughout times both liquid and illiquid, fortunate and unfortunate, over the years. In my opinion such stability would not be possible unless the husband was a man of his word, when he seems at all times to have had effective control of the companies and businesses within the group. Of the companies in the husband's ownership, the second retail company is least likely to be adversely affected in its business by a change of ownership of the husband's shares especially if that change of ownership (to whatever extent determined by the Court) is cloaked from prying eyes by a suitable trust arrangement to last at least into the medium term and up to a possible realisation of the value of the second retail company.

7. Without minimising in the least the wife's contribution the family assets by her work in the home and her special support within the group in its earlier stages and support for her husband at all stages together with her positive financial contributions from her own earnings to the family pool of assets, I consider that the husband is now indispensable to the success of the group and the second retail company, but I am satisfied that the husband's life is his work (at least until he retires at age 65), and that he is likely to continue to devote his talents and genius to the his business notwithstanding the significant provision being made in this case for the parties.

8. On a best case scenario, the group, apart from the second retail company, is not likely to have significant surplus profits accumulated until five or seven years. The second retail company is likely to show a profit on the husband's evidence certainly within two years. On the basis of the indebtedness of this company to the tune of a number of millions, it is fair to say that when substantial profits begin to flow, the company will rapidly acquire a sale value – especially having regard to the manner in which the first retail company was sold. The second retail company with its particular innovative and creative service linked with more diversified and integrated advanced technology, may be attractive to purchasers when profitable. It remains to be seen whether its sale value matches or surpasses the sale value of the first retail company. However, it is fair to say that the Court should endeavour to set a target at which ample resources may be generated for the wife against a backdrop of greater success and accommodation by the husband in the rest of the group. This approach is at best intuitive and represents the aim for equality of division tempered by the trade offs and exigencies of the case. The uncertainty and lack of definition of this approach can be strengthened by a wait and see policy over the medium term so that financial outcomes may give reality to it.

The Open Offers

11. The parties have made open offers by letter prior to proceedings which are set out below.

12. The purpose of such open offers prior to the hearing of separation and divorce proceedings as encouraged by the courts are as follows:

(a) To provide certainty and save the costs of a hearing as well as to enable some leverage to be obtained with regard to arguing costs in the event of a protracted hearing not improving on the terms of the offer to a significant extent.

(b) Such letters are an important guide to the Court in relation to the points of departure from which the issues at the hearing may be examined without leaving the court at large to pick from a vast number of issues and combination of issues from which it is to work out a solution having regard to the multifactorial influences of legislation and the Constitution.

(c) Even if the Court does not act on foot of the letters of offer or only acts on some of the elements contained therein, they give the parties proffering same an opportunity to defend their view in relation to how provision might be made and to have these views tested. The open letters are in many instances helpful and more meaningful secondary pleadings in the case.

13. However, notwithstanding the good reasons for such open letters of offer, the Court must be wary of accepting an element or elements in an open offer without first considering the importance of these elements within the whole structure and symmetry of the offer, and it should be on its guard against accepting without further evidence and consideration any element or elements of the letter of offer. To do otherwise would be to discourage the growing and very helpful practice of parties proffering these letters of offer prior to proceedings.

14. The open letter on behalf of the husband is dated the 16th June, 2006 and is as follows:-

"Dear Sirs,

We refer to the above matter and the upcoming hearing which is due to take place in the High Court on the 26th of June next.

The purpose of this open letter is to reconfirm our client's present financial position and to set out his proposals with a view to resolving all matters at issue between the parties.

Please note that we intend to produce this letter to the High Court at the commencement of the hearing of the action.

We firstly refer to our client's latest Statement of Affairs which deals with all assets, debts, income, outgoings etc. as at the 30th of September 2005. The said Statement of Affairs is incorporated in the Affidavit of Means sworn by our client on the 17th of October 2005. We are attaching for your attention an abbreviated Statement of Assets and Liabilities as at 31st of May 2006. As you can see our client's overall financial position has not altered significantly since the 30th of September 2005.

