THE COURT OF APPEAL

Neutral Citation Number: [2015] IECA 363

Appeal No. 2014/809 & 2014/817

(337/13 & 353/13 SC)

[Article 64 Transfer]

Ryan P.
Peart J.
Irvine J.

In the Matter of

The Judicial Separation and Family Law Reform Act, 1989

- and -

In the Matter of The Family Law Act, 1995

- and -

In the Matter of The Family Law (Maintenance of Spouses and Children) Act, 1976, As Amended

- and -

In the Matter of The Family Law (Divorce) Act, 1996

Between/

T.

Applicant/Respondent

- and -

L.

Respondent/Appellant

JUDGMENT of the Court delivered on the 3rd day of December 2015

1. This is an appeal against the judgment and order of the High Court (Abbott J.) delivered on 10th February, 2012, and 22nd February, 2013, respectively. The High Court judge granted a decree of divorce in respect of a marriage solemnised on 30th August, 1980, in Dublin and made ancillary orders pertaining to, *inter alia*, maintenance and a pension fund for the applicant.

2. There were seven issues on appeal, set out below, which the parties submitted were for the Court to decide; however, these can be condensed into two central issues. The first is whether, in light of the appropriate provisions and principles of EU law, the High Court judge erred in delivering a judgment which, it was submitted, would have the effect of creating two irreconcilable judgments within the Area of Freedom Security of Justice ("AFSJ"). The second was whether the High Court judge erred in law, and in fact, in how he approached the issue of maintenance, the retirement fund and the other associated orders which he made in favour of the applicant by, inter alia, failing to have sufficient regard to a prior settlement agreement.

3. Before moving on to elaborate and expand on these issues in detail, it is first necessary for the Court to briefly set out the relevant facts and chronology of the lengthy and complex proceedings to date.

Background
The Marriage and Subsequent Dutch Divorce

4. As detailed in the judgment of Abbott J., the applicant ("the Wife") and respondent ("the Husband"), both Irish citizens, married in Dublin in 1980. They have three children who are all of full age. In 1987, the parties sold the family home in Ireland as the Husband had taken up a position in a subsidiary of an Irish company operating in an E.U. Member State ("the Member State"). The parties and their children resided there from 1987 until 1992. It was during this time that unhappy differences developed in the marriage.

5. Consequently, the Wife returned to Ireland with the children in the summer of 1992. On the 26th October, 1993, solicitors acting for the Wife in the Member State wrote to the Husband seeking maintenance and financial support. In December, 1993 the Wife issued proceedings in the District Court of a City in the Member State seeking maintenance for herself and her children. At paragraph 4 of that application she said that the marriage had permanently broken down and that "for this reason [she] will shortly make a divorce application to your court".

6. On the 2nd February 1994, an interim maintenance order was made by the District Court hereinbefore mentioned for the monthly local currency equivalent of IR£1,455 for the Wife and IR£183 for each child. Under the law of the Member State, the Wife had four weeks from that date within which to institute proceedings for divorce; that would have enabled the interim maintenance order to remain in place and to continue to be enforceable. However, she never instituted such proceedings.

7. As a result, in March, 1994 the Husband himself instituted proceedings in the same District Court seeking a decree of divorce. By way of response, the Wife, who did not object to this relief being granted, sought orders of maintenance for herself and her children

as well as custody of the latter. Both parties were represented by lawyers from the Member State.

8. By 17th August, 1994, the parties had both signed an agreement entitled "Divorce Agreement", which intended to "regulate the consequences of the divorce".

9. On 12th September, 1994, the District Court of the Member State granted a decree of divorce. The judgment recited provisions of the law of the Member State to the effect that the Court was empowered in the matter, as the Husband had lived for more than 12 months in that State, and that the Wife had not objected. The judgment of the Court included provision for maintenance for the Wife but stated that it had no authority to make provision for custody or maintenance of the children. By this stage, the Husband had returned to Ireland and had taken up a new employment position.

The Irish Proceedings

10. On 6th July, 2000, the Wife commenced the present proceedings; she applied for a decree of judicial separation pursuant to s. 2(1)(a) or (b) of the Judicial Separation and Family Law Reform Act 1989 or, in the alternative, a decree of divorce pursuant to the Family Law (Divorce) Act 1996, as well as ancillary orders. By order dated 6th July, 2001, Lavan J. directed that:-

> "A preliminary issue be tried herein the issue being 'whether the [husband] is or is not entitled to a declaration that the validity of a divorce obtained on the 13th day of July 1994 under the civil law of the E.U. Member State is or is not entitled to recognition in this State pursuant to the Family Law Act, 1995, s. 29(1)(d) and / or (e)."
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> (The reference to a divorce having been obtained on 13th July, 1994, is an error. As was subsequently noted on appeal in the Supreme Court, the divorce was not granted until the 12th September, 1994.)

11. Both the High Court (Morris J.) and Supreme Court, by judgment of Keane C.J. [2003] IESC 59, rejected the Husband's submissions to the effect that the said divorce was entitled to recognition in this State. In particular, the Court found that the Husband had failed to establish that his domicile of origin, Ireland, had been abandoned and that a domicile of choice in the Member State had been established for the purposes of s. 5(1) of The Domicile and Recognition of Foreign Divorces Act, 1986.

12. On the 16th December, 2003, the Wife issued a notice of motion seeking an order that the Husband should not be entitled to defend the proceedings by reason of his failure to file an affidavit of means. She complained of hardship arising from the inordinate delays in the proceedings.

13. By notice of motion dated 28th January, 2004, the Husband sought declarations to the effect that the Court should decline jurisdiction in respect of the ancillary reliefs sought. The issue was heard as a preliminary issue on an undertaking given by Mr. Durcan S.C. on behalf of the Husband that no new issue or further grounds of challenge would be raised by him. The High Court, by judgment of McKechnie J. on 22nd February, 2006, rejected the Husband's submissions. In particular he rejected the argument that the Brussels regulations were applicable or that the Brussels Convention required the Court to recognise the divorce obtained in the Member State. The Supreme Court, by judgment of Fennelly J. on 29th July, 2008, upheld these findings.

14. Consequently, the Husband filed an affidavit of means on the 19th December, 2008, and 13th October, 2010, as did the Wife on 27th January, 2009, and 17th September, 2010. The case was heard over four days, from 19th to 21st October, 2010, and on 2nd November, 2010, before Abbott J. in the High Court. Judgment was delayed to allow the parties deliver further written and oral submissions on the possible implications of the Supreme Court decision in YG v. NG [2011] 3 I.R. 717 which was delivered on 19th October, 2011; accordingly, Abbott J. delivered judgment on 10th February, 2012.

The EU Law Dimension

15. The Court was asked to decide on three related issues pertaining to the jurisdiction of the High Court to grant the decree of divorce. Firstly, the Court was asked to determine whether, in light of the relevant provisions of EU law, the Court was obliged to reject the divorce application on the ground that it would create a judgment and order irreconcilable with a prior judgment and order from the Member State. Secondly, the Court was asked to consider whether a preliminary reference should be made to the CJEU in respect of the first issue. Thirdly, the Court was asked to consider whether an estoppel arose, either by virtue of *res judicata*, the prior undertaking given by the then counsel for the Husband to McKechnie J. or the fact that the Husband had re-married on foot of the order under appeal, such as to prevent the Husband relying on the EU law related arguments submitted in his appeal.

