Neutral Citation Number: [2007] IEHC 492

THE HIGH COURT

FAMILY LAW

2003 41 M

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

IN THE MATTER OF THE FAMILY LAW ACT, 1995

BETWEEN

S.D.

APPLICANT

AND
B.D.

RESPONDENT

Judgment of Mr. Justice Henry Abbott delivered on the 30th day of July, 2007.
The applicant wife and the respondent husband were married to one another on 8th September, 1971. There were five children of the marriage none of whom are dependent, namely D. 34, M. 33, S. 31, B. 29 and S.E 25. The wife describes herself as a full time homemaker, mother and now foster parent. The husband is a businessman with a variety of companies owned by him which involve a number of interests, including, manufacturing, dog breeding, racing and farming. He has an extensive property portfolio, both in terms of investment and development property.

Unhappy differences arose between the husband and wife and the husband moved out of the family home on 19th May, 1985. The husband and wife executed a deed of separation dated 18th December, 1985, which the husband claims dealt with matters arising from breakdown of their relationship. This claim is not accepted by the wife. The husband now lives with his new partner and has two dependent children by her.

Terms of the separation agreement of 1985
The separation agreement between the husband and the wife dealt with the separation itself, with custody of the children to the wife subject to access as detailed for the husband, and for the payment of a weekly sum of £300 for the maintenance of the wife and the infants of the marriage. Of considerable importance to the present proceedings are the provisions of clause 4 of the Separation Agreement of 1985 which provides as follows:-

> "4. It is a condition precedent of the operation of this paragraph that the husband shall having made a claim in that behalf in the manner prescribed by the Income Tax Acts be entitled for all purposes of the Income Tax Acts to deduct the payment or payments made hereunder in computing his total income for the year of assessment on which the payment is made."

Maintenance was to be increased annually in line with the cost of living. Maintenance was to cease for each child on their leaving fulltime education and whether in full time education or not the children would leave the maintenance net on attaining the age of twenty one years of age.

There followed two further important clauses in the separation agreement of special relevance to these proceedings. They are as follows (after para. 5):-

> "(e) Such a portion of the maintenance payable under this provision as is not for the benefit of the children shall cease and determine if the wife takes up a position of employment outside the family home or is in receipt of an income or co-habits with another.
>
> **AND IT IS HEREBY FURTHER AGREED AND DECLARED** that notwithstanding the above either the husband or the wife may at any time make such applications as may be appropriate to a court of competent jurisdiction to have the level of maintenance payable to be fixed or determined by that court pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976 as amended."

The separation agreement further provided for the transfer of the family home and its contents by the husband to the wife, and for various other ancillary provisions usual for a separation of the time. Finally, the applicant renounced all succession rights under Part IX of the Succession Act 1965. The wife also agreed to transfer any shares she had in three companies D (G) LB Limited and D Limited and SB Limited to the husband.

The wife maintained throughout the present proceedings that at the time of entering into the separation agreement of 1985, the husband represented to her that he was in grave financial difficulty and was facing bankruptcy, and that unless the applicant accepted the terms of the agreement the family home of the parties would be in jeopardy.

Further proceedings
The wife was not happy with the maintenance payments under the separation agreement of 1985. In evidence she said that she did not realise that the maintenance sum would be reduced so much by income tax. It is difficult to understand how she did not appreciate that such would be the outcome as she had been advised by an accountant in relation to the matter and had taken tax advice from a reputable accountant. In 1986, less than one year after the separation agreement, the applicant instituted Circuit Court proceedings (Record No. F 23/86) pursuant to the Family Law (Maintenance of Spouses and Children) Act 1976. The said proceedings came before the Circuit Court on a number of occasions where various maintenance orders were made. The final Circuit Court order in respect of maintenance which was appealed to the High Court was made subject to the continuing in force of the separation agreement of 1985. I conclude that the provision in the separation agreement that maintenance was to cease for the wife in the event of her co-habiting or taking up employment or having an income was to continue after the Circuit Court order.

This Circuit Court order was appealed to the High Court on Circuit and after some delay an order was made by the High Court on 25th October, 1990 whereby the husband was directed to pay the weekly sum of £380.38 to the wife in respect of maintenance as well as a further sum in respect of the children. The wife claims that the husband, in breach of this order, stopped paying maintenance from the 6th May, 1998 and when the proceedings herein were issued in March, 2003, there were arrears of £93,131 due and owing in respect of same and that arrears continue to accrue from the 26th March, 2003 at the rate of €19,797.76 per annum. The husband

claims that the said maintenance was not due under the separation agreement 1985 or the order of the High Court on appeal dated 25th October, 1990, by reason of the fact that he claimed that the wife was co-habiting, and was in business with and/or employed by the person referred to by the husband as J.W. Further, or in the alternative, the husband alleges that in respect of some of this time, at least, the wife agreed to waive payment of such maintenance.

The present divorce proceedings
The wife has instituted these proceedings by special summons dated 26th March, 2003 seeking a decree of divorce pursuant to s. 5(1) of the Family Law (Divorce) Act 1996, along with certain so called ancillary reliefs set out therein. The wife claims an equitable share of the assets of the family together with a lump sum provision for her future. The wife further claims that the maintenance which the husband was previously paying was not commensurate with his ability to pay an appropriate level, nor was it sufficient for the applicant's needs. The applicant further claims that the division of the assets under the separation agreement was improvident and inequitable.

The husband's defence
The husband claims that he has no objection to paying the wife maintenance as long as she does not co-habit with anyone but claims that these conditions are not met by reason of the fact that he believes that she continues to have a liaison with J.W., a man of considerable financial substance, who has provided for her throughout the years, and is likely to provide for her in the future. He claims that such assets as he has are the result of his inheritance from his family, and his hard work in the face of almost overwhelming debt. The husband argues that while the marriage lasted fourteen years, the parties have been separated for 22 years during most of which time the wife had a relationship with J.W. as described, and that it would be unjust and inequitable for the wife to be granted any further provision other than maintenance conditional on her not co-habiting and remaining dependant on the husband.