As you are aware, since Mr and Mrs B.'s marriage ended, the family home has been sold. Our client purchased a property for and on behalf of your client by agreement in which she now resides. This property is located at (C) (G).

Our client also purchased a property for his own use in which he now resides and which said property is located at (G) (S). The approximate valuations of both of these properties are roughly similar.

As you are also aware our client continues to assist the three children financially although they are no longer legally dependent and is quite happy to do so. The family trust has made cash gifts to each of the three children enabling them to purchase their first homes. Additionally our client continues to support each of the children through monthly allowances and he has also supported the business conducted by two of the children through loans and guarantees.

The family trust also made a gift to your client of €300,000 enabling her to purchase a property in Portugal. Our client also has a one third interest in a property in Portugal and while the valuation of this interest is less than the valuation of the property in Portugal which is owned outright by your client, our client proposes that, for the purposes of the settlement offer only, the properties in Portugal be treated as being of equal value.

It is clear that the properties as set out in the Statement of Affairs form, at this point, practically all of the assets held directly by our client.

You are fully aware of our client's business interests and in particular his interest in SG Limited and subsidiary (S) (W)ireless (C) Limited and (F) (M) (P) (D) Limited),(S) (T) Limited and (the second retail company). Presently these Companies are not trading particularly successfully but do pay our client's salary which enables him to make the maintenance payments to your client. Our client is not in a position to control the realisation through disposal etc. of any of the Companies given that, in first instance, the shares are held ultimately by his family trust (in the case of (S) (C) (G) and (S) (T) Limited) and secondly in all cases there are other significant shareholders who, in each case, hold at least 40% of the equity.

Finally in relation to our client's business interests it is important to bear in mind that, as a consequence of the poor financial performance of the businesses, the Bankers to the businesses have insisted that our client in conjunction with other shareholders, jointly and severally personally guarantee the Bank borrowings of the businesses. At this point in time our client is potentially exposed to up to €4.75 million in respect of these personal guarantees.

Your client's Forensic Accountant will, we are sure, provide Mrs. B. with a realistic assessment of the risk that these businesses might result in a significant personal liability for Mr. B. with consequent impact on his capacity to provide for Mrs. B. in the future.

Please also note that as is clear from the Affidavit of Means, our client's current gross annual salary amounts to €283,500. Our client's annual salary is determined by the Directors of the (S) (C) with annual increments being paid which are broadly in line with inflation.

The financial performance of the Companies businesses have been such that, over the last number of years, our client has not received any bonuses or additional emoluments from the Companies. Please also note that our client has ceased to receive Directors fees from H M and at this point his net income comprises solely of salary from the S G of €13,045 approx. per month (net of tax etc.) and rental income from the interest in a small UK commercial property of €400 approx. per month (net of interest payments and tax).

In summary, the overall financial position which must be borne in mind in the context of framing a settlement arrangement is as follows:-

Our respective clients both own their respective principal private residences which are free from debt;

Both our clients have interests in properties in Portugal which again are free of debt and which our client proposes be treated as having similar values;

Our client, at this point, has very little in the way of assets which he can readily realise so as to fund a cash settlement payment to your client. Our client has onerous personal guarantees to the Bankers of his business

interests and therefore has limited ability to raise personal Bank borrowings;

Our client has stable but relatively fixed in amount employment and other income available to him. To the extent our client uses his available income to make maintenance payments to your client it reduces the income he has available to him to service Bank borrowings (drawn down to finance a cash settlement payment);

Our client has other ongoing personal financial commitments of which you are aware;

Our client continues to develop his existing business interests through forging new alliances etc. Our client is hopeful that over the next few years he and his fellow shareholders in the various Companies will be able to position some of the businesses so that they can be sold. It is important to note that at this point there are no arrangements or proposals in place which could lead to the disposal of any of the businesses.

In view of the above comments we now wish to set out our client's proposals with a view to resolving all matters at issue between the parties in as fair and equitable a manner as possible with a view to ensuring the future security of the B. family.

