Neutral Citation [2016] IEHC 486

THE HIGH COURT

[RECORD NO. 2013/50M]

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

BETWEEN

C.Q.

APPLICANT

AND

N.Q.

RESPONDENT

JUDGMENT of Mr. Justice Henry Abbott delivered on the 22nd day of April, 2016.

1. The applicant wife and the respondent husband were married to one another on the 16th day of September, 1989. They and all their children are domiciled and habitually resident in Ireland. There are five children of the relationship born between 1993 and 2003 all of whom are involved in full time education are more or less dependent. The husband is fifty-eight and the wife is some years younger. A degree of judicial separation was granted by the High Court (Mr. Justice O'Neill) on the 18th day of October, 2006, in respect of their marriage to one another. Further, the Court made orders ancillary to the degree of judicial separation in terms of a document of settlement which was signed by the parties on the 17th day of October, 2006. The parties now seek divorce by way of special summons issued by the wife on the 20th September, 2013.

Terms of Judicial Separation Settlement

2. The settlement provided for the payment of €3,000.00 monthly in maintenance, apportioned equally between the children. No maintenance was afforded to the wife as she was in receipt of a substantial income. The respondent also agreed to be responsible for educational expenses.

3. Of crucial importance is the provision of para. 5 of the order which provides as follows:-

> "An order pursuant to s. (10)(1)(a)(ii) directing the sale of the family home of the parties at [C.B.] on the terms set out below
>
> > (i) Messrs. [T.G.] shall be appointed as agents of the parties in the conduct of the sale. They shall advise the parties as to the manner of sale and the reasonableness of any offer or date. The parties agree that a reserve of €2,800,000.00 is to be set by the auctioneers. The family home shall not be placed for sale/option prior to the 1st February 2007, unless advised to the contrary by the auctioneers so appointed and shall be sold as practicable thereafter.
> >
> > (ii) The parties' respective solicitors shall have joint carriage of sale Messrs. HS shall be lead solicitors in the sale
> >
> > (iii) From the proceeds of sale the following distribution shall be made:
> >
> > > (a) €300,000.00 to [U.D.]
> > >
> > > (b) Legal and auctioneer costs associated with sale.
>
> The balance then remaining shall be distributed as to 66.66% to the applicant and 33.33% to the respondent."

Orders were made pursuant to Guardianship of Infants Act 1964 in relation to the parties living in the same area, but in different houses when the house is sold, with the primary care or primary residence of the children being with the applicant in her home. Among the other usual type of provisions in the consent was para. 15 of the said order thereof, which is of particular relevance to these proceedings and relates to full and final settlement as follows:-

"5. This agreement is accepted by the parties in full and final settlement of any and all issues arising upon the breakdown of their marriage to one another. They accept that by this agreement proper provision has been made for both the spouses and their children. The parties intend that an application for a decree of divorce will be made in due course. These terms shall bind the parties as the issue of proper provision. There should be no further ancillary orders made in these proceedings, save as maybe required to give continuing effect to this agreement or further regulate the issue of periodic maintenance."

Post Settlement History

4. Very soon after the settlement, the husband purchased a house in the vicinity with the aid of a significant loan, taken out with his partner. Custody and access arrangements continued in accordance with the settlement and while the parties disagree on the extent of each of their involvement, it is fair to say that the husband retained a significant, beneficial and happy participation in the children's lives through the access arrangements, while their primary residence was undoubtedly with the wife. Where real difficulty arose was in relation to attempts to sell the family home in accordance with the settlement.

5. From the grounding affidavit of the wife of the 19th September, 2013, it is clear that although the reserved price in the settlement was €2,800,000.00, the parties likely believed the family home had a value of approximately €3,000,000.00 to €3.300,000.00, and the wife avers that there was an extensive marketing campaign over eight weeks, but no buyer emerged. In 2008 the respondent re-entered the judicial separation proceedings before this court for the purpose of having the court fix a revised market valuation. A bid of €2,400,000.00 was received in 2008, but the sale fell through. There was evidence to indicate that some query could possibly arise surrounding the boundary, but my conclusion is that there are no real title difficulties involved with the house and that the query in this regard would have been used as an excuse to withdraw from interest in the sale at a time when the property crash was beckoning.

6. In 2009 the court, with the consent of the parties, sanctioned sale of the house with the reduced asking price of €1,350,000.00 to

€1,500,000.00, however still the house did not sell. It was averred that the matter lay fallow for a number of years until the proceedings were re-entered again in 2013 with the respondent seeking a reduction in the reserve to €1,100,000.00 for an immediate sale in the September market of 2013.