History of the Marriage
The parties married in their very early twenties and the husband by that stage had qualified in the retail business carried on by his father. This business was situated in S. Street in the city in a premises which is still in the ownership of the husband having been gifted to him by his father. Apart from the retail business carried on in S. Street there was some rental income from the property. The husband also worked in the associated primary processing factory owned by his father in his father's home farm at C.H., some miles from the city in which S. Street was situated. This primary processing factory was not a large scale operation, and was operated primarily by the husband in his younger days. The availability of this primary processing factory enabled the S. Street premises not only to carry on a substantial retail trade but also to engage in a widespread wholesale trade. In evidence, it was conceded by the husband that this wholesale trade related to hotels mainly but a letter from his accountant to a financial institution to obtain substantial loan finance in the eighties indicated that this wholesale trade spread to institutional clients in the area including the army barracks. The wife had finished her secondary schooling and obtained a secretarial qualification, working in that area prior to her marriage. After the marriage of the parties the husband worked "all the hours of the day" in the retail business and processing facility and the wife's evidence was that she helped in the retail business as cashier and other had general duties. The wife had become very familiar with the primary processing facility. When the couple were going out together prior to the marriage they often went out buying material for the primary processing factory. After the marriage the couple set up a company to run a boutique over the retail business in S. Street, and while initially the wife helped with same on a widespread basis her subsequent involvement involved sewing and making alterations in the home as the children were arriving at this stage. A manager was employed to run the boutique but I accept the evidence of the husband that he had a considerable and crucial input in relation to the financial success of the boutique insofar as he became a very successful buyer on the national and international scene, facing down entrenched competitors on both sides of the Irish Sea even after a period when both husband and wife bought together. The wife has said in evidence that at that time, she was an "all rounder" and I am satisfied that notwithstanding her diminished role in these two businesses as more children arrived, she presented at all times a very attractive and a positive image for the couple's businesses. As the years went on the couple initially rented accommodation for their marital home and they moved for a while into accommodation on top of the retail premises in S. Street. After spending a while in suburbia they finally moved to R., some five miles or so outside the city in a rural area where there was a modern home and a Georgian home on a farm of approximately 52 acres which the husband had been gifted from his father. The parties lived with their children in the modern home at R. until the husband left the family home after unhappy differences occurred in 1985.

By the time these unhappy differences had arisen in 1985 the couple had experienced a severe setback in their joint enterprise by reason of a fire which entirely destroyed the S. premises. While the S. premises was insured to some extent, the parties looked to the proceeds of a successful malicious injury claim in respect of the fire to ensure full financing of the rebuilding of the S. Street premises to a modern standard.

The parties did not succeed in their claim in the courts for compensation under the Malicious Injury Code and this setback necessitated substantial borrowing. The husband also had considerable expenditure in retaining the staff for the retail business over the period of reconstruction of the premises. The couple's woes increased after the reconstructed premises opened at ground floor level again as a retail premises, only to discover that shopping patterns had changed with the advent of supermarkets/multiples and the depersonalisation of the trade generally. On the advice of his accountant the husband closed down the retailing outlet in S. Street, while keeping an interest in retail in a suburban location in the city which continued to be served from the primary processing facility and which continued to serve the wholesale trade. The S. Street premises was then rented in its entirety and the present rental and occupational pattern was established. I accept that this was a time of great financial strain for the couple, but notwithstanding this it appears that the husband branched out by purchasing an industrial site and developing a secondary processing facility with the aid of substantial borrowed finance. After the separation agreement made in December, 1985 the wife continued to live with the five children in the family home which had been valued at £30,000. Some years later as the children grew up she found it more convenient to move back into the city with them, and sold this family home for a sum in the region of £90,000 and purchased in place thereof her present home in the city for in evidence £90,000 but in respect of which the contract for sale only shows £65,000. The difference perhaps is made up by refurbishment and alterations.

At a certain stage, when Mr. J.W. came to reside with the wife and the children in the family home, the eldest son M. went to live with the husband in his home which, by then, was the other property at R. which he had renovated and resided with his new partner Ms. McC with their two children. This son M. very quickly came to work with the husband in his business and in his pursuit of his hobby/business in greyhound activities and subsequently was given the retail business in the suburbs from which he has developed indirectly a very successful retail business in his own right.

Notwithstanding the differences between the husband and wife in relation to the involvement of J.W., cordial relations continued between the husband and wife certainly until the proceedings were issued in 2003, and the husband played his part in guiding his children and assisting his wife at times of difficulty with them, so that both the husband and the wife can be proud of their now adult children who have made careers in the world quite successfully in their different ways.

After the separation the husband set about developing his businesses and taking down the substantial debt which he had, and also to pay off capital taxation and inheritance taxes as a result of his ultimate inheritance of the site of primary processing factory at C.H. and the surrounding lands which incorporated his "home place". While current income, no doubt, played a significant part in the process of getting down this debt, it was considerably aided by progressive disposal of lands. First at the home place as a result of a contested CPO for a sum of £190,000 subject to tax. Secondly the disposal of some land surrounding the site of the secondary processing factory and thirdly by the purchase and disposal on a semi speculative basis of a farm by the disposal of sites for development at the home place at CH (not necessarily in that order).