These proposals are as follows:

- 1. Mrs. B. to retain full ownership of the property in which she resides and the property in Portugal.*
- 2. Mr. B to retain full ownership of the property in which he resides at (G) (S) together with one third interest in his property in Portugal. Mr. B will also retain ownership of his part interest in the property at K, Co. W together with his part interest in the property investment in the UK.*
- 3. Mr. B to pay to Mrs. B the sum of €108,000 gross by way of maintenance per annum together with all premia necessary to maintain Mr. B VHI cover at the present rate. This maintenance payment will continue until varied by agreement or by the Court or on the retirement of Mr. B. Mr. B will also discharge the cost of Mrs. B's car insurance and car tax and will also bear the cost of changing Mrs. B's car every three years for a model of similar value. The annual maintenance payment will increase in line with inflation each year.*
- 4. Mr. B, out of personal Bank borrowings which he will arrange, will make a lump sum payment totalling €2 million to Mrs. B to be paid in the amounts and on the dates following, namely:*
 - (a) €750,000 on the 1st of October 2006;*
 - (b) €250,000 on the 31st of December 2007;*
 - (c) €250,000 on the 31st of December 2008;*
 - (d) €250,000 on the 31st of December 2009;*
 - (e) €500,000 on the 31st of December 2010.*

Please note that included in the first payment at (a) above is a contribution towards your client's legal costs and expenses.

- 5. Mrs. B to acknowledge and agree that the above settlement terms represent proper provision for her in the context of a Decree of Divorce and are in full and final settlement of all matters at issue between the parties.*
- 6. Both Mr. and Mrs. B to renounce their inheritance rights to the others Estate and agree to mutual Section 18(10) Orders.*
- 7. Mrs. B to specifically renounce any right or claim she might have to any other assets held by Mr. B in which he has an involvement or in which he has a legal or beneficial interest as set out in his Affidavit of Means.*
- 8. Mr. B to specifically renounce any right or claim he might have to any other assets held by Mrs. B in which she has an involvement or in which she has a legal or beneficial interest as set out in her Affidavit of Means.*

Yours faithfully"

15. The open offer of the wife was dated the 21st June, 2006 and there is a counter offer to the husband's offer as follows:-

"Dear Sirs,

We write in response and further to your letter of the 16th of June 2006 setting out your client's proposals for the making of proper provision herein.

We note that the aforesaid letter was an open letter setting out both your client's proposals, and the present financial position contended for by him.

In respect of the "present financial position", we do not accept for the purposes of the offer made by you the parity of property values advanced, and accordingly, our counter proposal set out hereafter takes our view of the divergence into account.

Further, your client's "present financial position" contains a significant anomaly as correctly identified by you at the fourth paragraph on page 2 of your letter. It is clear, and the de facto position is, that your client considers his interests in the (S) (G) Companies, although nominally held by his family trust, to be his personal business interests to deal with

as he sees fit.

In that light, and in the context of the two significant disposals made previously (namely the P to P business, and (S) (W) (T) Limited) and the proceeds received in respect of same, the lump sum payments proposed by your client by way of a full and final divorce settlement do not amount to proper provision and fall far short of what would be considered objectively fair.

Accordingly, we respond to your open proposal, in the manner adopted in your letter at page 4, as follows:

1. Agreed.

2. Agreed.

3. Maintenance herein should be in the sum of €125,000.00 gross per annum, and to be adjusted annually in accordance with the CPI. Maintenance must also be secured with a suitable life policy, or other alternative security.

4. Instead of lump sum payments amounting to €2m, our client seeks lump sum provision of €5m, payable in the following instalments;

(a) €1,000,000.00 on the 1st of October 2006

(b) 4 x €1m payable on the 30th June 2007, 2008, 2009 & 2010.

Suitable security must be put in place for the protection of our client in respect of these payments

The first payment set out above would be inclusive of a contribution to our client's legal costs and expenses.