7. The wife sets out her case in relation to a significant aspect of making provision in these divorce proceedings in para. 16 of her grounding affidavit as follows:-

> "I say and believe that the house probably worth no more than €850,000.00 in the present market. The interest of the respondent's brother, [U.D.] in the family home was quantified at €300,000.00 in the October 2006 settlement. At the time this would have represented no more than 8% or 9% of the supposed market value of the property. Now €300,000.00 represents a third of the market value, or more. If Mr. [U.D.] were to be paid the sum of €300,000.00 out of the sale proceeds, this would altogether prevent this Honourable Court from making provisions for myself and our dependent children. I say and believe that it would be impossible to rehouse myself and the children from my share of the net proceeds of sale if the order of 2006 were to be implemented without review or adjustment. I say and believe that the fairness of the situation demands that the issue of the sale of the family home would be postponed until our youngest child, L, ceases her dependency."

8. The wife further averred in her said affidavit that the respondent has honoured his maintenance obligations for the children throughout the period of separation until the date of the 19th September, 2013, but that in 2013 he refused to his son's fifth year school fees which were defrayed in full by the wife. The evidence at the hearing shows that the husband's income from his business deteriorated rapidly, and he remains in a valley, so to speak, whereby he was unable to continue the significant maintenance, although the wife points to the fact that he was able to make significant contributions to his pension in preference to paying maintenance for his children. Suffice to say that the husband at this stage is in a post depression income trough, and while he hopes that his business will improve so that he can resume paying maintenance, the improvement may be some time off. The wife on the other hand continued with her business and prospered, despite the depression, and was in a position to accumulate some savings.

9. The businesses of husband and wife although in the service industry generally, are both of a type which cannot be sold, they therefore do not have a capital value and hence do not contribute to the assets of the parties to be considered by the court in making provision for divorce in these proceedings.

Main Issues

10. Several main issues arise which are mixed issues of fact and law, which are required to be determined before a court proceeds in the ordinary way to consider the criteria directed by s. 20 subs. 2 of the above Act to be considered by the court. These issues are as follows:-

> 1. Whether the husband may insist on the court ordering the sale of the family home in accordance with the settlement, or at all.
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> 2. If the court orders a sale under any circumstances, whether U.D.'s share of €300,000.00 should be reduced proportionately.
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> 3. In the event that the court orders the sale of the family home having regard to any of the outcome of the issues regarding the reduction of U.D.'s share of €300,000.00, should the husband's share in the proceeds should be reduced below 33.33% having regard to the other factors.
>
> 4. Whether the court is obliged to hear the children's views and consider their interests in relation to the issue as to whether the family home should be sold.

11. The first issue arises in the debate on the case by reason of the occurrence in the settlement of the full and final settlement clause. In accordance with the judgment of the Supreme Court in *Y.G. v. N.G.* [2011] 3 I.R. 717, considerable weight should be given to such a clause, but the court should be alert to the qualifications of this judgment as the binding nature of a full and final settlement clause should be qualified by the actual need of the parties, especially need arising from a change of circumstances of evidence. In a technical sense, the husband does not comply with the criteria that have been set out by this court in the judgment *S. v. S.* (Abbott J.) where the court pointed to the need for a person seeking to use the full and final settlement clause, to show that he himself had been compliant therewith. To do otherwise would be to allow the jurisprudence of the courts arising from adjustment during the course of execution of an order in family law proceedings by reason of dramatic changes in house prices, or other circumstances, to become a "Rogues Charter". Two factors operate on this score; one for the husband, and the other against. The factor for the husband arises from the fact that he incurred significant debt (over €300,000.00) to jointly purchase a house with his new partner where he now lives with his young son, together with said partner. This factor tends to reinforce the right of the husband to rely on the full and final settlement clause by reason of his action and reliance on same in early course following the settlement.

12. The other factor (against reliance on the full and final settlement clause) arises from the eventual failure of the husband to be in a position to continue his maintenance, as evidenced by his application to have maintenance reduced during the course of these proceedings.

13. The argument against the full applicability of the full and final settlement clause arising from non-payment of maintenance, potentially opens the door for the court to consider the competing need of the wife to be housed by possibly remaining in the family home. Thus in accordance with the analysis in *Y.G. v. N.G.* [2011] 3 I.R. 717; the court could make a provision in its decision to allow the wife to stay in the family home, if sufficient cash could be obtained from the wife to pay down, or at least part, of the husband's indebtedness arising from his joint purchase.