The Evidence of the Husband
The husband rests a substantial part of his case on the basis that this debt was reduced by reason of his own efforts, sometimes under pressure of very high interest rates especially in the early years of the debt in the 1980s. The main assets of the husband are now the primary processing factory, which is not currently operational but which has planning permission at C.H., together with four and a half acres of residual land which may have some development value. He also has at C.H., the house, and 52 acres or so at R. and the secondary processing premises and surrounding lands with the business carried on therein, together with the premises at S. Street which is now an investment property consisting of barber shop at basement progressing up to retail and the nightclub at the top which is now fully let. The wife's physical assets consist of the family home in respect of which she has now developed a mews type converted outbuilding for a flat which can generate some rental income.

The Position of J.W.
J.W. came to reside with the wife in or about 1988. The evidence was that as the years went on the continued habitation of J.W. with the wife and children was not practicable resulting in J.W. leaving the wife's home. However, it emerged in evidence that the wife had been paid by J.W. for certain overseeing work of a catering establishment owned by one of J.W.'s companies. During the hearing taxation document emerged to show this and while the wife was not certain about dates it appears that J.W. continued to pay the wife to a greater or lesser extent as long as the husband refused to pay her maintenance. It is agreed that J.W. paid the household expenses of the wife during the course of his habitation with her and also enabled him and the wife to go on a number of holidays abroad and her current car has been purchased by J.W. While the wife claimed that J.W. built, on an arms length basis, the mews property at the rear of the premises I consider that such a transaction may not have been entirely at arms length. When Mr. J.W. came to reside with the wife the husband had a discussion with her and told her that he was not willing to pay her share of the maintenance to her as long as J.W. was residing with her, and the husband said in evidence that her reply words were to the effect "you do what you have to do", understanding that to mean that she consented to such steps being taken. The husband explained in evidence that this was as a result of his understanding of the Order of the High Court on appeal in relation to maintenance, that maintenance was not to be payable in the event of employment or co-habitation of the wife with another person.

I hold as a fact that the High Court Order was not a graft in any sense on the separation agreement and the terms in the separation agreement in relation to employment and co-habitation disqualifying the wife from maintenance were not incorporated into the High Court Order. As the High Court Order is an order of a court of record it should not be the subject of an interpretation using an aid documentation which is outside the order. If the husband or his advisors had a problem about that situation at or around the time of the making of the order, they could have applied to the learned appeal judge to seek to incorporate the terms from the separation agreement in accordance with the claims of the husband. In this context it is noteworthy that the case to counsel to advise the wife in preparation for the appeal which was produced to the court for the purpose of explaining the background to the appeal shows that the Circuit Court Order made by Rowe J. explicitly included the proviso attached to maintenance in the terms of the separation agreement. I hold that in view of the wife's lack of clarification of the words "you do what you have to do" these words constituted the consent of the wife to the course proposed by the husband in relation to maintenance and operated as a waiver of maintenance, certainly as long as Mr. J.W. resided with the wife. I therefore hold that the wife is not entitled to recover any maintenance arrears in respect of that period. As regards the balance of the arrears claimed from the period when J.W. left co-habitation with the wife, I consider that the wife should not be entitled to any arrears up to the present date by reason of her positive lack of disclosure of her employment and directorship status with J.W. and his companies. It is a fundamental aspect of family law proceedings that both parties would give at the earliest possible stage a full disclosure of income and assets. The route of this disclosure is paved with sworn affidavits. The whole scheme of the rules of court and now, the practice direction reinforce with practical effect this principle and it is for the courts to rigorously enforce it. It has always been in the power of courts to disentitle parties to a claim for compensation which has been tainted with untruths. In *Shelley-Morris v. Bus Átha Cliath* S.C. No. 357 of 2001, the Supreme Court has held that the court may refuse a claim based on exaggeration or untruths and could subject the claimant to an adverse cost order or use the inherent jurisdiction of the courts to penalise the claimant for abuse of court process. This inherent jurisdiction of the courts has been reinforced of late by the intervention of the legislature in relation to claims. I am relating to personal injuries in the Civil Liability of Costs Act 2004. I consider that it would be unjust and inequitable to fix the husband with a claim for maintenance which has been tainted by the failure to disclose by the wife and implied untruths which emerge in the presentation of the case, and in view of the fact that the husband had a quite understandable (if incorrect) view that he could as a result of the settlement and the subsequent order on the High Court Appeal reduce the maintenance of the wife without recourse to a court application for maintenance review. Accordingly I refuse maintenance up to the time of the disclosure by the wife of the payments following cross examination and disclosure completed by the court, but I will consider the making of payments for maintenance after that date pending a capital distribution under other headings in the case. I also leave to counsel for the parties the opportunity to argue before me how these conclusions might mandate the cost structure which I envisage for this case.

It is necessary to determine the likelihood and possibilities of the present and future relationship between the wife and J.W., not so much for the purpose of the making of provision for the parties, but for the purpose of the structure and architecture of such provision. This arises by reason of the understandable rivalry between the husband and J.W. The husband makes the case that the claimed waning of the relationship between J.W. and the wife is only an arrangement of convenience to suit the causes of the wife's litigation. The wife stated in evidence that the relationship had terminated at the latest in 2004, but was hazy about the dates when questioned on behalf of the husband in relation to a later meeting leading to an overnight stay in a town a bit further from the city. She stated that J.W. had met her as a friend and wished to show her his new house, that they had a meal and that she did not travel back to the city by reason of the fact that she had a panic attack. Mr. J.W., when giving his evidence, corroborated this account, although I must say that this corroboration is not as strong as it might be as I am satisfied that J.W. has had contact, if not directly with the wife, certainly then with some type of grapevine communication through a person or persons unknown with some aspects of the proceedings herein. I therefore hold that on the balance of probability the meeting leading to the meal and overnight was not a tryst of the romantic kind, as interpreted by the husband, but rather a meeting of old friends for the purpose of looking at a new house. However, notwithstanding this finding, I can readily understand how the husband's suspicion of such a tryst would be aroused, and how he grounds his basic claim that the couple of the wife and J.W. intend to get back together after the proceedings are over.