Or, in the alternative

In lieu of the foregoing lump sum provision, and in consideration of the likely value to be obtained, our client seeks 50% of the 75% shareholding in BMS as well as half of your client's 50% interest in the 2nd retail company..

In this context, our client's costs herein must be discharged by your client at the present time, such costs to be taxed in default of agreement.

For the avoidance of doubt, our client accepts that your client's existing business control of these shareholdings would continue heretofore save that her beneficial interest therein would be acknowledged, and that our client would participate equally with your client in respect of any proceeds of sale.

5. Agreed.

6. Agreed save that the Order pursuant to Section 18 (10) shall be subject to the lump sum payments set out above and/or the share option in the alternative.

7. Agreed.

8. Agreed.

In the event that your client accedes to one or other of the options set out at paragraph 4 above, our client will not seek pension adjustment orders in respect of your client's pension, but reserves the right to do so, if the provision to be made for our client falls below that suggested herein.

We trust the foregoing assists, and look forward to hearing from you.

Yours faithfully"

16. In exhibit B proffered by the husband there is contained an abbreviated statement of assets and liabilities as of 30th September, 2006. This statement of assets and liabilities is set out below with the addition of the pension of value €780,000 with appropriately altered totals on the husband's side.

The Income and Assets of the parties

Abbreviated Statement of Assets and Liabilities as at 30 September 2006				
	TB		GB	
Assets	€'000	€'000	€'000	€'000
Properties (value less estimated disposal costs and tax)				
Private home	2,565		2375	
Portugal House (AJB part share)	251		285	
W Holiday Home (AJB part share)	233		0	
Investment Property (AJB part share)	80	3,129	0	2,660
Furniture In Private Homes, etc	160		100	

Motor Vehicles 2005	100		46.5	
Business Loans 2nd Retail Co (loan balance €950,000)	0		0	
Advanced Bar (loan balance €304,278)	0		0	
Store (loan balance €326,731)	0		0	
Investments Savings Products/equities	101		63.7	
Other Interest in a racehorse		60		0
Pension	780		0	
Total Assets		4330		2870.2
Liabilities				
Bank Loan re 2nd Retail Co	(250)		0	
Bank Loan (consolidation of overdraft)	(300)		0	
Bank current account overdraft	(160)		0	
Bank loan re investment property		(45)		0
Car finance loan		(35)		0
Credit card debts		(12)		0
Total Liabilities	(802)		0	
Net Assets		3528		2870.2

17. I note that in the course of the hearing it was argued in evidence by Mr. Peelo and canvassed in cross examination by the wife's counsel that the three items totalling roughly €1.2 million under the category of business loans advanced do not contain any matching asset value for the husband. While strictly speaking these items should be included in an asset value of the husband, the fact is that the loan of €950,000 to the second retail company at this stage looks to be illiquid for some time. The food store and wine bar licences are even more illiquid as third parties are operating the premises concerned who have their own informal expectations (legitimate or otherwise) that these loans will not be called in by Mr. B. Subject to this qualification, the net assets of the husband are €3,528,000 and the net assets of the wife are €2,870,200. This represents a balance in region of €650,000 of excess assets on the part of the husband and goes away from the initial suggestion of the husband's counsel to the wife in cross examination that there bricks and mortar assets outside the company structure were on a par more or less. However it remains the case that a large proportion of the husband's assets consisting of the family private home value €2,565,000 is pledged as security for various borrowings by the group and also the husband is liable on person guarantees for further extensive borrowings. The wife's share of the assets of €2,870,200 on the other hand is liability free. To that extent the husband's assets are less liquid than the assets of the wife.