14. However, the issue does not rest there by reason of the inclusion in the order for sale of the family home, not only for the purpose of releasing equity from the home, to allow both parties to purchase new homes, but also to pay to U.D. €300,000.00 for his share in the family home, which is noted as a paper title of a half share in common with the husband. The question arises as to whether the order for sale is binding. Mr. Corrigan S.C. for the wife argued that the wife was not privy to the settlement between the husband and U.D., made in petition proceedings which were listed before O'Neill J. along with the family law proceedings and that therefore the term is not bound by that settlement.

15. While the evidence shows that U.D. did not participate in the hearing of the proceedings before O'Neill J. prior to the making of the settlement, it appears that the listing of the two cases followed the normal practice relating to the disposal of issues affecting

third parties in family law matters.

16. Faced with the claim of the notice party of the judicial separation proceedings, and in this circumstance, there are three options available to the parties:-

> A. The wife would accept that the house would be sold and the proceeds distributed in accordance with the paper title of the shared common ownership of U.D. and the husband of a moiety of 50:50 each, leaving the wife and the husband to dispute how the half share in the proceeds would be distributed.
>
> B. The wife could actively seek the assistance of the court to set up an issue in relation to ascertaining the true beneficial ownership and share of the said U.D., with or without the assistance of the husband in the said hearing.
>
> C. The wife could allow the husband to negotiate with the said U.D. and agree to buy out a liquidated sum the share of U.D. (whatever it was) in the jointly held property, and then negotiate with the wife in relation to the distribution of the sale proceeds between husband and wife, or failing same, to invite the court to determine the distribution of the balance of the proceeds as between husband and wife.

17. The parties decided to pursue option "C". It follows a sensible course of dealing, which is often taken in these cases, for the purpose of affecting a reasonable settlement, while avoiding the significant cost of the potential three way litigation that could arise as a result of option "B". While I accept that the wife may not have been involved in the negotiation with U.D., and therefore was not privy, in the strictest sense of the term, she agreed to have the results of the negotiations with U.D. inserted into the settlement made in 2006, the fruits of which became the terms of settlement, and one that was contractually binding to her.

18. In the light of this conclusion, a further question arises from the submissions of Mr. Corrigan made upon behalf of the wife in relation to the non-binding nature of the with U.D. I accept the submissions of Mr. Corrigan that contracts for the judicial separation proceedings are enforced, not from the contract itself, but from the order of the court ruling same, and that in family law proceedings these contracts may be reviewable by a court hearing an application for divorce by the same parties, subject to certain conditions.

19. Apart from the fact that Mr. McGonagle S.C. submitted that as U.D. is only a party on notice of these proceedings and not a party to these proceedings, this Court has no jurisdiction to make an order affecting his rights, or bind him to this order, it has submitted that U.D. had no hand, act or part in either the judicial separation or the divorce proceedings. It was submitted on behalf of U.D. that the authorities of *Hughes v. O'Rourke* [1986] ILRM 538, *Riordan v. An Taoiseach* [2000] IESC 61, (Unreported, Supreme Court, 29th June, 2000) and the authority of the judgment of Denham J. in *Talbot v. McCann Fitzgerald* [2009] IESC 25, (Unreported 26th March, 2009), that once a final order has been made and perfected in the High Court, the jurisdiction of the High Court as to the matters determined by that order is exhausted save possibly to the extent that a subsidiary or supplemental order may be made subsequently by consent.

20. Mr. McGonagle S.C. also relied on the summary of the statement by Foskett in *Foskett on Compromise* 8th Edition, (London, 2015) at p. 326 setting out the grounds for setting aside a consent order and that these can be summarised as:-

> "Failure to disclose all material facts before the court order is made, fraud and misrepresentation, mistake, undue influence, bad deal and badly legal advice, supervening events, erroneous valuations, delaying tactics, unexpected debt and changing economical climate."

He submitted that none of these factors applied to U.D.'s agreement with the husband relating to the partition suit between them and the order made by O'Neill J. incorporating same in the settlement between the applicant and the respondent.

21. I find that the submissions made on behalf of U.D. point clearly to the court taking a different approach to the family law element of the order of O'Neill J., by reason of the fact that the part of the order affecting him relates to litigation outside of family law where orders are to be taking as final, save for very exceptional circumstances, and is much in contrast with the more flexible situation applying to orders made in many family law cases.

Second issue

22. In relation to the second issue as to whether in the event of a sale U.D.'s share of €300,000.00 should be reduced in proportion to the reduced sale price of below €2,800,000.00, Mr. Corrigan, S.C., made very detailed submissions on the effect of s. 19(5) of the Family Law (Divorce) Act 1996.

