Neutral Citation Number: [2008] IEHC 452

THE HIGH COURT

2005 40 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

A. M. W.

APPLICANT

AND
S. W.

RESPONDENT

Judgment delivered by Mr. Justice Abbott on the 18th day of April, 2008

1. This hearing was in respect of two motions, one on behalf of the applicant dated the 4th May, 2006, and the other on behalf of the respondent dated the 6th July, 2006, each seeking in broad terms disclosure of information relating to trusts which each party in various ways alleged should be taken into consideration in the above entitled judicial separation proceedings. There was further notice of motion on behalf of the respondent dated the 12th December, 2007, seeking an order granting liberty for the trustees of a certain trust (referred to herein as the "M. Trust") to be joined as notice parties to the within proceedings. The respondent did not proceed with that notice of motion and it may be adjourned with liberty to re-enter.

2. The Marriage

2.1 The applicant and the respondent were married to one another on the 12th March, 1988, within the jurisdiction of this Court. There were three children born to the marriage on the 30th April, 1989, 6th April, 1992 and 17th July, 1999. While the applicant was in employment prior to and in the early years of the marriage, it may be said that in recent years the applicant was the homemaker and the respondent was the provider, in terms of a rule of thumb emphasis of roles. Unhappy differences in the marriage came to a head in 2003 and it is alleged that in or about August, 2003, the respondent left the family home and returned sometime later to collect his belongings. Ultimately after this time the respondent called and took with him a significant number of boxes (hereinafter referred to as "the boxes") from the family home which may or may not be relevant to the matters at issue in this hearing.

2.2 The applicant initiated proceedings in this Court seeking judicial separation and ancillary relief pursuant to the Judicial Separation and the Family Law Act 1995 by special summons dated the 8th June, 2005.

3. Trusts on the Applicant's side.

3.1 As appears from the pleadings and the affidavits, it is alleged that the applicant's father was, and is, a very wealthy businessman who assisted the parties financially, and in the respondent's case – professionally, over the years. The respondent is a professional person and while he did not act as such for the applicant's father in relation to the setting up of a trust referred to as the M. Trust, nevertheless discussed with the applicant's father the manner of setting up this trust, and through informal conversation with the applicant's father became aware of how very substantial assets became invested in the M. Trust through an offshore company owned by the trust. There were also two trusts set up by the applicant's father referred to as No. 1 Trust and No. 2 Trust. The No. 1 and No. 2 Trusts are not very significant financially, but they are significant insofar as the applicant, in her affidavits, has been in a position to disclose very substantially the nature of these trusts and ancillary documents such as to give, at this stage, a good outline understanding of the trusts. However, the respondent complains that this forthright approach has been absent in respect of the M. Trust. From the outset of the hearing counsel on behalf of the applicant stated that a letter dated 13th December, 2007, from solicitors for the applicant's father sets out the position in relation to the M. Trust as follows:-

> "Thank you for your letter of the 5th December. I note that in July 2006 I advised [solicitor for S.W.] that my client was willing to make reasonable disclosure in respect of any trusts in which [applicant] is identified as a potential beneficiary and that offer still remains. In this regard I enclose a copy of my letter of the 6th July, 2006, to E.D. In relation to the [M.] Trust I have been advised that the entire value of the Trust Fund has been distributed to my client. For the avoidance of doubt I confirm that no provision was made for [applicant]."

3.2 Other correspondence was exhibited indicating a marked reluctance on the part of the applicant's father to furnish any further information, highlighted by the pejorative nature of one replying letter, but this attitude softened somewhat insofar as further documentation including a letter of wishes of the applicant's father in relation to the M. Trust emerged.

4. Trusts on the Respondent's side

4.1 There are two family settlements which for the purpose of this hearing I should categorise as being on the respondent's side. Firstly, the C. Settlement in respect of which counsel for the applicant has argued that as yet nothing is known about the beneficiaries thereof in terms of appointment status, save that the ultimate beneficiary will be the Red Cross of Geneva. Against that counsel for the respondent countered that a letter of wishes in respect of the C. Settlement has been disclosed in the proceedings which shows *inter alia* that the wishes of the settlor are that the beneficiaries of the settlement are to be the children of the marriage. The other trust on the respondent's side was set up by the respondent as settlor and initially was called the EMB Trust and in its current form is called the K. Trust. It is important to set out the salient features of the setting up and the development of this trust in a little more detail than the other trusts mentioned in this case, as these details formed a structure in which the issues could be decided relating to disclosure of that trust, and also in relation to the issues surrounding the other trusts in the case, (even though the details thereof might vary from trust to trust.

4.2 The EMB settlement is stated to be made on the 25th July, 1997, between the respondent (thereinafter called "The Settlor") and A.A.T.C. (Isle of Man) (thereinafter called "The Trustees") and recites as follows:

> "Whereas the Settlor wishing to make such irrevocable Settlement as is hereinafter contained has had transferred or delivered to the Trustees or otherwise placed under their control the property specified in the Second Schedule hereto".