18. Apart from the income of €4,000 per annum from the investment bond purchased by the wife, the wife has no income other than that provided by the husband. The husband's income has varied from time to time and at one stage was described in this open letter of offer. It has been the wife's case that this income has been augmented by money available from the reasonably regular disposal of assets within the group, and, Mr. Peelo in his evidence has asserted that the salary of the husband is not commensurate with the salaries of chief executives of similarly sized Irish companies with comparable levels of turnover, investment, and employment. I accept that the husband's income is a matter which in the end of the day may be determined within limitations by himself and in any event would be sufficient to discharge any maintenance which the court may award to the wife in this case. However, I would be cautious in assuming that the husband could write a salary for himself to fund immediate staged lump sum payments much greater than those envisaged in his open offer by reason of the fact that regard must be had to the fact that the group is not going through its most profitable stage and in most instances the company units involved are making losses and increasing borrowings and the husband has to account for other minority but important investment and management partners in the various businesses. I have endeavoured to ease the cash flow burden of one of the staged payments in line in the husband's open letter by substitution of the pension fund.

19. The terms of the open offers are such that both parties are interested in achieving a clean break in the case. I am of the view that having regard to the large element of the wife's dependency and the illiquid state of the assets, with no gilt edged certainty in relation to the ability of the husband to raise the staged payments envisaged in the first instance and the business uncertainty which faces the group and the retail company in the next two to five years, it is not possible to view the case as an ample resources case, and hence a clean break as envisaged by the Supreme Court in the case *T. v. T.* (or in more qualified and extended circumstances in the decision of the judgment of this court in *C(J) v. C(M)*) is not possible. However, if the husband's group and business prosper as he envisages, then it is likely that the businesses will progressively become more liquid, profitable, and saleable thus creating the potential for resources to be released to both parties on a more liquid and secure basis so as to ensure the possibility of an ample allocation of resources between the parties bearing in mind the yardstick of equality posed in the judgment of Mr. Justice Keane in the decision in *T. v. T.* in the Supreme Court. However, the Court must also bear in mind that to date, it has to consider that there is a trade off between liquidity and security for a highly dependent wife, on the one hand, and the assumption of risk and illiquidity with the incentive of greater long term cash returns on the part of the husband. This trade off is not the same as the allocation of liquid and illiquid assets in the judgment of Barron J. in *P. v. P. (Financial Relief: Liquid Assets)* 2005 1 FLR nor is it consistent with the judgment of Coldridge J. in the Family Division in *C. v. C. (Variation of Post Nuptial Settlement: Company Shares)* 2003 EWHC 122 (Fam)). The difference of approach is dictated, in my view, by the considerable weight that has to be given in this case to the fact that no risk should be taken by the court in making provision for the wife up to the level of her basic needs by reason of the fact that there is no guarantee that she could fend for herself or make provision for herself in terms of such basic needs in the future.

20. While I am of the view that currently the case is not one of ample resources and hence a clean break solution cannot be ensured by court order in the short term, there is a likelihood that in the medium term (as in five years or so) the assets of the husband could transform in terms of liquidity profitability and saleability that the case could easily become an ample resources case. I base this view on the past record on several disposals of companies, which were in many respects similar to the existing business resulting in the release of resources which even at the present time could be considered ample if not affected by any prior debt. I am also comforted by the fact that Mr. Peelo gave an intuitive view of like effect. The question arises as to what approach the court should take to this real possibility or "likelihood" of complex assets becoming ample in the medium term. If the court took the line of least resistance in its determination it could conclude that a strict balance sheet approach should be taken and to make the allocation on the basis of achievable present resources by way of provision and to leave the parties to their own resources to seek whatever adjustment is necessary in an application to the court under their entitlement to have the order of the court varied by reason of new circumstances under the 1996 Act. Another course would be to take the approach of Mrs. Justice Denham which she applied in the judicial