23. Section 19(5) of the Family Law Divorce Act 1996 states as follows:-

> "(5) Where a spouse has a beneficial interest in any property, or in the proceeds of the sale of any property, and a person (not being the other spouse) also has a beneficial interest in that property or those proceeds, then, in considering whether to make an order under this section or section 14 or 15(1)(a) in relation to that property or those proceeds, the court shall give to that person an opportunity to make representations with respect to the making of the order and the contents thereof, and any representations made by such a person shall be deemed to be included among the matters to which the court is required to have regard under section 20 in any relevant proceedings under a provision referred to in that section after the making of those representations".

Mr. Corrigan submits that consideration under s. 20 of the Family Law (Divorce) Act 1996 enables the court to reduce U.D.'s share *pro rata* having regard to the fall in house prices. I do not agree with that proposition, as even s. 20 of the Family Law (Divorce) Act 1996 criteria acknowledge the fact that there will be certain liquidated or crystallised claims such as bank debts which will have to be dealt with arithmetically and in balance sheet fashion in the manner as directed by the Supreme court in *D. v. D* [2015] IESC 16.

24. U.D.'s claim for €300,000.00 was liquidated or crystallised in the order made by O'Neill J. when ruling the settlement and it is to be regarded in the very same light as a bank debt since the onset of the recession in 2008. This court has been frequently involved in cases dealing with situations dealing with s. 19 of the Act of 1996, (often where banks had interests under encumbrances on some of the properties or part of the properties owned by the parties to family law proceedings). While the court has been very flexible as dictated by s. 19 it has stopped short of making orders which would confiscate of property rights of third parties and therefore contrary to the Constitution of Ireland 1937.

25. An example of the procedure adopted by the court is shown in *H. v. H.* [2014] IEHC 673, (Unreported, High Court, 19th December, 2014), in that case the Court took a robust view as to how it could adjust the relationship between the heavily indebted husband and

the financial institution, in a manner in which the financial institution could not be expected to behave in the current financial climate to give the indebted husband a chance to work out his position in what was hoped would be a rising market without the ever threat of execution on foot of a judgment. The financial institution not only was a notice party, but was given an opportunity to institute parallel summary proceedings to claim the amounts of the debt and obtain summary judgment for same in this court while it decided the family law proceedings in parallel.

26. The course taken in this case for U.D. to initiate partition proceedings in parallel to the judicial separation proceedings was the best one. He was close at hand in the event of the applicant wishing to challenge him in a contentious fashion and he obtained a crystallised award which was free of the uncertainties of the Partition Acts and for that matter free of the uncertainties of the Land Conveyancing Reform Act 2009 and instead an order was obtained which had the effect (in old fashioned terms) to convert his share in the property, at least, to personate. To conclude otherwise would be to effectively have a forced marriage between the applicant and the respondent and the said U.D., insofar as the terms of the Family Law (Divorce) Act 1996, relating to provision for married persons apply.

Voice of the Child

27. As the court has held that by virtue of the finding in relation to the certainty of the order for sale in favour of U.D., no issue arises in respect of which it may be argued that the voice of the child might have to be heard under the provisions of the Constitution or under Brussels II bis. However, in view of the extensive submissions by both the applicant and the respondent in respect thereof I make the following further comments.

> A. There was no question on any view of the law for the court to hear the children directly in court on the basis of the criteria set out in *SJOD v. PCOD* [2008] IEHC 468 (Unreported, High Court, Abbott J.) as one of these criteria was not met by reason of the refusal of the respondent to consent.
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> B. The submissions made on behalf of the respondent that it is not usual for courts in Ireland to hear the views of children in relation to the making of provision in divorce cases including the question of the making of the order for sale or non-sale of the family home.

28. The respondent has provided a survey of the relevant provisions in New Zealand, Scotland, Ontario and England family law legislation indicating that matters of parental responsibility are not dealt with in conjunction with the making of ancillary relief in a divorce order. She also submits that her inquiries indicate that such views are not canvassed in relation to the sale or non-sale of a family home in family law proceedings in Germany. As far as I am aware a similar position pertains in Switzerland and Austria. It would appear that the provisions of Brussels II bis. reinforce this approach may be explained by the application of Brussels II bis. as it affects the members of the European Union at least. Brussels II bis. Council Regulation (EC) No. 2201/2003 of the 27th November, 2003 has as its first recital:

> "(1) The European Community has set the objective greater area of freedom, security and justice, in which the free movement of persons is ensured. To this end, the community is to adopt, among others, measures in the field of judicial cooperation and civil matters that are necessary for the proper functioning of the internal market."