He manifested the depth of his conviction of such claim by reason of his reaction to some proposals made during the course of the hearing in relation to the outline of a provision, by indicating that he had no objection to the payment of maintenance to his wife in the future provided that she remained unemployed and did not co-habit. The husband also indicated that he would not consider the

possibility of the sale of the development lands at C.H. surrounding the disused primary processing factory, especially if it led to a transfer in specie to the wife, on the basis that if such occurred that he would have to watch J.W. "walk all over the site" – a clearly unpalatable and hurtful prospect for the husband. As these types of considerations were of a recurring nature throughout the husband's evidence, the court suggested to the husband's counsel to have Mr. J.W. called in evidence. The court ordered that either party could cross examine J.W. in view of the fact that the husband issued the subpoena to procure his attendance at court. On his attendance, the court explained to J.W. that various claims and counterclaims had been made in relation to his alleged involvement with the wife, and that he would be required to give evidence of same, and that in the event of his being in danger of findings being made adverse to his interests that the court would consider granting separate legal representation although he was not a party to the proceedings. J.W. gave extensive evidence in relation to the past and present relationship between himself and the wife. On being questioned by the court as to whether the relationship would emerge again as a romantic one once the court proceedings were over, J.W. replied that that would not be possible, as the wife had had two relationships in the meantime and that he was "hurt" thereby. However, earlier in evidence he had conceded that he had purchased a house for one of the party's daughters after she had married and that this daughter and her husband were paying off the mortgage on that property. He also agreed that he had been at a recent wedding of one of the daughters although not without some embarrassment and without bringing a female partner. On the evidence and on the balance of probability I cannot find that it is likely that the wife and J.W. will start another romantic relationship although the remote possibility of this development cannot be ruled out and therefore the husband's worst apprehensions in relation to this must be given some weight. I will discuss this later in this judgment. The possibility of J.W. assisting the wife with the investments of any proceeds of provision to be made by the court is one of the possibilities in the case, but as long as that possibility remains only applicable to cash proceeds of the case it is of extremely doubtful relevance to the considerations of the court.

The Assets and Income of the Parties
Taking the format of Annex I to Mr. Brown's Accountants report, I deal with the properties by their respective numbers and denominations therein appearing as follows.

1. Dwelling of wife
As the wife's dwelling is in a central location relative to the city and as the mews (flat dwelling) has a value as evidenced by the use thereof of her daughter and, now her tenant, and as the comparisons used on behalf of the husband tended to support a higher valuation than that offered on behalf of the wife, I take a median value of this property at €1,270,000.00 and allow for disposal costs likely CGT arising from the non private residential status of the mews-flat at €70,000.00, leaving a net value of €1,200,000.00.

2. Husband's house and lands (52 acres) at R.
Initially the husband's case was that the value of the house and lands was €2,900,000.00 as against €7,500,000.00 offered for the wife. However, the husband later in the case proffered a second valuer who attendance was necessary by the unfortunate illness of his first valuer, who then offered evidence of the sale a more comparable Georgian/period house on lands in or around A. at €3,000,000.00 which while not as well located as the subject and not as endowed with a semi parkland hinterland or with the level of refurbishment and restoration of the subject provided a base against which the subject could be measured. The comparisons offered on behalf of the wife's valuation gave a good base to the agricultural land value but in terms of the house rested on two properties, and in particular the property approached by the level crossing and with an amenity zoning bordering on the river-coastline which I hold were in the nature of properties with the great attraction of "rus in urbe" rather than the more rural location of the subject on a national primary road. In addition to these considerations the valuer giving evidence on behalf of the wife was not able to point to the sale of any property which could be used as a close and direct comparison anywhere the level of a sale price as high as €7,500,000.00. Therefore, notwithstanding that I accept the evidence that the house and lands at R. represent a trophy property I find that on balance the value thereof should be €5,000,000.00.

3. Investment Property at S. Street
While the valuer giving evidence on behalf of the wife produced an impressive report referring to comparisons from which a percentage multiplier was derived so as to ascertain the capital value of this investment property on the basis of passing and likely passing rents, two of the comparisons used were shown by the husband's valuer to be sales arising from special purchasers both involved in the jewellery trade buying up adjacent or competitive properties, and in the case of a number of other comparisons were properties where the purchase price related to external economies which resulted from acquisition or possession of adjacent sites for the purpose of site assembly. The wife's valuers was heard and cross examined before the nightclub premises on the top floors of the property had been let and the subsequent letting at £150,000.00 per year for rent would tend to support many of the hypotheses of the wife's valuer relating to a likely percentage increase in rent occurring at the next revision date for the lower floors and basement of the property. Nevertheless I must give cognisance and recognition to the fact that the husband's valuer brought in a valuation of a fine premises sold by a financial institution with a gilt edged lease back covenant which showed a higher percentage ratio of the rent to capital value. In addition, the husband's valuer provided two valuable comparisons with a higher ratio of rent capital in a nearby successful shopping centre. While the passing rent for the nightclub is now in excess of what was estimated by the wife's valuer in the first instance, I am nevertheless quite apprehensive that occupancy of the nightclub is not 100% guaranteed into the future and the upper floors of the premises are not served by a lift, thereby not assisting alternative uses. Such alternative uses in the retail area are not promising by reason of the absence of such uses already existing in upper floors along the street. The only uses evidenced along the street for the upper floors are restaurant or offices. I am thus reluctant to accept the wife's valuation of €14,000,000.00 although I accept it is now much more a theoretical possibility in view of the passing rent of the nightclub.