16. The following provisions of EU law were relied upon in this case:

> (i) The Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 (hereinafter "the Brussels Convention"), as incorporated into Irish law pursuant to the Jurisdiction of Courts and Enforcement of Judgments Act 1998.
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> (ii) Council Regulation (EC) No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (hereinafter "Brussels I");
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> (iii) Council Regulation (EC) No 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (hereinafter "Brussels II"); and
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> (iv) The State's obligations as set out in Articles 4(3) TFEU as well as Articles 20(2)(a), 45, 49 and 67 TFEU, in addition to Article 6 ECHR and Article 47(2) of the Charter.

17. In this context, before considering the relevant legal submissions of the parties, it is first necessary to examine the EU law related submissions previously raised by the parties in the current set of proceedings. As the first preliminary issue concerned the application of Irish international private law, it is only necessary to examine the second preliminary issue concerning the ancillary maintenance order in detail, and in particular the Supreme Court judgment of Fennelly J. delivered in 2008.

The Second Preliminary Issue in Detail

18. In his submissions, the Husband relied on Articles 17, 19, 21 and 22 of the Brussels Convention, as incorporated into Irish law pursuant to the Jurisdiction of Courts and Enforcement of Judgments Act 1998; the provisions of Brussels I; the provisions of Brussels II and Brussels II bis; and the State's obligations as set out in Articles 3, 10, 18 and 39 of the Treaty establishing the European Community

19. In the High Court, McKechnie J. held that neither the Brussels I nor Brussels II regulations were applicable to the proceedings, and that, on the basis of Article 27(4) of the Brussels Convention as well as the CJEU decision in *Hoffmann v. Krieg* [1988] ECR 645, there was no requirement for the Court to recognise the maintenance order from the Member State in the circumstances of the case. Further, McKechnie J. rejected that Art. 39 EC nor any other provision of European law required recognition of a foreign judgment on the facts or that the Irish rules of private international law applied by the Supreme Court in the 2003 judgment were either directly or indirectly discriminatory for the purposes of EU law.

20. Finally, McKechnie J. noted that the grounds of challenge, as contained in the notice of motion dated the 28th January, 2004, could have been raised in the first preliminary issue. However, McKechnie J. held that the Supremacy of provisions of EU law with direct effect did not preclude the application of procedural rules such as *Henderson v. Henderson* (1843) 3 Hare 100 to proceedings such as these; though, in his discretion he decided to allow the Husband to proceed on account of, inter alia, the undertaking given by the then counsel for the Husband and the fact that issues raised were points of European law of general importance whose determination was in the public interest.

21. In the Supreme Court, Fennelly J. held that the rule in *Henderson v. Henderson* was not applicable to the proceedings at hand, as the Brussels I Regulation was not in force until after the notice of motion and judgment of Morris P. in relation to the first preliminary issue, and that it was desirable to hear all of the arguments concerning the Brussels Convention and regulations together given their interrelatedness.

22. Fennelly J. upheld the findings of McKechnie J. in relation to the Brussels regulations and the Brussels Convention. Similarly, Fennelly J. rejected that Article 61 and 65, in relation to the AFSJ, provided any basis for the Husband's contention that the courts should decline jurisdiction. Further, Fennelly J. rejected the Husband's contention that the Irish rules of international private law constituted a restriction on his rights of free movement on the basis that it was a theoretical and unreal argument, but also on the basis that it was actually Article 27 of the Brussels Convention that constituted that restriction.

23. Finally, Fennelly J. refused to send a preliminary reference to the CJEU, *inter alia*, on the grounds that the Husband's arguments were unfounded and without merit, and also in view of the Husband's propensity to delay proceedings.

The High Court Proceedings of October 2010 before Abbott J.

24. At the start of the counsel for the Husband's submissions on 19th October, 2010, before Abbott J., a document was submitted to the Court on the basis that the Husband was suing Ireland before the European Court of Human Rights and, therefore, was required to exhaust all domestic remedies. The document outlined the Husband's position as he saw it and contained similar arguments to those previously raised on appeal, but it was unsupported by any motion for a preliminary application. On account of the prior undertaking given by counsel for the Husband, the High Court judge agreed to read the document on a *de bene esse* basis. By judgment of 10th February, 2012, the High Court judge dismissed whatever claims could arise from that document on the basis of both the prior undertaking given by counsel for the Husband to McKechnie J., as well as the Supreme Court decision of Fennelly J. delivered in 2008. In addition, the High Court judge held that the arguments raised in the document had "no merit and no application to the present proceedings".

Legal Submissions of the Appellant

25. Mr. Travers S.C., counsel for the Husband, submits that the High Court did not have a positive competence to grant a decree of divorce and other ancillary relief which were irreconcilable with the prior judgment and order from the Member State. Counsel submits that the judgment and order under appeal were incompatible with the Brussels I and Brussels II bis regulations, which he submits were applicable at the date of their delivery. In addition, counsel submits that there is an independent general obligation against creating such irreconcilable judgments, under EU law.

26. In particular, counsel submits that the effect of the judgment under appeal is to frustrate the application of the Brussels regulations given that the recognition of the judgment under appeal is highly problematic, particularly in the Member State, on account of Art. 22(d) of Brussels II bis. However, counsel submits that neither the judgment nor order under appeal can be recognised in the Member State, and are unlikely to be recognised in other member states. In addition, counsel submits that there is no basis in the Brussels regulations, or in the provisions concerning the AFSJ, for suggesting that the effects of the judgment and order of the High Court judge can be limited territorially to this State; consequently, he submits that they create uncertainty and undermine the objective of an AFSJ as enshrined in Article 67 TFEU. Counsel submits that the High Court judge has, accordingly, also failed to comply with the duty of sincere co-operation enshrined in Article 4(3) TEU.

27. As a result, counsel submits that there are 4 particular errors in the judgment under appeal:

> (i) Firstly, he submits that the High Court judge erred in dismissing the Husband's submissions in this regard on the basis of their alleged irrelevance. Counsel submits that the High Court judge mischaracterised the Husband's objection to jurisdiction as a further preliminary point, rather than a substantive objection, and that the prior undertaking did not preclude the Husband from raising points as to the compatibility of the relief sought with EU law. In addition, counsel submits that, given the implications for other EU member states, the High Court judge was under a duty to consider that substantive objection. Hence, counsel submits that the High Court judge erred in refusing to consider the Husband's objection and in failing to give reasons for his refusal, thus breaching Article 6 ECHR and Article 47(2) of the Charter.
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> (ii) Secondly, he submits that, in rejecting the Husband's substantive objection, the High Court judge erred in so far as he appears to have based jurisdiction to grant the second decree of divorce and ancillary orders on the 2003 and 2008 Supreme Court judgments; counsel submits that both judgments were domestic judgments of a private international law nature with no implications for other EU member states and that the latter judgment was vitiated by several errors of EU and international law. Further counsel submits that the prior undertaking could not operate to give the High Court a jurisdiction which, counsel claims, does not exist.
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> (iii) Thirdly, he submits that the High Court judge erred in failing to have regard as to the implications of his judgment for legal certainty with respect to Title V Part Three TFEU; thus, the High Court judge failed in his duty to uphold and vindicate the principles which flow therefrom by delivering a judgment irreconcilable with both the prior agreement of the parties as well as the consensual judgment and order that followed on from it.
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> (iv) Fourthly, in light of the fact the Wife sought a decree of divorce in the alternative and, as alleged by counsel, is in reality seeking further monetary reliefs, counsel submits that the High Court judge effectively exercised a discretionary

decision to grant the decree of divorce. Consequently, he submits that the High Court judge erred in failing to explore the possibility of granting relief under the stand-alone provisions of the Family Law (Maintenance of Spouses and Children) Act 1976 and in proceeding in a manner that breached the aforementioned duty.