Recital number 8 of the preamble reads as follows:

> "8. As regard judgments on divorce, legal separation or marriage annulment, this regulation shall apply only to the dissolution of matrimonial ties it should not deal with issues such as the grounds for divorce, property consequences of the marriage or any other ancillary measures."

29. These two recitals among the others and the other provisions of Brussels II bis. set up the general policy of the regulation, which is to promote the free movement of people so that judgments in matrimonial matters and matters of parental responsibility may be recognised and enforced throughout the community, and that while enforcing a very high and rigorous standard in relation to the voice of the child in relation to matters of parental responsibility the requirements for the voice of the child to be heard under the Regulation are strictly excluded from applying to the property consequences of the marriage or any other ancillary matters. Brussels II bis. therefore acknowledges a dichotomy between the making of provision by way of ancillary relief in a divorce and the making of orders relating to parental responsibility. This dichotomy seems to have been anticipated by s. 5(2) of the Family Law (Divorce) Act 1996, which provides as follows:-

> "(2) Upon the grant of a decree of divorce, the court may, where appropriate, give such directions under section 11 of the Act of 1964 as it considers proper regarding the welfare (within the meaning of that Act), custody of, or right of access to, any dependent member of the family concerned who is an infant (within the meaning of that Act) as if an application had been made to it in that behalf under that section."

30. This dichotomy is evident from the context provided by s. 5(1) of the Family Law (Divorce) Act 1996, which provides for the three proofs A, B and C required for the court to exercise the jurisdiction conferred by Article 41.3.2o of the Constitution of Ireland, 1937. The provisions in Article 42A of the Constitution of Ireland 1937 requiring the views of the child to be ascertained relate to matters referred to in Article 42A4.1 'concerning the adoption, guardianship or custody of, or access to any child." I consider that the respondent's submissions that the views of the children should only be heard in relation to the matters referred to in the Constitution of Ireland, 1937, which do not include whether a child lives in a particular house, or for that matter, what part of a house a child resides in.

31. However, in many instances where the sale of a house is involved, it may also involve or imply the replacement of that house with another house in which the children are to reside and that is outside the locality of the house proposed to be sold, and therefore involves a move away from the social emotional and educational framework that the child has become accustomed to and on which it relies. In such cases guardianship/custody or parental responsibilities arise, in respect of which there is no doubt that the child's views should be heard. However in this case it is agreed in the settlement and the parties continue to agree that if the family home is sold it will be replaced in the same locality (albeit at a cheaper price). It should be noted that this case was heard before the 2015 Act was commenced in relation to amendments of the Guardianship of Infants Act of 1964.

Entitlement to a Divorce

32. Having considered the affidavits and all the evidence the court is satisfied that

> (a) At the date of the institution of the proceedings, the spouses been the parties hereto have lived apart from one another for a period of, or periods amounting to, at least four years during the previous five years.

(b) There is no reasonable prospect of a reconciliation between the spouses, and

(c) Such provision as the court considers proper having regard to the circumstances that exist and will be made in this judgment and any variations thereof for the spouses and the dependent members of the family.

33. As a result of these conclusions, the court in exercise of the jurisdictions which diction conferred by article 41.3.2o of the Constitution, grants a decree of divorce in respect of the marriage of the parties herein. The court considers the criteria set out in s. 20(2) of the Family Law (Divorce) Act of 1996 by their respective paragraph letters as follows:-

"20(2)(a) The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future."

In the past and up to the date of the settlement both parties had good incomes from their respective businesses. The wife has continued to earn a good income from her business but unfortunately the husband fell on hard times arising from the recession. I do not accept the case made during the course of intensive cross examination of the husband that he should have "traded down" and taken on more menial or junior tasks, rather than staying at the "taxi rank" of his particular business, awaiting the type of heavy weight work which would restore, or certainly almost restore, his high earning capacity for the next ten years or so.

34. The work of the court in calculating the matters to be considered under this subparagraph has been made considerably easier by the submission by the parties, presented on 11th December, 2015 an agreed "*D. v. D*. schedule" with calculations behind. I adopt Column 1 and Column 4 of the assets of both parties on the husband's case, except that I consider that in view of the fact that the wife claims no interest in foreign RN, it is best to treat foreign RN as an asset of the husband and hence the resulting figure for the husband will be increased by €27,689.00 and that for the wife will be decreased by a similar amount. I have accepted that the costs of the repairs to foreign PDM should be taken into account and I am assuming that it is necessary to carry out these repairs so as to give it the value assigned of €19,262.00. I intend to make these two foreign properties part of the dynamic of the final provision or at least some options within it.