Clause 1 (a)(i) provides as follows:

> "[T]he discretionary Objects" means all and any of the persons specified in the Fourth Schedule hereto and such other persons as are added to the class of Discretionary Objects in the exercise of the power conferred upon the Trustees by Clause 10 hereof . . .

Clause 1 (a)(v) provides:

"Excluded Persons" means the Settlor any person for the time being the spouse of the Settlor (including a spouse taken after the date hereof) and any person declared an Excluded Person pursuant to Clause 9 hereof".

4.3 Under the heading "Powers of Exclusion" in Clause 9 it is provided:-

"THE Trustees may by declaration in writing made at any time or times during the Trust period declare that the person or persons or members of a class of persons named or specified (whether or not ascertained) in such declaration who is are would or might but for this Clause be or become a Discretionary Object or Objects or be otherwise able to benefit hereunder as the case might be:-

(i) shall be wholly or partially excluded from future benefit hereunder; or

(ii) shall cease to be a Discretionary Object or Discretionary Objects, or

(iii) shall be an Excluded Person or Persons.

and any such declaration may be irrevocable or revocable during the Trust Period and shall have effect from the date specified in the said declaration provided that this power shall not be capable of being exercised so as to derogate from any interest to which any Discretionary Object has previously become indefeasibly entitled whether in possession or in reversion or otherwise."

4.4 Under the heading "Power of Addition Clause"10(a) provides:-

"THE Trustees shall have power (but subject to the proviso set out in Clause 1 (a)(i) hereof) at any time or times during the Trust Period to add to the class of Discretionary Objects such one or more persons or class of persons (not being an Excluded Person or Excluded Persons) as the Trustees shall in their absolute discretion determine".

4.5 The Fourth Schedule of the EMB Trust sets out the discretionary objects referred to in clause 1 (a)(i) above as follows:-

1. The Settlor

2. The Settlor's spouse [the applicant]

3. Any children or remoter issue (whether living or born during the trust period) of the Settlor

4. The Red Cross of Geneva.

4.6 As counsel for the applicant remarked, it is notable that there is a clear contradiction between the definition of excluded persons in clause 1 (a)(iv) above (excluding the Settlor (the respondent) and the spouse of the Settlor (the applicant)) and the Fourth Schedule of the settlement of the 25th July, 1997, which clearly specifies that they are in fact, to be discretionary objects of the settlement. In any event, this clear contradiction is removed temporarily by a Deed of Cessation As Discretionary Objects made by A.T.C. (Isle of Man) in the form of a Deed Poll invoking the power conferred upon it by Clause 9 (a)(ii) referred to above and declares that the respondent and the applicant shall, with effect from the 21st August, 2000, cease to be discretionary objects of the trust which the Deed Poll now refers to as the "K" Trust. The Deed Poll finally states that the deed itself is revocable. Counsel for the applicant remarked, when opening this Deed of Cessation, that while his client knew absolutely nothing about it, or about any reason why it was executed, he stated that he was concerned that the marriage had run into difficulties by April, 2000 and that for whatever reason the Trustees elected to make a deed of cessation four years after the settlement in circumstances where they obviously felt it necessary to, in effect, exclude the applicant and the respondent as discretionary objects.

4.7 The respondent produced a letter of wishes in relation to the EMB Trust from him to the Trustees dated the 29th July, 1997, the first two paragraphs whereof are in general terms appropriate to this type of letter and in the third paragraph it is stated:-

"The trust was established with a wide class of discretionary objects but, notwithstanding this, it would be my wish that the trust funds be used and applied primarily for the benefit of my daughters, [B.] and [E.] or their children or remoter issue and if more than one in equal shares, per stirpes on attaining the age of 25 years".

4.8 The fifth paragraph of this letter of wishes states:-

"During my lifetime, I should like you to continue to look to me for general guidance in all matters relating to the trust and thereafter to my wife [names applicant], if she survives me during her life save that following my death, no one shall be entitled to change the devolution of the trust funds as set out therein, while the same shall be subsisting and capable of taking effect. On the death of the survivor of myself and my wife, I should like you to look for guidance in our stead in all other respects to each beneficiary each in respect of his or her own share where practical."

4.9 There is another letter of wishes to the Trustees of the settlement, now referred to as the K Trust and formerly the EMB Trust, in very similar terms to the earlier letter of wishes, parts whereof have been abstracted above.

4.10 The grounding affidavits of both applicant and respondent set out their frustration with the lack of information in relation to the substantial trusts likely to be involved on either side, with the applicant highlighting the removal of the boxes by the respondent as being the watershed leading to a significant lack of information on her part, save for such documentation as was subsequently furnished by the respondent following requests by the applicant's solicitors including the applicant's forensic accountant, Mr. B., who was present at a meeting between the parties and their solicitors in 2004. The respondent pointed to the correspondence from the applicant's father's solicitors in relation to the alleged termination of the M Trust, complaining of its inadequacy.