However, I am of opinion that the court should take a cautious view in relation to depending on the very last percentage of high, but reasonably soundly based, valuation, as experience has shown that such high valuations may, for all sorts of reasons, not be realised in sale, and as the court has earmarked this premises as the premises against which the court should have recourse for securing the provision in the event of inability of the husband to raise the necessary finance for any reason, the court cannot with prudence rely on any valuation greater than €12,000,000.00 for the premises at S. Street. In the event of the court having taken an over cautious approach as proven by a result in sale, (if it may be necessary for the final resolution of this case) then the surplus obtained by the sale maybe shared on a percentage basis between the parties as surplus provision based on the percentage distribution figures worked out in this judgment, so that the parties do not suffer any injustice from the caution of the court.

4. Property of husband at C.H.
This property consists of the site of the old primary processing factory and lands capable of a residential permission with potential access to the road which runs parallel to the national primary route. On hearing the valuation evidence I was not inclined to move too far away from the husband's valuation for this property which was €2,500,000.00 by reason of the fact that the property is "back property" to modern residential developments and may be somewhat threatened by the recommencement of operations at the primary producing factory. A further factor restraining the value arose from the fact that some of the comparisons offered related to lands which were closer to the city and which carried with them tax incentives such as s. 50 incentives. A further consideration in my mind was that at least one of the comparisons, if not more, were in relation to actual sales of land where there was no planning permission and likely access for residential purpose in the near future which left the comparison bordering on the irrational.

The husband himself that he considered that the site would not be the best for sale (in the event of a sale being necessary) as he considered that there were other potential synergies arising from the possible availability of adjacent property of which he might avail of in the future with a member of his family. The evidence of the husband's accountant Mr. G. and the evidence of the husband was that the site of the primary producing factory with planning permission constituted a valuable bargaining chip to obtain planning permission for an alternative site for a similar unit in substitution for the present location of the factory so as to give a planning gain to the local authority. The presence of these two factors in the mind of the husband tends to give the site a higher value (at least in the hands of the husband) and while reliance on such factors specifically excluded from the valuation approach of the wife's vlauer in relation to the other properties, I consider that if this property is to remain in the hands of the husband, it is permissible to take into consideration the additional value it presents to him over and above what might be realised at a separate sale. This factor draws me closer to the valuation of the wife but not the whole way as I consider that the planning prospects and the situation of the site are such that optimum densities may not be obtained by reason of the proximity of the roundabout on the national primary route and the fact that as a residential site the property will always be a back property and not a prime residential site for that reason. I further take into account the evidence of the husband's accountant that there may be some synergies between a relocated primary processing factory and the secondary processing factory.

5. It is difficult to see the value of a quarter acre old garage site now disused, but with an obvious planning footprint, being valued at less than €70,000.

6. While Mr. B. did not include the secondary processing factory including 1.7 acres which it held in the D. Limited Company as part of the overall property values in determining gross costs less disposal and CGT costs, he nevertheless included a valuation of €3,500,000.00 for same. This separate treatment arose from the difficulty of extracting value for the factory out of the company in a tax efficient way. It also arose by reason of the fact that the company might to be used as a mechanism for generating increased income for the husband as a possible solution to funding capital provision in the case (if the court were that way disposed) and by reason of the natural consideration that the actual sale of the company might not realise this sum, as it is dependent uniquely on the dynamism and genius of the husband whose skills and commitments to the business might not necessarily transfer efficiently on a sale. Nevertheless, I consider that it should be included in the assets, not least because Mr. B. considered that if other happier circumstances prevailed between the husband and wife, that the court could easily make an allocation of shares in the company to the wife to facilitate her having a capital provision in shares backed by a sharing of income generated by the company. Provision made in that way would go a long distance towards proper proviso under the Act certainly as regards income if not capital. I therefore decide a figure of €3,500,000.00 as a value for the secondary processing factory and site and will deal with same as regards disposal costs and CGT in a rough way based on the approach shown elsewhere in Annex I of Mr. B.'s report. Taking the total value of the properties listed at 1 to 6 above at €25,070,000.00 and observing that from Mr. B.'s analysis in his Annex I results in the gross value of the first five properties valued by him being 125% (not including the secondary factor) of the net value after disposal costs and CGT, I propose to take in round figures the sum of €5,000,000.00 from the gross value of the husband's property leaving net value of €20,070,000.00. Adding the value of the wife's home and mews/flat at €1,200,000.00 there is a total net asset pool in terms of property of €21,270,000.00. The accountants have taken the approach that the valuation of family chattels is subject to diminishing returns when it is attempted to divide same on the same basis as the broad fixed assets base and the justice and the practicalities of the case would indicate that the parties should retain same and I am satisfied that such an outcome does not significantly alter the percentage provision in the case. I likewise find that such an outcome does not significantly alter incidentals such as bank accounts, Stock Exchange shares and cars.

INCOME OF THE PARTIES

Income of Wife
As appears from the affidavit of means of the wife sworn on the 3rd May, 2006 and from her evidence and the Accountant's reports, the most up to date statement of income of the wife is €37,800 annually in respect of income for foster care and letting of the mews-apartment at approximately €6,600 per annum. The evidence of the wife was that one of the foster children was going to be 18 shortly and while this talented child would probably continue to live with the wife on a gratuitous basis into the future, the income from fostering would cease and the other fostering was of a temporary nature. In any event the wife considers that in her mid 50's she is getting passed the stage for being a suitable a foster parent. While the court finds that she has been a very successful foster parent and might continue her career with effort in that regard into the future, the court also recognises that the wife is the best person to judge whether she is going to proceed with that activity and the court would not in all the circumstances force a continuation.