28. In addition, counsel submits that the judgment and order of the High Court judge are incompatible with the Husband's right of free movement within the EU. In particular, he submits that the ultimate effect is to place the Husband in a position which a comparable national of the E.U. Member State moving to Ireland after divorcing in that State would not face. Counsel submits that the basis for the impediment appears to be non-recognition, which he submits constitutes discrimination insofar as it is based on domicile, in effect nationality. Further, counsel contends that, on account of the judgment under appeal, his conditions of residence are not the same in Ireland as they are in the Member State, or indeed other member states; consequently, he submits that the legal uncertainty resulting from the judgment under appeal constitutes an impediment in respect of Articles 20(2)(a), 45 and 49 TFEU.

29. Counsel also made specific submissions to the effect that the *lis pendens* rule in Article 21 of the Convention still applied in circumstances where the first court had given judgment, and not just while it was deliberating, and that the High Court judge undermined the effectiveness of Article 267 TFEU in not providing reasons for his refusal to make a reference to the CJEU.

30. Finally, counsel submits that the 2003 and 2008 Supreme Court judgments do not address the specific issues raised and are therefore not *res judicata* and that, even if they were, the supremacy of EU law requires their consideration by the Court, particularly in circumstances where the CJEU has not explicitly considered the issues raised.

Legal Submissions of the Respondent

31. Mr. O'Riordan S.C., counsel for the Wife, objects to the Husband raising issues arising from an interpretation of EU law as an attempt to elongate the proceedings. Further, he submits that the husband's conduct is not only oppressive, and effectively an abuse of the Wife, but also amounts to an abuse of the court process. In particular, counsel submits that the issues raised are *res judicata* and that the husband is estopped, by virtue of both personal and issue estoppel, from raising those particular issues.

32. Counsel submits that the issues raised on appeal are identical to those raised as part of the second preliminary issue, as summarised by Fennelly J. at p.8 para.29 of the 2008 Supreme Court judgment. Furthermore, counsel submits that, in those proceedings, the Brussels Convention and Brussels Regulations were specifically raised and that the husband had argued that any resulting order of the High Court would be irreconcilable with the prior maintenance order from the Member State, having regard to Articles 61 and 65 EC. In addition, counsel highlights that the husband also raised arguments to the effect that the 2003 Supreme Court order was incompatible with the free movement of workers and that, in accordance with Articles 2,3,10 and 61 EC, Ireland was obliged to facilitate the creation of an internal market and promote mutual respect between various judicial organs.

33. Counsel emphasises that all of these arguments were rejected and submits that the husband is asking the Court of Appeal to act as an appellate court to the Supreme Court. Thus, counsel submits that the Supreme Court determined those issues on the merits and passed judgments which were final and conclusive. Counsel submits that the husband simply does not accept the prior Supreme Court judgments.

34. Counsel submits that the decree of divorce granted by The High Court judge is recognisable by other EU member states and has been relied upon by the husband to re-marry in this jurisdiction. On account of the latter, counsel submits that the husband is personally estopped from placing the validity of the decree of divorce granted by The High Court judge in question.

35. In addition, counsel submits that the husband is personally estopped from raising European law issues in this appeal on account of the prior undertaking given by counsel on his behalf, having taken express instructions, not to raise any further issue or new ground of challenge. Counsel submits that the husband erred in believing that he is not bound by it.

36. Finally, counsel submits that the High Court judge outlined in detail his reasons for rejecting the EU and EC concerns in the written document handed in, and that the High Court judge correctly held that in relation to these aspects of the document, he was bound by the prior Supreme Court decisions. Counsel submits that the points raised in the personal document were never pursued at the actual hearing nor was a reference to the CJEU sought in Court on the husband's behalf. Counsel submits that the submissions filed by counsel for the husband in the High Court only dealt with the effect and weight of the prior agreement made in the Member State in the context of whether ancillary relief should be granted to the wife.

The EU Law Dimension

37. The first issue that arises for consideration on this appeal is: Was the High Court obliged to reject the claim for divorce made by the wife on the basis that a judgment granting a divorce would create an irreconcilable conflict with the judgment given in proceedings between the same parties in the Member State pursuant to Article 22(c) or (d) of Brussels II bis or other EU Treaty provisions and/or obligations?

38. It will be recalled that these proceedings began on the 6th July, 2000, when the wife issued proceedings in the High Court claiming a decree of judicial separation pursuant to s. 2(1)(a) or (b) of the Judicial Separation and Family Law Reform Act 1989 or, in the alternative, a decree of divorce pursuant to the Family Law (Divorce) Act 1996 and certain ancillary reliefs. An order was made by consent that a preliminary issue be tried as to whether the divorce obtained on the 12th September, 1994 under the civil law of the Member State was entitled to recognition in this State pursuant to the provisions of the Family Law Act, 1995. The High Court held that the divorce from the Member State was not entitled to recognition in this jurisdiction. The Supreme Court dismissed the husband's appeal and affirmed the order of the High Court, holding that the admitted and agreed facts in the case could lead to only one conclusion, namely, that the husband had failed to prove that he had abandoned his domicile of origin and acquired a domicile of choice in the Member State.

39. The husband then ventured along another path. He sought by way of a motion to persuade the court to decline jurisdiction in respect of the ancillary reliefs sought by the wife, relying on the Brussels Convention, Brussels I, II and II *bis* regulations and other provisions of the Treaty. He failed in the High Court and once again appealed to the Supreme Court, which delivered judgment on the 29th of July 2008. The unanimous judgment of the court was delivered by Mr Justice Fennelly, who conducted a detailed analysis of the arguments put forward on the husband's behalf. A brief summary of the findings of the Supreme Court may be helpful.

40. The Court held that Case 145/86 *Hoffmann v Kreig* [1988] ECR 645 "conclusively establishes that the Convention does not require the Irish courts to recognise the judgment of the Court of the E.U. Member State in respect of maintenance". Ireland was free to continue to apply its own private international law with regard to the recognition of foreign judgments concerning status, which included divorce. Although the facts in this case are the converse of *Hoffmann*, the principle is the same. The Court was not satisfied

that the Brussels Convention actually applied to the case but if it did and "specifically if it continues to apply to the question of whether the Irish courts should decline jurisdiction by reason of the existence of the judgment of the E.U. Member State, the appellant's case must fail".