5. The Submissions

5.1 Mr. Durcan, S.C. for the applicant, set out in general terms that a court when dealing with trusts in separation or divorce proceedings, could take either of the following broad views (hereinafter referred to as "the broad framework") in relation to the trusts:-

1. The trust was a sham, either absolutely, or to some limited degree; and the assets therein could be regarded as

beneficially the property of the settlor without further ado.

2. Having regard to the provisions of s. 16(2)(a), it would appear that the case law suggests that the assets must be treated as financial resources which a spouse has, or is likely to have in the foreseeable future, if that person has access to those assets notwithstanding the fact that they are in trust, and not withstanding that the trust may not be altered by order of the court.

3. The court may vary an anti-nuptial or post-nuptial settlement pursuant to s. 9(1)(c) of the Family Law Act 1995. It is instructive to set out the relevant part of s. 9 of the Family Law Act 1995 dealing with property adjustments orders as follows:-

> "(c) the variation for the benefit of either of the spouses and of any dependent member of the family or of any or all of those persons of any ante-nuptial or post-nuptial settlement (including such a settlement made by will or codicil) made on the spouses."

5.2 At this point Mr. Hayden, S.C. for the respondent, objected that it was inappropriate, in the absence of any trustees or the professional personnel involved in the trusts receiving the attention of Mr. Durcan, S.C. that there would be allegations in relation to sham. (This objection, while valid, was strange coming from Mr. Hayden, S.C., as his client, the respondent, in his last affidavit grounding the application to join the trustees of the M. Trust had specifically averred that that particular Trust was a sham!). However, I understand that counsel for the applicant, pointed out the three approaches a court might take as indicating the parameters of interest that a court could, and should, have, during the course of case management of matrimonial proceedings, and for the moment I take the meaning of any allegation or suggestion of "sham" as a point of departure for further analysis, rather than an outright allegation.

5.3 With reference to the removal of the applicant as a beneficiary of the K. Trust by the Deed of Cessation, counsel for the applicant, cited the judgment of Thorpe L.J., in the case *Charalambous v. Charalambous* [2004] 2 F.L.R. 1093, where at para. 44 p. 1105, he stated:-

> "…So whether the removal of the spouses from the beneficial class does or does not erase the nuptial element must, in my judgment, depend on the facts and circumstances of the individual case."

He submitted that it was not making a trawl (or a fishing expedition) to seek all of the facts and circumstances in relation to the K. Trust, as these were necessary so that the court could ultimately decide whether or not the K. Trust is still a post-nuptial settlement. He referred to various letters in regard to the K Trust written on the 4th of March, 1989, from the respondent clearly referring to "ongoing usage of funds etc to settle upon the trust for the benefit of [the applicant] and my children". He then referred to a further document of claim allegedly "found" by the applicant marked "Strictly Private and Confidential [respondent] Personal Report as at December, 1998" where the description of K. Ltd and the K. Trust was as follows "[b]oth of the above are for the benefit of [respondent] plus family and are managed by A. Ltd… the relevant bank account details of [K.] are following and… the [K.] trust is a discretionary Trust in favour of [B.] and [E.] currently it has IR£140,000 in cash on deposit at… Bank and details of the relevant account can be sourced from [J.D.]"

5.4 Counsel for the applicant urged the attention of the Court on the facts stated in a letter of the 5th day of July, 1999 from the respondent to Ms. N.S. and a copy to Ms. C.R. of A. Ltd in which the respondent issued instructions in relation to the transfer of funds from K. Ltd in respect of an investment jointly with another trust (a stranger to the parties), and with reference to the funding of what was alleged to be work on a holiday home in Kerry by the settlement of an invoice for work to the value of IR£5,500.00. This, according to counsel for the applicant, was to show to the Court the ease with which the respondent could extract money from K. Ltd. This proposition was vigorously disputed there and then by counsel for the respondent and I would prefer to look on this information as being neutral, insofar as the company K. Ltd may well be a private investment vehicle of the respondent, as well as having a connection to the K. Trust.

5.5 Another document entitled "Responsibility List Re [respondent] Taxation 1999" was opened. This is a type of check list at item No. 4, to the K. Trust, under the heading "review arrangements with A.B., Letters of Wishes" responsibility is stated to be that of the respondent. Under the heading "Review long term strategy" it is stated that responsibility lies with the respondent and Mr. R. (surmised to be a tax advisor). Under the heading "List assets" the respondent is the person responsible. Under the heading "Review beneficiaries" the respondent is the person responsible, as he is also in relation to the heading "Review account with Goodbody". Under item No. 3 similar type responsibilities arise for the respondent in relation to the C. Trust via the company D. which appears to be the company which holds the assets in England belonging to that trust. Again counsel for the applicant was in a position to surmise from summaries presented, at least, that there was a link between an entity referred to as S. Enterprises and the K. Trust and the respondent. Counsel said that while he was prepared to take the point made by the respondent in his replying affidavit that these were historical documents and must be seen in context, nevertheless, the existence of these documents shows that it is necessary for the Court to see the whole position with regard to the running of the trust concerned, and exactly who is responsible for it, and who has access to the assets in it. Counsel conceded that, at this stage of the proceedings, his application was for disclosure and discovery and not to establish just who was entitled to the assets, but for the purpose of giving some indication as to what the level of information is, which must be before the Court, so that it may carry out its duties in relation to deciding proper provision in the course of the judicial separation in this case.