Income of the Husband
The unfortunate aspect of the case is that the husband's last affidavit of means was sworn on the 10th October, 2003 in which he said that his income for 2002 was €120,831.00 and that he believed his income for 2003 would be the same. It is interesting to note that in the same affidavit of means there was a loan from the Anglo Irish Bank of €220,431.45 to one of the husband's companies and that the husband anticipated expenditure to upgrade the nightclub in the region of €0.5 million. He expected income tax for the year 2003 to be in the sum of €80,000. In the face of these three significant outgoings it emerges that by the date of the hearing in 2006/2007 the husband had discharged these three items and also an extra bill in respect of income tax of €200,000.00. The accounts prepared by Mr. Liam Grant, Accountant for the husband, based on discovery documentation of the husband dated January, 2006 indicates that his income for 2005 was €386,090.00. Consistently with the figure of €386,090.00 is a calculation of Mr. Brown, Accountant for the wife in exercise A of Annex 2 to his report in which the figure adjusted for nightclub company income etc., amounts to €247,096.00 net of tax.

Crucial to the case of the wife as put forward in the evidence of Mr. Brown is that the company holding the secondary processing factory could, even within the challenges of modernisation and refocusing of marketing efforts, produce additional salary less 47% taxes of €106,000.00 per annum, thus leaving the husband with the likely projected disposal income of €354,196.00 per annum.

It is necessary for the court to decide, having regard to the structure of the provision proposed herein, whether this sum is realistic or not. From the affidavit of means of the husband, he envisaged that it would be necessary to spend €1.5 million extra on his factory for secondary processing in recognition of the changes in product design and competitive factors moving away from the small labour intensive retailer to the fewer more merchandising orientated multiples placing an emphasis on packaging and presentation. This is a radical change from the more solid, traditional distribution business allied to the secondary processing factory. The move necessitated for this factory is to become as much a packaging and marketing operation in the future, as it was a successful processing and distribution facility in the past. I am satisfied by reason of the evidence of the husband himself, (who has indicated that he is prepared to apply his undoubted genius and flare to this challenge in the future), and also the evidence of both accountants (particularly Mr. Grant), that the husband has the advantage of a particular synergy arising from the likely availability of a recommencement and relocation of the primary processing facility to ensure that he has a competitive edge when facing the future. This conclusion by the court is important not only to base a conclusion of the likelihood of tolerance of a net disposable income being

feasible at a level of €354,196.00 for the husband, but also in relation to a solid and necessary working assumption that neither the lands at C.H. (certainly as they relate to the primary processing factory as it is now located) and the secondary processing factory would not be sold by order of the court in any package for provision made under the 1996 Act for the parties in this case. The feasibility of this working assumption is also underwritten by the conclusion of the court that the borrowing necessitated to up-grade the secondary processing facility and the necessary planning manoeuvrings and negotiations to set up a modern alternative site for the primary processing facility together with any borrowing required to fund a provision for the wife in the medium term is well within the capacity of the assets likely to be left in the ownership and control of the husband.

Scheme or Architecture of Provision

In deciding on the form and level of provision to be made to the parties pursuant to s. 20 sub.s (1) of the Family Law (Divorce) Act, 1996 the Court is obliged to take into consideration in deciding such proper provision in accordance with s. 1 the matters and criteria set out in sub.s (2) paragraphs (a) – (l) together with all other existing circumstances, and in deciding to make an order making the provision referred to in sub.s (1) is mandated by sub.s (3) to have regard to the terms which has been entered into by the spouses and is still in force. The approach suggested by O'Neill J. in *K. v. K.* [2003] 1 I.R. 326 hereafter referred to as *K. v. K.* was that the court would concern itself primarily with an examination of the circumstances of the parties in the light of the criteria set out in s. 20(2) and then subsequently an examination of the deed of separation to see whether, in the light of those criteria and the passage of time, it could be said that the continued observance of the terms of the separation agreement resulted in "proper provision existing at that time or in the future". I accept that this approach represents a final proper sequential check on whatever conclusion might be reached in the case, but in most cases, it is necessary to consider matters "in the round" in relation to deciding on one or at least a limited number of feasible and efficient structures having regard to the outlined parameters presented by the parties themselves, their personal dispositions and their assets and their likely behaviour in the future. For instance, in this, and in almost every conceivable case, the existing value of any assets resulting from the prior separation agreement must be pooled between the parties and compared from the point of view of asset-income consideration under s. 20(2). Furthermore, in this case, a fundamental aspect of the husband's defence is that the court should make provision based on the periodical payments – maintenance structure of the separation agreement in 1985 on the basis that the wife was likely to set up in a stable, personal and financial relationship with J.W. I have rejected this possibility as being unlikely, and I consider that it is utterly unfair having regard to the likely entitlements of the wife by virtue of her contribution to the marriage of 14 years and longer in terms of childcare to be left in a position where the only provision is maintenance (even of the most generous kind) when such maintenance is subject to automatic statutory cut-off in the event of marriage. In the recently decided case in the House of Lords *McFarlane v. McFarlane* [2006] UKHL 24 Lord Nicholls held that maintenance was one of the least desirable means of making provision for a dependant spouse. I accept that in many many cases maintenance is the only mechanism whereby provision may be made, but I consider that to restrict a dependant spouse who would otherwise be entitled to significant or ample lump sums to maintenance on the basis of a speculated intended marriage would be utterly unjust as well as demeaning to that dependant spouse. I consider that this case, in the round, is one of ample resources, where the wife may be entitled to a lump sum on that basis and to posit any other structure would in my opinion and in view of my foregoing comments in this paragraph be entirely unfair and unjust. Another decision already made affecting the structure of the provision is that (however advantageous such a proposal might be) the division of capital and expanded income distribution of the company holding the secondary processing factory is not a realistic option at all in view of the personal dispositions of both parties, especially the husband and his apprehension of the future appearance of J.W. on the scene of his endeavours in the business area. Another pointer towards the general structure of the provision arises from the desirability accepted by the court and suggested by the wife through her accountant and by the husband personally that property would not be sold, (at least in the first instance) and that the provision for the wife would be met by an interest free loan for the medium term, pending maturing of the development lands at C.H., and the various combinations of possibilities in relation to the primary processing factory located thereon. There is a further consideration in relation to the structure suggested by the medium term raising of a loan to finance the provision for the wife, by reason of the fact that in the event of an alternative in relation to a court directed sale of the secondary processing factory company or the lands at C.H. were opted for, the values attributable to same might not be realised and there is a distinct possibility that the business of the company would be lost and the value of the secondary processing facility would be reduced to the husband's valuer's estimation of €1.5 million, and similarly, and without the special value to the husband of the C.H. lands (in the hands of the husband), the value thereof could be diminished on a disposal by a sum in the region of €1.5 million. This result suggests a dangerous paradox always facing a court making provision. That is that in an effort to maximise the return for a spouse by reason of a sale, the underlying value of the assets may be lost by the sale process, thereby injuring both spouses. I consider the dangers of this paradox are not likely to impinge on the proposals and framework I have in mind for this case by way of provision of a medium term financing facility pending the disposal of some or all of the C.H. lands at a higher developmental value, backed up a default provision provided by the sale of the less volatile S. Street premises.