separation context in the case of *D. v. D.* in 1991 when she adjourned the issue of the parties seeking further relief within the present litigation in the event of the business assets of the provider improving. This latter approach would in my view be preferable to the first insofar as it would enable the court to preserve as many reliefs as possible for the parties without the restrictions of the review provisions of the 1996 Act. However, both approaches carry with them the considerable disadvantage in that they open up the possibility of a second full scale law suit with associated expensive forensic trawls and hearings. A third approach (and one which I propose to take in this case) is to provide in the order of this court a means by which the assets which may be released on the prospering of the business in the medium term on the basis of a reasonably simple calculation to be made between the parties or at worst on the basis of a court application of the most summary nature based on the determination of the value of parameters clearly set out. In taking this course I bear in mind the authorities opened in the written submissions presented on behalf of the wife particularly *Wells v. Wells* (2002) 2 FLR 97 and the decision of this court in *McM. v. McM.* (Unreported, Abbott J. 29th November, 2006). In this context I not only bear in mind the trade off between the provision of gilt edged cash provisions for a highly dependent wife and the assumption of risk-laden assets by the husband in the general terms of this process, but also, the effect that the assets of the group (apart from the second retail company) are likely to be ring fenced by reason of the pre-requisites and requirements of the consortiums possible participation in the PPP which will be the driving force of the group and the ability of same to fund an increased salary for the husband which will have the indirect effect of funding the periodical payments (maintenance of the wife and her medium term lump sum payments). Counsel for the husband submitted strongly to me that in the case of potentially large assets, which may emerge in this case on an optimistic view of the development of the husband's business, the yardstick of equality should not be used as a criterion for division, but rather the court should consider that the term "provision" used in the context of the 1996 Act and the Constitution should be considered in terms of the needs of the dependant spouse. I consider that I am precluded by the authority of *T. v. T.* from taking this needs based approach. However, the ultimate outcome of the case may be such that notwithstanding a generous and ample allocation of provision to the wife on a successful outcome in the medium term, the assets of the group may well greatly exceed the assets in the second retail company which will be earmarked by the provision made by the court for the wife. However, this imbalance is unpredictable. I consider that if the immediate to medium term needs of the wife are catered for in the provision to be made by the court on the authority of *T. v. T.* equality should be considered as a yardstick. The requirement that the contribution of the wife in a way which is different from that of the husband should be treated with the equality of esteem that is required in the *T. v. T.* case that the wife should have the possibility of enjoying the success of bearing the risks of the company at least to some feasible degree having regard to the need to ring fence certain risks and operations of the group associated with the husband.

21. In accordance with the recommendation of Denham J. in the *T. v. T.* case I now apply the provisions of s. 20(2) of the Divorce Act 1996 in respect of paragraph letter seriatim as follows:-

(a) The income earning capacity of the wife is extremely limited and that of the husband is sufficient to meet her day to day needs and the provision of some other financial resources. Although the value of the wife's assets amounts to €2,870,200, the bulk of this consists of her private home and house in Portugal, both of which are very necessary and appropriate to her needs and hence cannot be regarded as income earning resources. The location of the wife's dwelling house is particularly appropriate as she is near her daughter as described, and not too far away from the other daughters who are a great help and comfort to her. Even if the wife were to downsize or change her house to release some income earning assets she would be faced with the cost of adaptations to cater for her disability in any new property and such an exercise would be costly and inhibit the usual benefit of downsizing. However there may be a potential for increasing the paper value of the wife's dwelling house by an appropriate planning permission and bye-law approval, even if it is not envisaged in the package of provision that same would be realised.

(b) The financial needs as already discussed of the parties involved the keeping of house for the wife herself and for the husband with his very young dependant child. A sum in excess of €100,000 gross is certainly necessary to sustain these expenses and in addition the husband's income would have to be increased to carry in gross terms a further cost of servicing loans to provide for short term and medium term lump sum instalments as envisaged.

(c) I am of the view that the parties will be in a position to continue and to enjoy the standard of living enjoyed by the family before the proceedings were issued, and before the spouses commenced to live apart from one another insofar as it is possible. I bear in mind that the wife complained that she will no longer be able to participate with the husband in what may be generally described as corporate events, which of themselves cannot be replaced in qualitative terms, and which have not been priced into the provision calculations. Such qualitative loss of enjoyment of life must be balanced with the possibility that each of the parties have sufficient provision to develop not the same style and standard of living but a new and different one appropriate to the circumstances.