5.6 Counsel for the applicant then referred the court to the judgment of the Court of Appeal in *Charman v. Charman* [2006] W.L.R. 1053. Both parties opened the judgments in this case and the case law referred to therein to support their arguments. Counsel for the applicant relies on this case to show the approach of the Court of Appeal in relation to the extent and manner in which trust assets could be dealt with or taken into consideration in financial proceedings following divorce in England. The case involved the question of whether orders for the letter of request and for the inspection appointment for documents made to the Bermudian Courts designed to illicit material about discretionary trusts established by the husband could have been made if they represented a "fishing" expedition.

5.7 Mr. Durcan referred to Practise Direction, HC 40 on family law proceedings in the High Court made by the President on the 6th day of October, 2005, paras. 4 and 5(ix). He submitted that it was incumbent on the respondent, in view of his considerable involvement in the Trust, (certainly in the early years), to:-

> "put before the court all information and documentation which he has in regard to the two trusts – so that those documents and that information can be examined and taken into account by the court to see whether any of the three methods by which a trust can be relevant to matrimonial proceedings (already referred to herein) are relevant in the

case."

He stated that the applicant was in the same position as the wife in the *Charman* appeal referred to and was reliant on the court process to get the necessary financial information. She had not been privy to what has been going on with these trusts in recent years. He noted that the respondent refers to himself at one stage in his affidavits, as a kind of quasi-protector of the trust. He stated that, as a minimum, para. 5(ix) of the Practise Direction creates the obligation on the respondent, as it would appear that the children are beneficiaries of the K. Trust, at least, and he could not see how a Matrimonial Court making provision in accordance with the legislation for wives and children could proceed in the absence of knowing what provision is already there in the trusts for the children in circumstances where all of the children were under eighteen and dependent. He referred to the judgment of Mr. Justice Bennett in the case *Thacker v. Thacker* [2007] E.W.H.C. 1378 (Fam), as to the approach of the courts towards trusts (invariably offshore) in paras. 84 and 85 thereof.

5.8 In relation to the obligation of the applicant to furnish details and disclosure in relation to the M. Trust, counsel for the applicant said that there was a great difference between a trust where the respondent is the settlor and the M. Trust where the applicant was not the settlor and where the court is now told that she is not a beneficiary and that the M. Trust has collapsed. He conceded that the M. Trust was set up after the marriage of the parties, according to the face of the trust.

5.9 In relation to the K. Trust, he submitted that what was running through the documentation and replying affidavits of the respondent was the suggestion that the applicant should contact the trustees regarding the trust and get the information from them, rather than press the respondent to give that information. He said that the trusts are outside the jurisdiction and stated that the trustees would be circumspect in relation to the manner in which they would answer questions, and that the answers would be conditioned by the questions the applicant would ask, so that it was wiser to have as much information as possible before she asked the questions of the trustees outside the jurisdiction.

6. Submissions on Behalf of the Respondent

6.1 Mr. Hayden, S.C. on behalf of the respondent submitted that the Court had to take into consideration that the respondent's affidavits show that there was a meeting on the 23rd of November, 2003, in McCann Fitzgerald Solicitors, attended by the respondent and by a forensic accountant, and that the respondent confirmed that if any more information was required the respondent would have no difficulty with the applicant raising any question or queries to the trustees, having explained the structures of the K. Trust and also C. Trust. He submitted that the situation in which the respondent found himself was much different than the husband in *Charman v. Charman* [2006] 1 W.L.R. 1053 case already cited. He said that in *Charman* case the husband was not co-operative whereas, in this case the respondent has been the opposite. He referred to the dictum of Wilson L.J., at para. 37 on p. 1066 of *Charman v. Charman*, approving the analysis of "fishing" made by Kerr L.J. in, In Re Norway's Application [1987] Q.B. 433. Counsel for the respondent referred to the judgment of Salmon L.J. in *Londonderry's Settlement, In Re* [1965] Ch. 918, where at p. 937 Salmon L.J., defined the strict boundaries to the obligation of trustees of a Discretionary Trust to furnish information and documentation as long as there was no allegation that they were not acting *bona fide*. Counsel stated that in the *Charman* case there was such an allegation, but in this case there is none. He also referred to *Murphy v. Murphy* [1999] 1 W.L.R. 282, where the right of a potential beneficiary under discretionary trusts seek orders for disclosure of identities of trustees was upheld by reason of the fact that the beneficiary of such a discretionary trust was entitled to require the trustees to provide information as to the nature and the value of the trust property, the trust income and how it had been invested and distributed, even though there was no suggestion of any wrong doing by the trustees, provided however, that that jurisdiction carried with it a broad discretion so there would be no unfair burden placed upon the trustees. As I understand them, counsel for the respondent's submissions arising from the *Londonderry* and *Murphy* cases related to the opportunities available to a beneficiary to obtain information from trustees which would enure for the benefit of the applicant in some way, and also, the limitations on the availability of such information, which, in some way, would hamper the respondent in getting further information in response to the applicant's request. His submissions based on the *Londonderry* and *Murphy* cases dovetailed into the case which he had to make in relation to the M. Trust. In particular, he submitted that the facts relating to the winding up of the trust and exclusion of the applicant as beneficiary somewhat reflected what might be alleged in relation to the M. Trust created by the respondent's father-in-law. I note from the judgment of Neuberger J. in *Murphy v. Murphy* at p. 298, that the plaintiff was not granted any relief in relation to the later settlements following what counsel for the respondent sought to characterise as the collapse of the earlier settlement.