The Section 22(2) Criteria

In deciding the proper provision to be made in accordance with s. 20 sub.s (1) I have regard to the criteria set out in s. 20 sub.s (2) and I shall set out the criteria in each sub paragraph and deal with same seriatim as is the practice as follows:-

> *"(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.*

I rule out, for the purpose at least of income and earning capacity, the likelihood of J.W. coming in aid of the wife. While the wife has had some success in making a contribution to the husband's business and in seeking out some income from her fostering activities and in the past some bed and breakfast catering as well as occasional overseeing type employment with Mr. J.W., she has in no sense established a career for herself or indeed a business, (much less a set of generated income streams). I do not rule out the possibility of her having some employment in the future, but it would not be prudent to allow for that as a significant item in the future. The husband on the other hand currently has a vouched income in excess of €300,000.00. I have accepted Mr. B.'s hypotheses about potential disposal income for the husband of €354,196.00 which might be available in the medium term as in six to seven years to fund interest only payment on a level of borrowing to provide a reasonable lump sum for the wife and to provide a balance of disposable income. A scenario posited by Mr. B. that the husband could borrow €5,000,000 at interest only for six to seven years costing €225,000 per annum would have left, (on Mr. B.'s reckoning on the basis of interest at 4.5% per annum) with net disposable income of €129,196. Since Mr. B.'s appearance, interest has gone up once and is likely to move up another .25% in the autumn of this year in which case Mr. B's calculation might be more in the region of €100,000 disposable income for the husband which is still within the ambit of his expenditure requirements having regard to the standard in his affidavit of means and his evidence under cross-examination indicating that his expenditure had now gone above level indicated in the affidavit of means. The husband (in response to cross-examination) indicated that Mr. B.'s assumption of the generous availability of cash recourses as exhibited by his accounts and his company's accounts did not take cognisance of the fact that last year he had to expend more than €200,000 of these cash rescores, which demonstrates the fact that there may be some strain on the cash flow of the husband to cater for the financial scenario posited by Mr. B. in relation to funding a provision by way of loan for the wife. I am nevertheless satisfied that, overall, the cash flow situation of the husband will easily support the commitments of the husband likely to be placed upon him by reason of any range or provision which might be imposed by the court. The property resources of the husband and wife are as set out above and

reveal a vast disparity between the property and assets of the wife and the husband. It must also be borne in mind that the husband can look forward to a rent revision of the two bottom lettings of S. Street in 2009, which will result in greater income and also holds on to all the financial/developmental possibilities of C.H. Also the case has proceeded on the basis that R. with 52 acres of land is effectively not income producing. There must be modest capacity for income here if pressure came on for same, although this judgment is not premised on any income arising from that quarter. Suffice it to say that it is a comfort that there is such a cushion in terms of capital and income for the husband in the case.

> *(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).*

The wife has, after deduction of contributions for SSIA and rounding down an estimated cost of living, outgoings expenditure of €50,000 net of tax. This will likely increase in line with inflation into the future and she has no extra provision for nursing home accommodation or extra medical expenses. Neither has she any contingency provision for a home help in the event of premature or later immobility or incapacity. In view of the foregoing conclusions I do not consider that remarriage or otherwise co-habiting is a feature to be taken into consideration under this criteria sub paragraph for the wife. With €100,000 net plus likely to be available for the husband it is likely that his financial needs and obligations will be quite substantial, having regard to the fact that he has two children by his partner with whom he lives at R. who are now approaching or in the teenage stage and likely to go on to third level schooling of some kind and will be more expensive to maintain into the future. The husband's interest in revised rents should cater for this increased expenditure. My calculation of the disposal of income for the husband having regard to his financial needs, obligations and responsibilities is premised on the fact that this is a figure arrived after calculation of what is an affordable sum for interest payment on borrowing to fund provision for the wife. Remarriage of the husband is a possibility but uncertain at this stage but the commitment to the husband's two children with the assistance of his partner with whom he co-habits is a reality in relation to the needs, obligations and responsibilities of the husband into the future.