(d) The parties are each in their 50s, their marriage has been a long one and they have lived together for a length of time which on the scale of things is a long one. The age of the spouses alone does not deter them from earning their living - the deterrence against the wife earning her living in employment or in any active business arises from her physical disability and her loss of contact with employment and business over the years while rearing the family and supporting her husband. I have elsewhere dealt with the outstanding abilities of the husband to earn a living and add to the value of his business. I have already dealt with the health of the parties. Neither of them have a mental disability and I intend to take care so that the provisions made by this court are fair and just but nevertheless are not de-motivating to either of them so as to challenge their physical or mental health.

(e) I have described in detail the contributions of each of the spouses to the family in the different ways. A lesser contribution from the wife limited only to the caring of the children in the home and the home support of the husband would be, having regard to the length of the marriage and the time spent together by the parties to it, sufficient to entitle the wife to have her provision measured against the overall yardstick of parity.

(f) In addition to the matters already discussed in this judgment under this subparagraph heading it is important to emphasis (as the court raised during the hearing) that the wife made a contribution not in the usual terms discussed, but also by way of opportunity - cost to her through her forbearance, on the disposal of the technology company and the first retail company and other disposals from making any application under s. 35 by way disposition of these proceeds or the reinvesting of same. The forbearance of the wife in this way, should in my opinion, be rewarded by some participation in any hoped for windfall or bonanza arising on the liquidation of the business of the husband subject to the ring fencing and trade off considerations already discussed. The special contribution of the wife in making the family home available as security for borrowings of the business at a critical stage which was associated with her stroke is a further contribution over and above the normal spouse to which I have given added weight.

(g) The wife had to cease work on the birth of her children and lost contact with the business. It is likely, having regard

to the fact that she occupied the position of clerk typist and assistant to the husband that she could have grown on the business had she not the added responsibility of running the home and rearing the children, she also had the responsibility of retaining employment outside the home to support the husband while he obtained his degree and the disruption of her life through moving abroad to support his career and bring her children to that new situation has meant that the wife's future earning capacity has been diminished. But I consider that capacity has not been diminished not to the level of maintenance she has enjoyed from her husband or likely to enjoy from her husband. Without her physical disability and without her family commitments I would expect her to earn something in the region of one third of the present gross value of her maintenance.

(h) Neither spouse seems to be entitled to any social welfare pension insofar as the husband is not entitled to same as a Director of a company making no contributions in respect of contributory old age pension and the disability benefit of the wife which she once enjoyed seems to have long run out. It may well be that the wife might be able to salvage some contributory old age pension with the aid of credits but I think that this is so problematical (and has not been addressed in the hearing) that I will ignore same.

(i) The conduct of the spouses in the sense of paragraph I is not a feature in the case.

(j) The accommodation needs of the spouses are well described in the discussion in this judgment and especially in the case of the wife constitute a constraint on the release of asset value for income purposes. The husband's accommodation is appropriate to his status in the business world and to his role of a father of a very young child.

(k) I intend to make a pension adjustment order to give the pension to the wife on the basis that the likelihood is that the favourable tax provisions for the accumulation of a pension by the husband are likely to remain long enough for the husband to build up a further pension sum. In addition if the business proceeds to successful outcome, the capital available to the husband may be sufficient to obviate the necessity for a pension fund at all.

22. At all times, I have taken into consideration the rights of the very young child of the husband and the husband's obligation to maintain and nurture same with the assistance of his partner and mother of that child.

Provisions

1. I direct that gross maintenance in the sum of €120,000 annually be paid by the husband to the wife. The first payment to be paid within one calendar month of the date of this judgment and such further monthly payments thereof to be paid on the same date of each excessive month and that the husband provide the wife every two years commencing from this date with a motor car of similar capacity and value to that which is now provided for her, the first such motor to be provided within two years of this date on the basis that the wife applies for a grant under the scheme providing for assistance for disabled drivers and that the husband procures or makes the payment of the VHI and car insurance premium for the wife on a continuing basis. Potential gross maintenance shall be reviewed annually in accordance with the CPI.