41. In respect of Brussels I, Brussels II or Brussels II bis, the Court was emphatic, declaring that it was clear beyond argument that none of the regulations applied to the judgment of the Member State.

42. The Court rejected the arguments based on co-operation, supremacy and effectiveness, holding that the Treaty provisions cited were not even remotely related to the case. Neither was the argument based on free movement in any way relevant or helpful to the husband's case.

43. At a fundamental level and referring back to the 2003 judgment, Fennelly J said that:-

> "this Court has already conclusively decided that the judgment of the E.U. Member State is not entitled to recognition in this State. That remains the case. The judgment of this Court is final and conclusive under the Constitution".

44. The Supreme Court also rejected the husband's application for a reference to the Court of Justice under Article 267. The Court decisively rejected the husband's motion on grounds that did not admit of uncertainty in respect of Union law in circumstances in which each of the points raised by the appeal was dealt with in detail and in turn.

45. The situation therefore is that in 2003 the Supreme Court refused to accord validity to the divorce from the Member State that was obtained in 1994. In 2008, that Court rejected an attempt to secure another mode of recognition based on the ancillary orders. In the judgment under appeal, the High Court granted the wife a decree of divorce and made a series of orders providing for financial terms. A question that the husband is unable to answer is how this court would be legitimately able to disregard the findings of its superior court on the issue of recognition of the divorce from the Member State. If the appeal had been made to the Supreme Court, it would at least have been possible to argue that it should not follow its 2003 decision but that does not arise with this court. The question of a reference has also been decisively dealt with by the Supreme Court.

46. The question for this court is whether the High Court erred in its judgment in applying the law on the issue of the divorce from the Member State. The judge was obliged to respect the decision of the Supreme Court in 2003 and its judgment in 2008 on the other issues raised by the husband. This court is similarly bound. It follows that the husband must fail on this issue.

47. It is equally clear that the matter of a reference under article 267 has been decisively rejected. It is of course the case that this court has a separate jurisdiction to make a reference but it would not be appropriate to consider doing so when the matter in issue is the subject of a binding decision by the Superior Court. In this case, it is not even that there is a binding precedent; the decision arises in the very proceedings that are under appeal.

48. In the judgment of this court, all the arguments that the husband has put forward either through his counsel or his own separate document must yield to the definitive judgment of the Supreme Court on the status of the divorce from the Member State to the rejection by that court of the various Union law challenges and submissions; and as to a reference to the separate consideration of that question by the Supreme Court in 2008. In our view, the learned High Court judge was not only entitled to come to the conclusion he did but was obliged to do so, as is this Court.

The National Law Dimension

49. Apart from the European law dimension to this appeal, the following issues remain to be determined by this Court: the first being whether the High Court judge attached adequate weight to the 1994 agreement; the second being whether the High Court judge erred in law, or in fact, in the making of the ancillary orders; the third being whether the Court is entitled to insert its own figures into any consequential order if satisfied that the High Court judge erred in principle; the fourth being the validity of the costs order made by the High Court judge; and the final issue to be determined being whether, as sought, this Court should, in line with the notice to vary, award a lump sum in favour of the Wife.

50. At the heart of this aspect of the appeal is s. 20 of the Family Law (Divorce) Act 1996. This section sets out the matters to which the Court must have regard when determining whether or not "proper provision" has been made for the spouses and dependant children of a marriage where one of them seeks a decree of divorce. In this case it is the Husband's contention that, in granting the Wife a decree of divorce on the 22nd February, 2013, the High Court judge did not comply with his statutory obligations, failed to have regard to the relevant legal principles - particularly those set out in Y.G. v. N.G. [2011] 3 I.R. 717 - and that certain finding of fact which he made were not supported by the evidence.

The Order of Abbott J.

51. Firstly, in his order, the High Court judge directed pursuant to s. 13(1)(a)(i) of the Family Law Divorce Act 1996 that the Husband make periodic payments of €5,000 in the manner of the prior maintenance obligation, to take effect from 10th February, 2010, and to be reviewed after one year in the event of the Wife establishing a new profession.

52. Secondly, the High Court judge directed pursuant to s. 14(1) of the Family Law Divorce Act 1996 that the Husband transfer a lump sum of €450,000 to an approved retirement fund in the name of the Wife.

53. Thirdly, the High Court judge declared pursuant to s. 15(1)(b) of the Family Law Divorce Act 1996 and s. 36 of the Family Law Act 1995 that the Wife and Husband were each entitled to the sole beneficial occupation of the dwellings which they then or subsequently might occupy such that neither party would be required to consent to the disposal of any such property pursuant to the provisions of the Family Home Protection Act 1976.

54. Fourthly, the High Court judge directed that the Wife would have liberty pursuant to s. 18 of the Family Law (Divorce) Act 1996 to apply to court for maintenance to be provided from the estate of the Husband in the event that he predeceased her but that pursuant to s. 18(10) of the Family Law (Divorce) Act 1996 that he would not be entitled to make any claim against her estate.

55. Finally, the High Court judge made an order of costs in favour of the Wife for the proceedings.

The Role of the Court

56. Before dealing with the relevant statutory provisions and the guiding legal principles, it has to be remembered that this Court is

not hearing the Wife's application for divorce de novo. This Court is exercising a purely appellate function and is not permitted to supplant the conclusions of the High Court judge in favour of its own conclusions as to what, if any, financial provision he should have made for the Wife. To this extent, the Court is bound by the legal principles which emerge from the oft quoted decision in Hay v. O'Grady [1992] 1 I.R. 210, at p.217, where McCarthy J. held as follows:-

> "1. An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
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> 2. If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
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> 3. Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact.... In my judgment, an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

57. That said, having regard to the Husband's submissions, this Court must of course scrutinise the judgment and order of the High Court to consider whether his complaints are well founded. Did the High Court judge, in reaching his conclusions, pay proper regard to the statutory provisions, the guiding legal principles and the evidence?

The 1994 Agreement

58. Of major factual significance to the case advanced by the Husband is the 1994 agreement, which, at the time it was executed, was intended by him and the Wife to be in full and final settlement of all or any claims that they might have against each other arising from the termination of their marriage in the E.U. Member State. That agreement was implemented and performed by both of them, subject to certain consensual variations, up until the date of the institution of these proceedings, even though it is the Wife's contention that it did not properly provide for herself and her children over that period.