35. It is also entirely appropriate that in Column 1 a negative sum of €122,000.00 has been provided for costs in accordance with the directions of the Supreme Court in *D. v. D*. [2015] IESC 16. The provision for contingent sum in costs of course is always subject to the ultimate modulation of costs having regard to the submission of counsel in relation to any unwarranted or egregious running up of costs or waste of time by either party.

"20(2)(b) the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise)"

36. The parties continue to have a number of dependent children facing expensive stages in their lives, continued maintenance is needed from the husband, but unfortunately his business has declined. Pending this business recovering, the wife may have to resort to the reserve of children's allowances accumulated by agreement of the parties. The husband may have to abandon some of his strong sentiment and dispose of one or both of the foreign properties to help them cover maintenance in the medium term, if his business does not recover quickly enough. The wife requires at least €800,000.00 to purchase alternative accommodation if the house is to be sold. It will be seen from the "*D. v. D*. schedule" that on the most optimistic valuation and distribution in accordance with the settlement the wife will have to draw on her savings to make up this sum.

37. The husband purchased a house to accommodate his partner and their seven year old son and he requires the balance of the sum arising on an optimistic sale of the house to cover the most of his joint indebtedness on his house.

38. Both parties especially the wife will have to continue to contribute to their pensions. While the husband neglected paying maintenance in preference to his pension, I do not accept the he should cash in his pension at sixty as he should still be accumulating same. His lack of income means that it will be sometime before he can catch up on his pension contributions whereas the wife's income remains buoyant and she can, in a tax efficient way, catch up on her contributions from now on. I accept these contributions to the wife's pension will be constrained by the need for weekly cash flow caused by the absence, at least in the next two years or so, of any significant maintenance. I accept the needs of the husband to redeem his mortgage or at least his share of it especially now that it is necessary for his partner to pay same.

39. However, this view is tempered by the fact that the husband's present partner may receive compensation for the additional contributions to the joint mortgage by an adjustment in the beneficial ownership made by agreement between the husband and his new partner. Also a stage has been reached in the Irish courts where the income of partners who maybe established as co-habitees, or have a likelihood to marry in the event of a divorce being granted, should be considered as part of the pot of resources available to a husband in situations such as these. I do not propose to take this course in the case at hand, as I wish to remain true to the overall symmetry of the settlement under which the husband acted in good faith and purchased a house within the locality so as to facilitate continuing contact with the children and unfortunately got trapped in negative equity by purchasing at the height of the market.

"20(2)(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be"

40. The parties enjoyed a high standard of living prior to the proceedings as evidenced by the comparative grandeur of the family home at a prestigious address, and the frequent holidays, many of which were enjoyed principally by the husband and the children in a foreign country. The fact that all of the children went to private schools also suggests a high standard of living. After the settlement the family continued to enjoy this standard of living, private schools being a major feature, together with the holidays in foreign countries, in the properties owned there. I am loathe to say (as I very often do in these cases) that divorce means an end to private education, but the interests of the parties are certainly best served by the sale of the family home and the distribution of the proceeds thereof in accordance with the settlement, or in modulated terms thereof, to provide incentives for movement.

41. With economy measures in mind, (having regard to the need for two family homes where there was only one before, and the consequences of the drop in income from the husband's business) the disposal of one or both of the foreign properties comes into view, although I do not propose to order their sale. To make an order such as this, might give rise to a stream of disproportionate costs if there were difficulties in achieving such sales.

"20(2)(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another."

42. The parties were married on 16th September, 1989, the applicant is aged fifty-two approximately and the respondent is aged fifty-seven. The parties separated in 2004, they had five children most of whom were dependent. They lived together for fifteen years. They were granted a separation in October, 2006, and the parties have lived separately for a period of almost twelve years. Having regard to the period of time living together and also the period of time separated, but still subject to the old agreement and the parenting arrangements resulting in both partes being very dedicated to the attention of their children, this is to be viewed as a long marriage and there can be no question of any discounting of provision by reason of a shortness thereof. Indeed, in the separation agreement of 2006 the parties may be regarded as having acted in good faith with each other, and acknowledged the contributions each of them had made and their generosity of spirit heading into the future.

> "20(2)(e) any physical or mental disability of either of the spouses."