7. Conclusions and Findings of Fact

7.1 On any view of the documentation available in relation to the K. and C. Trusts, it would seem that the children of the parties are likely to be beneficiaries or potential beneficiaries. There is an added complication in relation to the K. Trust that, for the moment, the interest of the children beneficiaries may not vest in possession until they are aged 25 and thus, in all likely events, when they are not dependents of the parties within the meaning of the legislation. There is a technical complication in relation to the C. Trust insofar as, letter of wishes apart, there is no beneficiary identified in respect of that trust except the Red Cross of Geneva. I have no doubt that there is an arguable case that the Court in dealing with these trusts would view them as Trusts to which the powers of variation in s. 9 of the Family Law Act, 1995 might well apply in the absence of co-operation of the relevant party to the proceedings and the trustees involved. The result of such variation would be to leave available for the children of the marriage, now dependents, some or all of the assets of the trust, so that these may be regarded by the Court in determining the provisions of an order pursuant to s. 16 of the Family Law Act, 1995 in these proceedings as "resources which each of the spouses concerned has or is likely to have" in the foreseeable future as envisaged by s. 16(2)(a), insofar as the resources thus defined would form part of the pool of resources available to the Court for consideration in determination of that provision, as both the K. and the C. Trusts are post-nuptial settlements as contemplated by s. 9 of the Act of 1995.

7.2 At the directions and case management stage, the Court should not be confined to pursuing disclosure and the furnishing of information and documentation solely on the basis of the structure envisaged by para. 7.1 of the conclusions above. This arises not so much in the context of having, in all circumstances to consider the possibility of a case arising where there is a lack of bona fides on the part of any relevant party, as in the case of an outright sham, but for the purpose of the parties (and the court) having available to them information which might facilitate an order or set of orders, or settled negotiation which would avoid or at least mitigate the costs of a formal variation of the trust or trusts concerned, not to mention potentially very costly joinder of trustees as notice parties or as participating parties in the litigation. In reaching this conclusion I am strongly moved by the consideration that the Court is obligated by s. 16(1) to:-

> "…ensure that such provision is made for each spouse concerned and for any dependent member of the family concerned as is adequate and reasonable having regard to all the circumstances of the case"

In addition, the Court is further obligated by s. 16(5) of the Act of 1995 not to make an order under a provision referred to in subs. (1), unless it would be "in the interests of justice to do so". To unnecessarily confine the disclosure, production, inspection or discovery obligations of a party would, in my view, in the vast majority of cases, and in this case in particular, be counter productive,

and lack proportionality insofar as by pursuing only one aspect of the broad framework the court might well have to commence further inquiries in relation to other aspects, thereby giving rise to duplication of costs and unnecessary delay. In the judgment of Wilson J., in the *Charman* case, at para. 51, p. 1070, under the heading of "Proportionality" it is stated:-

> "Rule 2.51b(3) of the Rules of 1991 provides that, when exercising any power given to it under the rules for financial relief following divorce, the court must seek to give effect to the overriding objective. Rule 2.51b(1) defines the overriding objective as enabling the court to deal with cases justly. Rule 2.51b(2) provides:
>
> "Dealing with a case justly includes, so far as is practicable…
>
> (c) Dealing with the case in ways which are proportionate –
>
> (i) to the amount of money involved;
>
> (ii) to the importance of the case;
>
> (iii) to the complexity of the issues; and
>
> (iv) to the financial position of each party…"

7.3 This provision of the English Family Proceedings Rules 1991, of which there is no equivalent in this jurisdiction, gives a persuasive insight into how the overall obligation of ensuring that justice is done in accordance with s. 16(5) of the Act of 1995, can be achieved? /secured? /approached?. The law, as persuasively stated in the *Londonderry* and *Murphy* cases and other cases dealing with the approach of the courts to disclosure by trustees, also requires that the considerations of justice and proportionality would inform the Court in to relation placing obligations of such a nature on trustees. Indeed, the same considerations of proportionality come into play actively in relation to the more frequent requests to banks and financial institutions to disclose and produce accounts over a considerable period of time. In conclusion, I consider that the inclusion of the broad framework into the area of inquiry of the Court from the outset, in very many cases in general and in this case in particular, involves a broad requirement of justice which in practical terms (having regard to the foregoing discussion in this paragraph), amounts to taking a cost benefit analysis approach, in monetary and human terms, towards the issue.