59. The Court will now summarise the main provisions of the 1994 agreement, not only because it reflects the intentions of the parties at the time it was executed, but also because of the Court's obligation, when considering the terms upon which a decree of divorce might be made, to have regard to the terms of any such prior agreement. After that, the Court will set out the relevant statutory provisions and the guiding principles as outlined by the Supreme Court in *Y.G. v. N.G.*

60. The principle provisions of the agreement signed by the parties on 7th July, 1994, are as follows:-

> (i) The Wife to be principally responsible for the care and upbringing of the children with the Husband providing additional support, when possible.
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> (ii) The Husband to pay the Wife £182 per child per month by way of maintenance subject to reduction by reference to any child benefit received.
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> (iii) Both parties to pay a sum of £1,818 towards the school fees of their elder two children for a period of five years.
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> (iv) The Husband to have access every second weekend.
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> (v) £12,747.50 to be paid by the Husband into a bank account to meet disbursements in respect of the children's ongoing needs.
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> (vi) The Husband to pay maintenance to the Wife in a sum of £1,455 gross per month, subject to adjustment by reference to any increase in his salary.
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> (vii) Clause 10:
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> "The man is obliged, as a result of the above distribution of assets, to pay to the woman an amount of £35,000. In fixing this amount it is assumed that the family home in a district of the E.U. Member State will realise a gross amount of 400,000 in local currency (being the equivalent of IR£145,507). This amount of 400,000 in local currency (being the equivalent of IR£145,507) will entail Estate Agent's costs of 9,500 in local currency (being the equivalent of IR£3,455). Any excess or deficit over or under 390,500 in local currency (being the equivalent of IR£141,869) from the sale of the house shall be divided in two and shall be used to adjust the IR£35,000".
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> (viii) The Wife's claim to any share of the Husband's pension entitlement to be satisfied by performance on the part of the Husband of his obligations under Clause 10.
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> (ix) The Husband to use his discretion to ensure that his trustees would continue to meet his maintenance obligations in the event of him pre-deceasing the Wife.
>
> (x) That the parties would make no future claims on each other under any heading referred to in the agreement, which was stated to be in final satisfaction of all potential claims.

The Relevant Legal Provisions

61. As to the relevant statutory provisions, these are as provided for in s. 20 of the 1996 Act. The section, in full, provides as follows:

> "(1) In deciding whether to make an order under ss. 12, 13, 14, 15 (1)(a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.
>
> (2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in

determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(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,

(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),

(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,

(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,

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

(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,

(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,

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

(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,

(j) the accommodation needs of either of the spouses,

(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,

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

(3) In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.

(4) Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family concerned and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters

(a) the financial needs of the member,

(b) the income, earning capacity (if any), property and other financial resources of the member,

(c) any physical or mental disability of the member,

(d) any income or benefits to which the member is entitled by or under statute,

(e) the manner in which the member was being and in which the spouses concerned anticipated that the member would be educated or trained,

(f) the matters specified in paragraphs (a), (b) and (c) of subsection (2) and in subsection (3),

(g) the accommodation needs of the member.

(5) 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."

62. The weight to be given to a prior agreement between separating parties, when dealing with ancillary relief such as maintenance etc., was addressed in significant detail by the Supreme Court in *Y.G. v. N.G.*

63. The facts of that case were that the parties had lived together as husband and wife for approximately eighteen years prior to their separation. They entered into a separation agreement pursuant to which the husband provided a capital sum, maintenance and other benefits, including a house, to his wife. The agreement was stated to be in full and final settlement of all matters arising between them and was to be incorporated into any decree of separation or divorce. After the agreement had been reached, the wife developed a debilitating illness, expended much of the capital sum that had been paid to her under the separation agreement and had incurred significant debt. She later sought a decree of divorce in the High Court and in his judgment, Abbot J. in effect embarked upon a re-distribution of the husband's assets and wealth in favour of the wife, a process with which the Supreme Court found fault. It concluded that the High Court judge had erred in law and had acted contrary to the provisions of s. 20(3) of the act of 1996 in that he had failed to have sufficient regard to the "full and final" nature of the matters agreed between the parties pursuant when they

concluded their separation agreement.

64. The principles that emerge from that decision are summarised conveniently by Denham J., commencing at para. 22 of her judgment, where she stated the following:

> "In light of the law and the Constitution, there are a few general principles which may be applied where there has been a prior separation agreement followed by a subsequent application by a party to court. These principles are drawn up in light of the circumstances of this case, but they are general principles.
>
> (i) A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight. This is so especially if the separation agreement, as here, provides that it was agreed between the parties that the agreement was intended to be a full and final settlement of all matters arising between the parties; and, in the event of either party being granted a court decree, the terms of the agreement should be incorporated into the court order.
>
> (ii) Irish law does not establish a right to a "clean break". However, it is a legitimate aspiration. As Keane C.J. said in D.T. v. C.T. [2002] 3 I.R. 334 at p. 364:-
>
> > "It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the "clean break" approach which are clearly beneficial. As Denham J. observed in F. v. F. [1995] 2 I.R. 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the "clean break" approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties."
>
> In that, case Murray J. stated at p.411:-
>
> > "I also agree that when making proper provision for the spouses, a court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s. 22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit."
>
> (iii) The constitutional and legislative scheme gives to the Court a specific jurisdiction and duty under the Act of 1996.
>
> (iv) Under s. 20(1) of the Act of 1996 "the court shall ensure that such provision as the court considers proper having regard to the circumstances exists" will be made for the spouses and any dependent children. Thus, this duty requires the Court to make proper provision, having regard to all the circumstances. A deed of separation stated to be in full and final settlement is a significant factor.
>
> (v) If the circumstances are the same as when the separation agreement was signed *then prima facie* the provision made by the Court would be the same, as long as it was considered to be proper provision.
>
> (vi) If the circumstances of the spouses, one or both, have changed significantly then the Court is required to consider all the circumstances carefully. However, the requirement is to make proper provision and it is not a requirement for the redistribution of wealth.
>
> (vii) Relevant changed circumstances may include the changed needs of a spouse. If there is a new or different need, that may be a relevant factor. Such a need may be an illness.
>
> (viii) The changed circumstances which may be relevant include the bursting of a property bubble which has altered the value of the assets so as to render an earlier provision unjust. These are two example illustrations and are not intended to be a conclusive list of relevant changed circumstances.
>
> (ix) If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project by spouses during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets.
>
> (x) If, in the period subsequent to the conclusion of a separation agreement, one spouse becomes very wealthy, there is no right to an automatic increase in money or other assets for the other spouse.
>
> (xi) If a party seeks additional funds, the Court has to look at all the circumstances and its duty is to make proper provision, not to enter into a redistribution of wealth.
>
> (xii) The facts and circumstances to be considered will include the length of time since the separation agreement was entered into. The greater the length of time which has passed, barring catastrophic circumstances, the less likely a court will be to alter arrangements.
>
> (xiii) The standard of living of a dependent spouse should be commensurate with that enjoyed when the marriage ended. The Act of 1996 specifically refers to matters to which the Court shall have regard and these include the standard of living enjoyed by the family before the proceedings were instituted or before the spouses commenced to live apart, as the case may be.
>
> (xiv) However, if a party has new needs, for example, a debilitating illness, that will be a factor to be considered by a court in all the circumstances of the case.
>
> (xv) Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances. In one case, where a couple had worked a farm

together, which the husband had inherited, the wife on separation sought 50%, however, the order given by a court was 75% to the husband and 25% to the wife. This is a precedent to illustrate an approach, but the circumstances of each case should be considered specifically.

(xvi) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party.

(xvii) If there has been an exceptional change in the value of assets, which was unforeseen at the time of the judicial separation or High Court hearing, it is a relevant factor, as not to take account of such a factor would result in an injustice. See *M.D. v. N.D.* [2011] I.E.S.C. 18."