43. Neither party has any physical or mental disability. However, the court is impressed by the endurance of both parties who have withstood a situation arising from the depression (and the interface of their settlement), with great success and fortitude. This awareness directs the court to ensure a speedy and dynamic solution of provision in this case so that further strain can be avoided and their physical or mental wellbeing is not affected thereby.

> "20(2)(f) the contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family."

44. Until the depression both parties contributed in stellar fashion to the welfare of the family through their incomes, and by their care for the family, although the children mainly resided with the wife. The family home can be regarded as equivalent to an inherited asset, as the husband's father purchased the same for the husband and U.D. The structure of the settlement of 2006 shows that the husband did not seek to obtain any premium by reason of his greater contribution towards the accommodation needs of the family house by substantially providing that house through paternal gift and the additional work of himself and his brother U.D.

> "20(2)(g) the effect on the earning capacity of each of the spouses of the marital responsibilities assumed by each during the period when they lived with one another and, in particular, the degree to which the future earning capacity of a spouse is impaired by reason of that spouse having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family."

45. The earning capacity of the parties was not hampered by their martial responsibility. It seems that at their peak, the parties were two successful business people who supported each other in their endeavours and enjoyed a good life with their family within the context of that support.

> "20(2)(h) any income or benefits to which either of the spouses is entitled by or under statute."

46. Child benefit has been and will continue to be an accumulated source of savings which will become very important during the regrettable maintenance deficit which will probably ensue for at least two years. Both parties are in the private sector, and it is anticipated that they will have old age contributory pensions at sixty-eight years of age. This is on the basis that they continue to make the appropriate PRSI contributions.

> "20(2)(i) the conduct of each of the spouses, if that conduct is such that in the opinion of the court it would in all the circumstances of the case be unjust to disregard it."

47. Nothing arises under this criterion.

> "20(2)(j) the accommodation needs of either of the spouses."

48. The accommodation needs of the parties are more than adequately met by the houses which they now occupy. Unfortunately, the family home has to be sold by reason of the certainty of this court that the share of U.D. is a "*deus ex machina*" which directs that the sale must go on.

49. Having heard the evidence of the wife, who pleaded strongly for the privilege and comfort of remaining in the home for some years, I have given careful consideration to the prospect of postponing the sale of the family home, at least until the youngest child is eighteen years of age and presumably left secondary school. This would be on the basis that, while recognising the need for the husband to discharge his mortgage as planned, he is nevertheless on a very cheap tracker mortgage, and he has the potential to compensate his partner for assistance in paying the mortgage by handing over a greater share of the beneficial ownership of the house to her while retaining excellent accommodation for himself and his seven year old son.

> "20(2)(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse will forfeit the opportunity or possibility of acquiring."

50. I have already dealt with pensions

> "20(2)(l) the rights of any person other than the spouses but including a person to whom either spouse is remarried."

51. Throughout this judgment I have already considered the interests of the husband's young son of seven years of age together with the interests of his partner to whom he may well be remarried in the event of a divorce. The interest of this son in having a home coincides with the interests of the children of the parties to have a home where they can visit their father as they have done in the past. Hopefully this practice will resume when the tension of these proceedings abates.

Effect of Settlement pursuant to Section 20(3) of the Family Law (Divorce) Act 1996

52. Ms. Clissman, S.C., made extensive submissions in relation to the need to comply with the terms of the settlement as much as possible. She referred to the judgment of White J. in the High Court in *P.C.R v. G.R* [2013] IEHC at para. 29 page 9 where the court held:-

> "The terms of settlement were very carefully drafted to deal with default. If this court acceded to the application to vary, one would have to say that certainty of any sorted family law litigation would be impossible to achieve."

She submitted then that, *mutatis mutandis*, that this principle is equally applicable to High Court orders and settlement of 2006 in this case and that the applicant cannot choose to cherry pick the parts of the previous orders she likes and avoid the obligations that she dislikes.

53. While I have followed the considerations enunciated by White J. in *P.C.R. v. G.R.*, in some recent cases where the market provoked a change in proportionality of the assets of the parties, I consider that this course is not suitable in the instant case. I prefer to follow the well-trodden road initiated by *F. v. F*. [1995] 2 I.R. 354 referred to by Mr. Corrigan, S.C. This relates to a flexible adjustment having regard to the very substantial changes brought about by the depression, leaving it impossible for the party to comply with the order: in this case, the 2006 settlement. The court is well exercised in relation to that impossibility, having been involved several times in revising the downward sale price for the family home. The approach in *F. v. F*. has been followed by this court many times and has been the driving force behind many settlements which resulted from a re-negotiation of terms necessitated by the ravages of the property recession. This approach has been approved in recent times by the Supreme Court most notably in the first *D. v. D*. [2015] IESC 16 case where the court took judicial notice of the fact that land prices had fallen, and that the otherwise correct judgment of this court should be remitted back to the court to determine how the equality approved by the appeal judgment could be attained having regard to the changed economic circumstances.