7.4 I find that while the respondent has disclosed on a wide ranging basis much documentation, (certainly up to the time of his taking the boxes away from the family home and through his meetings with the parties Solicitors in the presence of Mr. Browne and through his affidavits and correspondence), nevertheless, his disclosure has been inadequate, as evidenced, for instance, by his averment in an affidavit that he is not mentioned in trust documentation in recent times. In relation to this averment I accept counsel for the applicant's submission that the respondent could not be in a position to make such an averment unless he was in possession, or at least had sight of up to date trust documentation. In this regard I also take into consideration the history of the trusts and the respondent's pivotal involvement in them, both as settlor and as a person frequently mentioned in check lists and other documentation and by reason of his averment that he regarded himself as being in the position of "quasi protector of the settlement" on behalf of the children.

7.5 I also find that it is necessary for inquiry into each of the three categories of the broad framework that full disclosure would be made up to date by the respondent.

7.6 I find that it is much more cost efficient and effective to seek this disclosure from the respondent in the first instance rather than from the trustees, as it has been be seen (as demonstrated by counsel for the respondent in his submissions relying on the *Londonderry* and *Murphy* cases), that the obligations of trustees to give information are circumscribed in certain instances. I can easily envisage circumstances where the trustees may well be asked questions and by reason of the trustees taking a formal view in relation to the state of affairs of either or both of the K. and C. Trusts, that they might well refuse, or limit their answers in a manner which would be inconsistent with the more schematic and purposeful view which the Court might take in relation to these trusts in the context of family law proceedings. The respondent, on the other hand, would be obligated and indeed advised to have more regard to this schematic and purposeful view when answering questions and/or making disclosure. I accept the submissions of counsel for the applicant that against this background it is easy to place a party such as the applicant in a position where, not only she did not know the right questions to ask the trustees for the purpose of receiving the necessary information, but also might not be able to design any question sufficient to elicit the required information.

7.7 I do not regard the request made by counsel on behalf of the applicant within the broad framework as a "fishing expedition". In this context it may be useful to set out the basis of my understanding of what a fishing expedition might mean in the context of the submissions. The judgment of Wilson L.J., in *Charman v. Charman*, [2006] 1 W.L.R. 1053 at para. 32, provides an exposé of what is understood by a fishing expedition:-

> "In *Re State of Norway's Application* [1987] Q.B. 433, this Court, by a majority, set aside on the ground of 'fishing' an order made pursuant to a Norwegian request for oral evidence to be taken from two London bankers alleged to have such knowledge of the affairs of the deceased as was relevant to an issue in the Norwegian court as to his estates liability to pay tax. Kerr L.J., said at p.482:-
>
> > 'Although "fishing" has become a term of art for the purposes of many of our procedural rules dealing with applications for particulars of pleadings, interrogatories and discovery, illustrations of the concept are more easily recognised than defined. It arises in cases where what is sought is not evidence as such, but information which may lead to a line of inquiry which would disclose evidence. It is the search for material in the hope of being able to raise allegations of fact, as opposed to the elicitation of evidence to support allegations of fact, which have been raised bona fide with adequate particularisation …it is perhaps best described as a roving inquiry, by means of the examination and cross-examination of witnesses, which is not designed to establish by means of their evidence allegations of fact which have been raised bona fide with adequate particulars, but to obtain information which may lead to obtaining evidence in general support of party's case.'
>
> Kerr L.J. gave an example of what he meant at pp. 482-483: namely that, if raised with adequate particularisation, a question whether X was the settlor of a trust would be legitimate but that, if the answer was negative, a supplementary question as to 'who, then, was it?' would be 'fishing'."

In family law proceedings there are coercive reasons for the necessity to assemble all information in relation to the availability of assets, as broadly defined. These arise from the manner by which provision may be made, by not only the division of the assets but also the design or acceptance of the structure (sometimes referred to as the architecture of the provision) whereby such provision by way of division of assets may be delivered. I cannot see how it could be argued otherwise than that the full disclosure being sought of the respondent is not in the words of Kerr L.J. quoted above "designed to establish by means of their evidence allegations of fact which have been raised bona fide with adequate particulars", insofar as the trusts namely the K. and the C. trusts have been very specifically identified, with a history of dealing in documentation which is sufficiently focused and which is now sought to be fully brought up to date by disclosure by the respondent.