65. On the present appeal, the Husband's principal complaint is that while the High Court judge correctly set out his obligations in light of the decision in *Y.G. v. N.G.*, he then proceeded to give little weight to the 1994 agreement and embarked upon something close to a re-distribution of his assets in the absence of evidence substantiating the Wife's need for the adjustment granted. Then, to make matters worse, without hearing any submissions that he would have wished to advance concerning the costs of the proceedings, the High Court judge proceeded to award the costs of the hearing against him, contrary to the principles of fair procedures and the normal practice of the court.

66. Given that the Wife has served a notice of cross appeal against the refusal of the High Court judge to award her a lump sum to enable her purchase a house, the Court will set out its conclusions on the issues on the appeal and cross appeal in the following order, namely:-

(i) Maintenance

(ii) Pension provision.

(iii) Property lump sum

(iv) Costs.

67. However, in advance of addressing each of these issues, some additional factual information concerning the parties at the time the High Court proceedings were heard will now be referred to, as will the arguments advanced by the parties on the appeal.

Relevant Facts & Submissions

68. The three children of the relationship were then twenty nine, twenty seven and twenty four years of age. The Husband was paying the Wife €3,000 gross per month maintenance. While her maintenance had increased since 1994, it had never, she maintained, been sufficient to meet her needs. Her needs and those of the children were only adequately met because she had been able to supplement her maintenance with earnings from certain secretarial work, various sums received by way of inheritance and, for a brief time, social welfare payments. Her outgoings were in excess of €6,000 per month and she contended that she required €7,000 per month as proper provision for her ongoing needs. She relied upon the fact that the CPI had risen 25% between 2000 and 2009 and contended that her maintenance had not kept pace with inflation or her needs.

69. As to her pension, the Wife complained that the Husband had a total pension portfolio of approximately €1,880,000. She had never been able to contribute to a pension scheme because of the modest level of her maintenance even during the period when she was working as a legal secretary between 1994 and 2000. For many years, annual rent was almost €20,000 per annum, and this was at a time when her gross maintenance payment was €36,000 per annum. She was also, *inter alia*, paying her daughter's private school fees, household VHI contributions and running a small car.

70. The Wife maintained that in stark contrast to her own financial situation, her husband had found the money to spend €800,000 on legal fees to thwart her claim, had committed to pay €435,000 for a luxury item which he used for pleasure purposes etc., had purchased a home in south Dublin valued at approximately €875,000, and for several years had enjoyed a gross income in excess of €1 million per annum.

71. The Wife maintained that, following her return from the Member State, she was never in a position to purchase property. While in the course of efforts to reach a mediated settlement, the Husband had offered her the deposit required to enable her to purchase a particular property and had agreed to guarantee her mortgage repayments; his overall offer was one which she considered unjust. In return for his contribution, he was to become the beneficiary of any monies which she might receive by way of inheritance and further, if she started to earn a living, she would be liable to pay maintenance to him based upon a particular formula. In these circumstances, she felt she could not proceed with the purchase. Further, her parents were not in a position to guarantee payment of her mortgage even though she had sufficient funds herself to pay the deposit.

72. The Husband had, since the 1994 agreement, entered into a new relationship and was supporting his partner and the two children of that union. He bought a house in 1998 in respect of which he had a mortgage. He gave evidence that the value of his pension fund did not represent its realisable value and that some of the funds in his portfolio required ongoing capital commitments. There was, he maintained, real uncertainly about the value of his assets as his minority shareholding in the Irish company referred to in his affidavit of means had no realisable value, certainly in the short or medium term. The Husband's liabilities were then €2.2 million, leaving aside such capital commitments as might in the future be required to support certain elements of his pension fund. He had converted a self administered pension fund into an ARF administered by Davy Stockbrokers, €450,000 of which was held in a cash fund at the time of the High Court hearing. His outgoings, he maintained, were greater than his income and he saw himself moving towards retirement in circumstances where he would still be supporting the children from his second relationship.

73. In his affidavit of means, he maintained that his monthly personal outgoings were €38,895. These included a sum of €5,000 net paid to his partner for household costs, children's costs and child minders.

74. In terms of the Court's obligations on the Wife's application for divorce and ancillary relief, the Husband emphasised the obligation of the Court to have regard to the circumstances and the lifestyle of himself and his wife at the time that they separated in 1994. He maintained that their standard of living at the time was relatively modest and that this had to be reflected in the Court's findings. Further, the vast majority of his assets had been acquired after his separation and were not the result of any joint enterprise between them. The Wife had received €50,000 from the sale of their home at the time they separated, and he maintained that she should not be compensated for her indiscretion in failing to invest that sum in the purchase of a home for herself in Ireland, given his willingness to guarantee her mortgage repayments.

75. Further, insofar as maintenance was concerned, his obligation under the law of the Member State was only to discharge maintenance for a period of twelve years, a factor which he submitted ought to have been taken into account by the Court when considering the Wife's claim to maintenance long beyond the contractual period provided for in the 1994 agreement. In respect of every aspect of the Wife's claim, he maintained she had failed to establish that her claims were driven by need or a change in her circumstances since the 1994 agreement and hence should be rejected.

76. In summary, the Wife considered herself entitled to 50% of the Husband's pension fund, €7,000 maintenance per month and a lump sum to be used by her to buy a house. The Husband's position was that she had not experienced any change of means such as would justify the Court departing from the terms agreed in 1994 and that each party should have been directed to pay their own costs.

The Court's Consideration

77. In considering the appeal and cross-appeal, the Court must have regard to the findings of the High Court judge in relation to the 1994 Agreement, even if the divorce from the Member State is not to be recognised in this jurisdiction. In relation to the time at which the 1994 Agreement was concluded, the High Court judge made the following findings: firstly, both parties had been legally advised, notwithstanding the Wife's complaint as to the extent of that advice; secondly, the 1994 Agreement was intended to bind the conduct of the parties on a permanent basis; and, thirdly, the agreement was operated for six years before the Wife took the first legal step evidencing her contention that it did not make proper provision for her needs.

78. However, those facts, which were to a certain extent contested by the Wife in the course of her oral evidence, even if 100% true, did not preclude the Court reviewing the adequacy of the provisions of that agreement. It is clear that the High Court judge was bound to attach substantial weight to any such agreement, as was advised by the Supreme Court in *Y.G. v. N.G.* However, in order to attach that type of weight to the agreement, the court had to be satisfied that, at the time it was made, the agreement made proper provision for the parties. If it did, before the court could interfere with it on a subsequent divorce application, it had to be satisfied that the applicant had demonstrated significantly changed circumstances concerning her needs, as was the case in *Y.G. v. N.G*

79. A judge, when faced with proceedings for divorce subsequent to an earlier agreement intended to bind the parties has a difficult task when asked to consider the adequacy of the provisions of that agreement made potentially decades earlier. Not only is the judge tasked with considering the circumstances of the parties as they existed at the time of its execution to see if its terms were fair and reasonable, but they must also then conduct a forward looking exercise to determine if the terms and provisions of the agreement were likely to protect the parties into the future in light of their probable needs. Having conducted such an analysis, if the judge is satisfied that proper provision was made in the agreement then he should not make further financial provision, subject to maintenance which always remains a reviewable factor.