54. Of course, *F. v. F*. [1995] 2 I.R. 354 considerations cannot apply to the share of U.D. which on the consideration of the earlier issues in this case must be paid without diminution or reduction of any sort. This inflexible demand for payment of U.D. to which he is legally entitled, creates disproportion in the disposition of the assets of the family, which seriously exasperates the horrendous asset loss caused by property price reductions and even more forcefully dictates that the court would take the more flexible approach of *F. v. F*. and subsequent cases.

55. The reality of this case is that the court cannot stray very far from the settlement, as it has created its own history since 2006. Part of that history has been the successive attempts to "chase the price down" as the market fell none of which resulted in a successful sale. The experience of this "knife catching exercise" has cast its shadow on my consideration of the practicalities of the court proceeding in the old fashioned way of attempting to sell the property (as it must) with the presence of the wife and the children in the house doing their best to present it for sale by sending the animals on holidays for example, but nevertheless being in the house in circumstances where the market might be encouraged to think that the sale is not a fire sale. Added to that consideration is the fact that potential purchasers might get the impression that there is a certain "eminence" about the parties which could also lead them to shy away from bidding on the property preferring to bid on less "formidable" properties.

56. It is not worthwhile directing a sale for any less than a reserve of €1,300,000.00. To be more certain of achieving this, I recalled the partes to discuss whether it is worthwhile to give the wife the option of using her savings together with the accumulative children's allowances to purchase a house within the locality of the husband's house at a price of not more than €800,000.00. She may have to borrow something on a bridging loan to achieve this, but there are sufficient agencies springing up of late to provide that source of finance over a short term (at possibly high interest rates) to allow her to do that. If she were in a position to affect this purchase within three months of the present date then the sale could proceed with vacant possession and all parties could have more confidence about the success of the sale of the family home. In the event of the sale of the family home proceeding, her savings could be re-instated very substantially by the payment out of her 66.66% share of the net proceeds of sale after discharge of the sum owing to U.D.

57. This voluntary option would have had the advantage of not only increasing the chances of a better sale for the family home, but it also could have established certainty of getting alternative accommodation. This is because, apart from the difficulties of sale, there might be delays in closing the sale of the family home and thus a price might be obtained for the family home which is not received by the applicant until after a time when prices of alternative accommodation have increased. This suggestion did not meet with the favour of Mr. Corrigan S.C. indicating that this client (the wife) would not agree to it and that in any event, the Court would not have jurisdiction to make such an order. As a result, I decided not to make this order but I am nevertheless convinced that a court may add such conditions to an order for sale as shall provide an incentive for early sale pursuant to s. 19(3)(a) of the Family Law (Divorce) Act 1996.

58. I therefore propose to make the following orders:

(1) Grant of a decree of divorce as described in the judgment

(2) Effect Paragraph 2 of the settlement by providing for payment of €300.00 per child to commence in March 2018

(3) A stay on accumulated arrears of maintenance until further order of the court.

(4) Sale of the dwelling referred to in the settlement for a sum not less than €1,300,000.

(5) An order that after the discharge of all costs including solicitor's fees in accordance with the settlement that the sum of €300,000 be paid to U.D. and out of the balance, 66.66% shall be paid to the applicant and 33.33% should be paid to the respondent, provided however, that if the sale closes on or before 1st December, 2016, the applicant may be paid an additional €75,000 with equal deduction of the respondents share.

(6) The applicant should be at liberty to draw on any funds in her control (including accumulated children's allowances) in order to make up such sum as is required to purchase an alternative dwelling in the general vicinity indicated in the settlement and to make up for the temporary loss of maintenance from the respondent.

(7) The parties should be at liberty to address the court in relation to such further order as may be necessary (including an order to ensure the tax efficiency of the disposal of the dwelling referred to in the said settlement of 2006.)

Consideration of complaints of the applicant of a change in proportionality on the one hand and the complaints of the respondent that the applicant on any of the view of the case is getting a disproportion percentage have been balanced to cater for housing needs:-

59. I consider that I have struck a fair balance while still, taking as a general guide, the template of the settlement of 2006.