7.8 Even if I am incorrect in my view that what is sought by way of disclosure from the respondent is not a "fishing expedition", I consider that the ordinary obligations of the respondent, as a party to the proceedings, pursuant to the Rules of the Superior Courts and practise direction, HC 40, to fully disclose his assets and vouch same with appropriate documentation, clearly point to the duty of the respondent to make the disclosure sought by the applicant in relation to the trust documents and all other assets. In this context I find the dictum of Wilson J., in the *Charman* case at para. 38, pp. 1066 to 1067, to be both instructive and persuasive, (while accepting that the first sentence of the paragraph may somewhat distract from the overall meaning thereof):-

> "It follows that, in this area of the case, I would not accept that different principles apply in financial proceedings following divorce from those which apply elsewhere. In this regard I refer to the decision of Dunne J., in *B. v. B. Matrimonial Proceedings; Discovery* [1978] Fam. 181. Before him was a wife's application in financial proceedings for disclosure by the husband, rather than by a non party. The judge said at p. 191:
>
> > 'It is another feature of such proceedings that one party, usually the wife, is in a situation quite different from that of ordinary litigants. In general terms, she may know more than anyone else about the husband's financial position… She may… know, from conversations with the husband in the privacy of the matrimonial home, the general sources of his wealth and how he is able to maintain the standard of living that he does. But she is unlikely to know the details of such sources or precise figures, and it is for this reason that discovery now plays such an important part in financial proceedings in the Family Division.
> >
> > Applications for such discovery cannot be described as "fishing" for information, as they might be in other divisions. The wife is entitled to go "fishing" in the Family Division within the limits of the law and practice.'
>
> The judges first paragraph is, if I may say so, important. But his reference to an entitlement to go "fishing" might have caused confusion. I believe that he meant to convey only that, by a request for an order for disclosure, a wife is entitled to seek to ensure that a husband complies with his duty to make full and frank disclosure of all his resources. The passage does not, and could not, confer upon a spouse a license to go "fishing" for documents against a non party."

7.9 At para. 49 pp. 1069 to 1070 of his judgment Wilson L.J., continued (albeit in the context of the Court deciding a wide boundary around the scope of documents which a judge could order a third party, such as the wife's accountant to produce at an inspection appointment):-

> "In *Parra v. Para* [2003] 1 F.L.R. 942 at para. 22, Thorpe L.J., in this court observed:
>
> > 'The quasi-inquisitorial role of the judge in ancillary relief litigation obliges him to investigate issues which he considers relevant to outcome even if not advanced by either party. Equally, he is not bound to adopt a conclusion upon which the parties have agreed'.

The courts 'quasi-inquisitorial', role stems from section25 of the Act of 1973. In so far as it is its independent duty to have regard to a spouse's resources, the court cannot be disabled from discharging it by any substantial fetter upon its ability to extract relevant documents from a non -party not expressly mandated by the words of s.2(4) of the Evidence (Proceedings in Other Jurisdiction) 1975.

Thus in *D v. D (Production Appointment)* [1995] 2 F.L.R. 497, Thorpe J. in deciding to set a wide boundary around the scope of the documents which he was ordering the wife's accountant to produce at (as it is now called) an inspection appointment, said at p. 500:

> 'If the boundary is set narrow, there is risk that information as to the nature and extent of the [wife's] financial circumstances may be lost to the detriment of the husband and to the obstruction of the court in its duty to carry out the s.25 exercise as between the husband and the wife".

I am of the opinion that the approach of Wilson L.J., in the paragraph just quoted not only may be properly applicable in relation to discovery matters in family law proceedings in this jurisdiction, but may also apply with more force to the spouses' obligation to make a full disclosure of the resources, information and documentation in relation thereto under the rules of the Superior Courts and practice direction HC40.

7.10 The quasi-inquisitorial role referred to by Thorpe L.J., has been traced in the English context to the approach of the old ecclesiastical courts when dealing with the matrimonial jurisdiction, but in this jurisdiction it has more affirmatively a modern constitutional provenance. Article 41.3.2 of the Constitution provides as follows:-

> "A Court designated by law may grant a dissolution of marriage where, but only where, it is satisfied that –
>
> > i. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years,
> >
> > ii. there is no reasonable prospect of reconciliation between the spouses,
> >
> > iii. such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law, and
> >
> > iv. any further conditions prescribed by law are complied with."

7.11 From the use of the words "where but only where" in Article 41.3.2. there is no doubt that the Court cannot solely rely on the

outcome of an ordinary adversarial process as it is obliged to do in other litigation, much less accept as a binding contract a consent between the parties without inquiry as it is obliged to do in ordinary litigation. Hence the obligation of the Court, of its own motion, to enquire into all relevant facts which may touch upon the adequacy and propriety of provision to be made or made in a divorce case. While the application herein is made in a judicial separation proceeding rather than in a divorce proceeding, I nevertheless conclude that it would be entirely inconsistent with the provisions of Article 41.1. 1 and Article 41.1.2 which recognise the family as the natural, primary and fundamental unit of society and which acknowledge that the State therefore guarantees to protect the family in its constitution and authority, "as the necessary basis of social order and as indispensable to the welfare of the Nation and the State", to argue now that judicial separation proceedings cannot draw on the same constitutional provenance for the inquisitorial power of the Court, certainly in relation to the conduct of the proceedings. To argue in this way would be to posit discrimination by the State in favour of divorce as against judicial separation which would run strongly contrary to the provision of Article 41.1.1 and Article 41.1.2 of the Constitution. Counsel for the application was correct to rely on the persuasive authority of the *Charman* judgment in relation to a closely similar provision in the English legislation, that the provisions of s.16(2)(a) of Act of 1995, which require the court in deciding provision to have regard to "the income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future" necessitate extensive enquiry by the Court into the assets of the parties.