80. In this case, it would appear from his judgment that the High Court judge came to the conclusion that the 1994 agreement had not made proper provision for the Wife, and he identified a number of needs that were not adequately or properly addressed in the agreement. First, he concluded that the 1994 Agreement, by its terms had not put the Wife in a position whereby she would be able to provide herself with a pension. Second, he was satisfied that that the maintenance aspect of the agreement did not make proper provision for her reasonable needs and neither was it likely to do so in the future, particularly if her employment targets were not reached, targets which he concluded, as a matter of fact, she was unlikely to achieve. Third, he concluded that there was nothing in the agreement which gave her any protection in later life should she lose independence and require nursing home care or the like.

81. It has to be said that this Court has found it difficult to find a sound foundation in the evidence for certain conclusions reached by the High Court judge in the course of his judgment. The first of these was his conclusion that the Husband's assets would likely have a value of €8 Million five years out from the date of the hearing. The second, his finding that the Wife's net assets, as of the date of the hearing, were €300,000 rather than €456,000. Third, his statement that the Husband's net monthly income was €23,000. That would appear to be a gross figure and the appropriate net figure would be that of €16,078, as stated in the report of Browne and Murphy of 18th October, 2009.

82. Nonetheless, it is clear that the High Court judge also concluded, as he was entitled to do on the evidence, that the Husband's financial situation was likely to improve in the relatively short term due to a range of possibilities, which included the following:

> (1) the likely upturn in the economy,
>
> (2) his potential future receipt of dividends,
>
> (3) a likely future increase in his salary,
>
> (4) the receipt of financial benefits following the implementation of an appropriate exit strategy from his company, and
>
> (5) the possibility of supplementing his income from his pension provision.

He also concluded that the Husband, as a prudent investor, would be well placed to manage his portfolio of investments and pensions to maximise his returns therefrom.

Maintenance

83. Having discussed the income of both parties, the High Court judge then proceeded to consider the maintenance needs of the Wife by reference to s. 20(2)(b) of the 1996 Act which provides that the court, when making proper provision for the spouse, must have regard to 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 re-marriage of the spouse or otherwise.

84. The High Court judge set out the financial obligations that the Husband had at the time concerning his household. He referred to the mortgage on his family home, his then €3,000 a month maintenance obligations to the Wife, payments to his son, and the payment of €5,000 to his current partner. Having concluded that these outgoings, which totalled €30,000 odd per month, were in excess of his then monthly income, he stated that he considered the Husband to be significantly over-stretched.

85. However, regardless of those facts, he then proceeded to order that the Husband pay the Wife a sum of €5,000 gross per month, and in the course of so doing he stated as follows:-

> "In relation to the wife's intention to support herself in the future, I consider that this is an admirable objective and I

have no doubt that her education, commitment and intelligence allied with her varied experience of life, will leave her very employable, but she faces into a challenging and difficult world commercially and notwithstanding her brimming confidence I consider that the court should make provision for continuance of maintenance years from the date of the order in this case to enable the wife to catch up with some of her borrowing and to cater for transition to a new home. The level of this maintenance should be €5,000 gross as suggested by the Attorney General and this would seem fair having regard to the fact that the husband's present partner receives €5,000 per month for household expense (and this is not tax deductible in the case of a partner). In the context of need in relation to maintenance identified by the judgment in G v. G I find that it would be absolutely unreasonable to expect a divorcing spouse to live on a sum less than that being given to a partner who has little or no rights either statutory or constitutional in comparison."

86. Insofar as the High Court judge expressed a view that it was legally permissible to adjust the maintenance arrangements between the parties, previously agreed, on the basis that the Wife should automatically be entitled, at the date of divorce, to a maintenance order equivalent to the sum being paid to the Husband's present partner, the same flies in the face of the decision of the Court in *N.G. v. Y. G*. However, this Court considers it highly probable that this was not the basis upon which the High Court judge decided to uplift the maintenance payment to his wife and that the statement was nothing more than a statement, and an unfortunate one at that, used by him to validate a decision made on the evidence before him that the Wife's needs had not been properly provided for under the 1994 agreement.

87. The Court had ample evidence that the Wife required a sum well in excess of €5,000 gross per month to meet her reasonable living expenses. €7,000.00 per month was the sum advocated on her behalf. Her need in this regard was borne out by her affidavit of means as well as her own oral testimony. For example, she told the Court that she had not been able to provide a holiday for herself or her family for the ten years between 1995 and 2005, and how she had only been in a position to further her educational prospects, when her employment as a legal secretary concluded in 2000, by reference to monies borrowed from her mother's potential estate. Further, it is clear as a matter of fact that the payments to the Wife and the Husband's current wife cannot be compared. Firstly, the sum which he directed to be paid to the Wife by way of maintenance was of course a gross payment of €5,000.00 per month. Out of that sum, she was obliged to discharge all of her living expenses. The payment to the Husband's partner (now wife) was a net sum of €5,000 per month. This was stated to be for household costs, children's costs and child minders, as per the fourth schedule to his affidavit. However, that sum was not to maintain the entire household. The Husband separately discharged all motoring costs including tax, insurance, fuel and depreciation. Likewise, he paid separately for health insurance, dental charges, telephone, TV licence, holidays, *etc.*, all of which the Wife was obliged to pay out of her gross €5,000.

88. Regardless of the somewhat unfortunate language used by the High Court judge to underscore his maintenance order, having considered the totality of the evidence available to him, this Court is not satisfied that that there are grounds to interfere with his findings that the 1994 agreement had not protected the Wife in terms of her future maintenance requirements and that, as a result, it needed to be adjusted to take into account what he, correctly in this Court's view, deemed to be her potentially poor income generating capacity. That the High Court judge did not err in making a maintenance order under s. 13 (1)(a)(i) of the 1996 Act, is borne out by his findings on the other issues to which the Court will now refer.

Pension Provision

89. It is clear from his judgment that the High Court judge considered that the 1994 agreement was deficient in that it did not protect the Wife from a range of risks, including the possibility that she might suffer a period of prolonged debilitation or ill-health, or that in old age might require nursing home or other like care. This was to be contrasted with the position of the Husband, who would never face any such concerns having regard to his asset base and pension fund. In these circumstances, the High Court judge decided that the deficiency was best met by increasing the Wife's maintenance entitlement and providing her with a fund for a limited pension. With these in place, he considered that she ought to be able to purchase a modest home, which she could later use as equity should she require nursing home care in later life.

90. While this Court accepts that the Wife received an additional sum of approximately €6,000 out of the net proceeds of the sale of the family home in 1994 to reflect the extent of her then interest in the Husband's pension, this Court is satisfied that it was open to the High Court judge to conclude that this adjustment was not adequate for the purpose of providing her with proper provision at that stage in her life when she might become vulnerable.