2. Lump sum instalment payments as follows:

- a) €750,000.00 payable on the 1st May, 2007.
- b) €250,000.00 payable on the 31st December, 2008.
- c) €250,000.00 payable on the 31st December, 2009.
- d) €500,000.00 payable on the 31st December, 2010.

3. A pension adjustment order shall be made securing the immediate transfer of the total value of the husband's pension funds to the wife.

4. Succession rights of the parties are to be barred in accordance with the usual procedures.

5. Rights of the parties under the Family Home Protection Act shall be declared not to exist and orders for the usual formalities to ensure the free sale of such properties shall be made as sought by the parties. The husband shall take out a term insurance policy up to the age of 60 for a sum of not less than €500,000 to secure maintenance and other periodical provisions under this order and judgment and in the event of such insurance policy not being procured or procurable the husband shall be liable to provide such alternative security as shall be directed by the court. The periodical payments (maintenance) payable by the husband to the wife under this order and judgment shall be varied annually in accordance with the consumer price index.

6. I direct that the husband his successors and personal representatives hold 90% of his shares representing his 50% shareholding in the second retail company in trust for the wife to the intent of the wife may hold and dispose of same by deed or will (such disposal to take effect not earlier than five years from date of perfection order made consequent on this judgment) and for her own benefit as she decides, provided however that the wife shall not be entitled to call for the vesting of such shares but shall be entitled to such dividends and cash proceeds as they fall due on the basis that the husband shall be liable for funding any corporate action associated with such shares. In the event of a disposal by way of sale or other method of the at the wife's intent interest in the second retail company within five years of the date of order having the value of €5 million adjusted and varied from this date in accordance with the Consumer Price Index, the case shall be regarded as an ample resources case and the said sum or such greater sum realised by such shares held in trust by the husband shall be taken by the wife in full and final settlement of this case on the basis that such full and final settlement is provision in accordance with the Act of 1996 on the Constitution of Ireland, and on the basis that the same discharge (from the date of receipt of such sum or greater sum by the wife) of the obligation of the husband to pay the periodical payments of maintenance and other periodical benefits to the wife. The court directs that all applications in relation to the administration of the ambulatory nature of the provision in this case shall be made to the court on the terms of this order and the parties shall have generally liberty to apply.

23. The above provision is made on the basis that the first payment of €750,000 shall go towards discharge of the costs on the wife's part and that the husband shall pay his own costs subject to any modulation of this provision having regard to submissions that may be made to the court subsequent to this judgment.

24. As an insurance against optimistic predictions of the likelihood of growth of the husband's businesses not being met the court directs that the wife apply for such planning permission for an additional development which will enhance the value of her dwelling house without interfering with the amenities thereof for her own use in such terms as shall be advised and designed by a professionally qualified architect, but the court places no obligation on the wife to dispose of any site arising from such planning operation but shall hold the property with the benefit of the planning and physical service status of the site recorded and ascertained, for the purpose of preserving possible resale value of the site in the future. The court takes this somewhat patronising and cautious approach not by reason of any bad reflection on the wife's ability to deal with any resources provided for her in this judgment but because the wife herself has indicated that she is happy to do this and the court trusts that this is a soft touch approach, ensuring prudence and protection against the less favourable scenarios, which might occur in this case.

25. I find that at the date of the institution of proceedings the husband and wife have lived apart from one another for a period amounting to at least a period of four years during the previous five years and there is no reasonable prospect of reconciliation between spouses and the court has proper provision having regard to the circumstances existing for the spouses being husband and wife in this case and that there are no dependents members of this family within the meaning of the 1996 Act and accordingly I am prepared to grant a decree of divorce in respect of the marriage of the husband and wife in this case. I invite submissions of counsel in relation to the fine tuning of the formalities of the order having regard to the foregoing judgment.