7.12 Indeed, it is only in the context of such inquisitorial power of the Court that it may be firmly concluded that the duties of disclosure of one spouse to the other in family law proceedings (as identified by the Rules of the Superior Courts and detailed by the practice direction and noted in particular in the passage of the judgment of Wilson J., in the *Charman* case at para. 38, pp. 1066 to 1067 quoted above), arise.

7.13 Following the requirements of s. 16(5) of the Family Law Act 1995, that the "court shall not make an order under a provision referred to in subsection 1 unless it would be in the interests of justice to do so" and my characterisation of this, as interpreted in the *Charman* case, as a test on a cost benefit basis in financial and human terms, I consider the implications for the respondent in making disclosure in accordance with the applicant's application as follows:-

> (a) The respondent has from the outset been involved as settlor and active expert in the development of the trusts and settlements involved
>
> (b) The respondent is skilled in assembling and presenting the materials required by disclosure, and this factor mitigates the cost and burden upon him in doing so.
>
> (c) The respondent has a considerable penchant for the retention and analysis of documentation, as evidenced by the storage and subsequent removal of the boxes on one of his exits from the family home.
>
> (d) The procedural difficulty and expense caused by obligating the applicant to seek third party discovery from trustees and like third parties involved with the trusts, (not to mention applying to have them joined at this stage in the proceedings to encourage such disclosure discovery) are a disproportionately more threatening prospect as regards cost, and delay than a first direct response of the respondent, hopefully with the co-operation which he may get from the trustees, which would not necessarily be available to the applicant or her representatives.

7.14 Accordingly I have decided (as already indicated in the Court hearing that the applicant succeeds to the extent that an order should be made in the terms of paras (a) and (b) of the notice of motion dated 4th May, 2006, and as regards (c), I do not propose to make any order as the parties are free to enter the matter before me for case management as they choose.

7.15 As regards the respondent's application that the applicant would make disclosure discovery on the same basis as the relief sought by the applicant and as decided above, I consider that as the applicant does not stand in relation to the M Trust either as settlor or as a person fully acquainted with the details thereof, different considerations apply. Indeed it is clear from the affidavits and the arguments that the respondent probably knows more from informal discussions with the settlor of the M Trust than the applicant might know. Of course an option in this situation would be to compel disclosure by the applicant once she has resorted to third party discovery or less formal inquiry with her father and any other persons in a position to give her information about the settlement. However, I accept that this course may be too onerous, less productive and most likely to cause delay and I accept that at the end of the day there might be a danger that the applicant might be caught, to use Mr. Durcan's metaphor) "as the meat in the sandwich between two powerful men" – the respondent and her father. The fact that she is at least a disappointed beneficiary might give her somewhat more of a formal standing than the respondent in respect of such an application, but I am satisfied that in view of the possible contentious nature thereof that the risk attached thereto (in terms of ultimate failure) should be borne by the respondent notwithstanding his having possibly less direct standing than the applicant, in relation to what is alleged to be a terminated trust.

7.16 Accordingly, I am prepared to order, and have ordered, that the in camera rule be lifted to such an extent as is necessary to notify the party or parties involved, or who have been involved, in the M. Trust in such discovery proceedings as the respondent should decide to initiate. It should be absolutely clear that the Court in its management and inquisitorial function is certainly not at this stage directing the respondent to take such action – it is a matter for the respondent to choose or not to choose. It is also very desirable that the Court does not propose to prejudge the merits of any such application, as to do so would be contrary to the rights of any third parties intended to be joined. The Court has taken this course mindful of the fact that the issue of seeking disclosure discovery from the applicant by the respondent should not be closed if it emerges from information obtained through any third party discovery or other means that the applicant is not as bereft of information and weak in relation to obtaining same as now considered by the Court.

7.17 In relation to the respondent's notice of motion seeking that the trustees of the M Trust be joined as parties to the proceedings, it is certainly premature to consider granting this application by reason of the lack of information necessary to ground such application and to have it grounded in circumstances where the Court could be reasonably sure that such joinder would not give rise to prohibitive and unproductive costs. Accordingly, I propose that this notice of motion ought to be adjourned generally with liberty to re-enter pending further development in the case.

7.18 In respect of each notice of motion I propose that the costs would be reserved.