91. Having regard to the evidence that was before the High Court judge as to the Wife's income and expenditure post 1994, this Court rejects the submission made by counsel on behalf of the Husband that her lack of pension provision was due to incompetence or indiscretion on her part. It is clear from the evidence that wherever possible the Wife supplemented her income by working as a legal secretary, even when she had three children to rear effectively as a single parent. There is no evidence that she lived in anything other than relatively modest circumstances. She appears to have been prudent in the manner in which she managed her income and expenditure. Under the 1994 agreement, she was charged with bringing up the children. It can reasonably be inferred that, in more favourable circumstances, she would have pursued additional studies and been well positioned to pursue a more lucrative career which would have generated the type of income generating capacity that would have allowed her build up a pension fund.

92. Looking at the type of pension fund available to the Husband at the time of the hearing, the High Court judge was entitled on the evidence to take the view that he should make an order pursuant to s. 14(1) of the 1996 Act directing the Husband to effect the transfer a significant sum from the approved retirement fund held at the time by Davy into an approved retirement fund in the Wife's name. However, having regard to the increased maintenance payment which the High Court judge ordered, this Court is not satisfied that the sum which he directed to be transferred was proportionate in all of the circumstances. Rather, the Court is satisfied that, having regard to the needs expressed by the Wife in the course of her evidence, proper provision in this regard would be adequately met by the transfer of the sum of €300,000.

Lump sum payment

93. As to the Wife's cross-appeal based on the refusal of the High Court judge to award her a lump sum to enable her to buy a house, this Court is not satisfied that there is any basis upon which it could interfere with the conclusions of the High Court judge on this issue. The High Court judge was satisfied that, when taken together and considered in the context of the increased monthly maintenance payment, the net assets available to the Wife ought to be sufficient to enable her purchase, in a favourable market, a three to four bed roomed house in reasonable surroundings. Such a house would then be available to her at a later date, if she needed to generate income for nursing home care. In these circumstances, the Court will dismiss the cross-appeal.

Costs

94. In proceedings brought under a range of family law statutes, including the Family Law (divorce) act 1996, the court inevitably finds itself dealing with a finite pool of assets belonging to the parties when considering the issue of costs. As McCracken J. pointed

out in *MK v. JPK* (No.3) [2006] 1 I.R. 283, it is these assets from which proper provision must be made for the parties and their dependent family, and from which the costs of the proceedings must be met. It is well recognised that a vindictive litigant in the family law arena may, by their conduct, end up significantly depleting the overall assets available to meet any ancillary orders.

95. The starting point for any consideration of the decision of the High Court judge on this issue must be the Rules of the Superior Courts. In this regard, Order 99 rule 1 gives the presiding judge discretion as to who should bear the burden of the costs of any legal proceedings.

96. Quite apart from the Rules of Court, the rules of natural justice and fair procedures require any such discretion to be exercised judicially given that an adverse costs order is likely to have a significant financial impact on the party found liable to discharge such an order. A party likely to be so affected is entitled to be afforded an adequate opportunity to make submissions as to why, as a matter of fact and or law, the costs of the proceedings should be dealt with in a particular way.

97. That the parties are entitled to be heard as to the manner in which the court should exercise its discretion in relation the costs of the proceedings is also to be inferred from the High Court Practice Direction of 16th July, 2009. It identifies a number of factors which the court may take into account in determining how the issue of costs in family law proceedings should be addressed. The court is entitled to take into account whether or not a party has complied with any directions given in the course of proceedings, has been guilty of neglect or delay, has caused unnecessary work or the creation of unnecessary documentary material, or otherwise has been guilty of improper conduct by act or omission.

98. In the present case, notwithstanding his entitlement to be heard on these and any other issues which he wished to raise concerning the costs of the proceedings, the Husband was afforded no such opportunity to make any submissions. That being so, this Court is satisfied that the High Court judge erred in the manner in which he exercised his discretion such that the justice of the case would require that his order which directed the Husband to pay the costs of those proceedings must be set aside.

99. For the purpose of deciding what order should now be made in lieu of that made by the High Court judge on the 22nd February, 2013, the Court has considered the proceedings as a whole, the transcript of the evidence of the High Court hearing, the written submissions filed by the parties at the conclusion of the proceedings and the oral submissions of counsel on the appeal.

100. Relevant to the Husband's appeal in respect of the costs order is that from a review of the transcript in the High Court, it would appear that at least three of the four days of the hearing were spent on evidence concerning the financial and personal circumstances of the parties relevant to whether or not the 1994 Agreement had made proper provision for the Wife in the light of her application for a decree of divorce and ancillary relief. While it is clear that significant costs were incurred and effort expended in the preparation of extensive written submissions concerning the Court's jurisdiction to make the orders sought in light of the divorce from the Member State, very little time at the trial was taken up with this aspect of the case. Thus, it would be unjust to visit the entire costs of the proceedings on the Husband.

101. It is however undoubtedly the case that the determination of the substantive proceedings in the High Court was very substantially delayed by a number of legal challenges made by the Husband to the Court's jurisdiction to entertain those proceedings, in light of the divorce from the Member State, and these gave rise to the Supreme Court judgments of 2003 and 2008.

102. Protracted delay is almost universally damaging to the meritorious plaintiff in any type of litigation. But this is particularly so where the applicant is living in financial hardship while awaiting delayed access to a final order. It is of course true to say that insofar as the costs implications of the Husband's unsuccessful challenges to the Court's jurisdiction are concerned, the Wife was awarded and has been paid her legal costs of defending those proceedings. Accordingly, this Court is not satisfied that his conduct in those proceedings could automatically entitle the wife to the right to have all of her costs of the High Court proceedings paid by the Husband, as was ordered by the High Court judge.

103. There are, however, other financial consequences which flow from the manner in which the Husband conducted his litigation and, in particular, the manner in which he has engaged with the Court in relation to the divorce from the Member State.

104. While undoubtedly a losing party enjoys the right to appeal a decision of the High Court made at first instance, where a party pursues a course of action which amounts to the re-litigation of an issue already determined, that type of conduct can have a range of detrimental effects on the opposing party. In this case, the Husband, regardless of whether his actions in this regard were *bona fide* or otherwise, has pursued such an approach to the detriment of his wife and the delay in the determination of her claim. Given that her maintenance was significantly increased following the hearing of the High Court proceedings, it is reasonable to conclude that, absent the second challenge by the Husband to the Court's rejection of his entitlement to have the divorce from the Member State recognised in Ireland, the within divorce proceedings ought to have been conveniently determined, at the very latest, in 2006 with the result that the Wife would have had substantially more money to live off in the intervening period.

105. Further, while the Husband has paid the Wife's legal costs in respect of the two appeals which he pursued unsuccessfully to the Supreme Court, his actions in this regard have had the effect of significantly reducing his assets. At the time of the High Court hearing, the Husband accepted that he had expended approximately €800,000 in seeking to have his divorce from the Member State recognised in this jurisdiction. Even allowing for the cost of pursuing one appeal to the Supreme Court on this issue, he has since 2003 pursued a course of action which has very substantially reduced his means, a matter crucial to the consideration of the court when making orders for ancillary relief.

106. Confining itself therefore to the evidence led before the High Court and all of the pleadings, submissions and other materials placed before the Court, this Court is satisfied that it must set aside the costs order made by the High Court judge. In its place, the Court will direct that the Husband pay the plaintiff half of her costs of the High Court hearing, the same to be taxed in default of agreement.