> *(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.*

The standard of living of both husband and wife was not extravagant by any means. However the husband probably improved his standard of living in terms of living in even more spacious and comfortable surroundings and the fact of his accumulating large quantities of wealth and eliminating significant debt is indicative of the husband's ability to comfortably maintain the standard of living enjoyed by him prior to the marriage break-up. On the other hand the wife has not been in a position to accumulate any wealth of significance and this indicates that she has had a struggle to maintain her standard of living although it must be recognised that she admitted that she had gone on some holidays funded by J.W. and that the husband helped with weddings, birthdays and so forth. The wife complained in evidence that her present housing accommodation was insufficient to cater for her larger family of grandchildren and in-laws but getting vacant possession of the mews apartment would probably provide sufficient overflow facilities to cater for most contingencies in that regard and this setup, while not matching the grandeur of the husband's house, has advantages of location which assist a good standard of living and quality of life.

> *(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.*

Both parties are in their mid-fifties. In common parlance the marriage lasted fourteen years and they have been apart 22 years. However, this does not present the full picture as the wife has had the onus of bringing up the children until seven years ago, thus the caring role of the mother (and the father) has lasted 29 years. This is by any standard a very long commitment to each other and their children by a couple. It evokes and brings into play strong considerations of parity of esteem in deciding the division of assets in this ample resources case. While both spouses are reasonably active each of them has experienced the onset of some deterioration in their health. I am satisfied that with care their working lives and life expectancy will not be impinged greatly by their present or likely health conditions. Nevertheless at the age of each of the spouses they must have a mind to nursing home, home help, additional medical expenditure expenses in addition to the fact that they have but a short time to make a contribution to a pension fund to provide security for their old age especially in the case of the wife who has no resources from which a pension may be derived.

> *(e) Any physical or mental disability of either of the spouses.*

Nothing of significance arises here having regard to what might normally be expected of persons of either of the party's age.

> *(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 contributions 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.*

As will be seen from the earlier parts of this judgment the contributions which both husband and wife made to the various businesses of the parties were strong and shared in accordance with their abilities from the outset, with the wife moving away from more active involvement with the business as the children arrived and taking up more of her time with the nurturing and caring of the children. By engaging in this task she freed up time for her husband who used it well in developing and protecting the various businesses. The husband therefore accumulated wealth and increased the value of his existing property by being freed from family duties through the full time involvement of his wife in the rearing and nurturing of his children, apart from an older boy who went to live with him in his teenage years and who assisted him progressively in his own business. However, it must be remembered that the husband made a large contribution to the joint assets of the parties by reason of his inheritance from his father and mother. While there is no doubt that the efforts of the husband and indirectly of the wife greatly augmented the value of these inherited assets, considerable weight should be given to this aspect of the case which will contribute to the reduction of the percentage division in the case as compared with the percentage division referable to the case *T. v. T*. where assets and income were built up from scratch by both husband and wife.

> *(g) The effect on the earning capacity of each of souses of the marital responsibly 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.*

The husband did not suffer any adverse effects as a result of the marriage. However, the wife, in assuming responsibilities in the home, gave up a promising career in fashion retail. She obviously had the training through her secondary schooling and secretarial background to be able to develop an employment business of her chosen area. While the trust which Mr. J.W. reposed in her as an

inactive director of some of his companies, which is duplicated by one of the couple's daughters in a similar role, shows some capacity, the wife really has lost touch with the real employment business world and she is at an age when it will be difficult for her to reengage.

> *(h) Any income or benefits to which either of the spouses is entitled by or under statute.*

These criteria have no application in this case.

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

It has been held in *T. T.,* in the judgment of Keane C.J., that for conduct to be relevant under these criteria the misconduct must be gross and obvious. There is no such conduct arising on the part of either party in this case. It would be entirely confusing, unfair and unjust to equate misconduct under these criteria with the lack of notification and candour displayed in the proceedings in respect of which the wife has been substantially penalised regarding arrears claimed for maintenance.

> *(j) The accommodation needs of either of the spouses*

The accommodation needs of both spouses seems to be, with the balance of grandeur and luxury on the husband's side.

> *(k) The value to each of the spouses of any benefits (for example a benefit under a pension scheme) which by reason of the decree of divorce concerned, that spouse would forfeit the opportunity of possibility of acquiring.*

These criteria are of no relevance as there are no pensions on either side.

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

Clearly the rights of the husband's two children residing with him at R. with his partner must be considered and regarded. I consider that the housing arrangements and income arrangements proposed in the provision in this case adequately cover such children and by reason of their existence it is reasonable and proper that consideration would be given to the possibility of the wife having some assurance that she might be able to provide some inheritance to the children of the parties in this case and to protect against a planned inheritance of the other children which the husband has with his partner and or by will of the partner herself.

Costs
In this case costs require special attention although they generally fall under the criteria set out in s. 20(2) para. (b) in relation to financial needs of the parties. It is usual in an ample resources case that the parties would pay for their own costs out of the resources provided for them. However, in this case which started with the absence of an up-to-date affidavit of means and the absence of the exchange of any auctioneer's reports, the absence of an up-to-date call over return or verifying affidavit on the part of the husband, and the total opposition of the husband to anything but the most stringently circumscribed maintenance for the wife, and proceeded for a period of fifteen days of the hearing by the court with very few concessions made in circumstances, where there was a stubborn refusal to accept that any lump sum might be made to the wife in recognition of her work as a mother and carer of the party's children of whom they can be rightly proud, it is proper that the husband will be liable for the largest portion of the costs in the case. This view is especially reinforced by the fact that at the end of the proceedings prior to the cross-examination of the husband, the solicitors acting on behalf of the wife wrote to the husband's solicitors requesting that an up-to-date affidavit of means would be filed but to no avail. The cross-examination of the husband proceeded on the basis of an affidavit of means filed in 2003. While the accountants were agreed on most things, this state of affairs is not sufficient to ground the proper examination of a husband in such complex proceedings. The Court signalled to the parties at the commencement of the proceedings, when arrangements about valuer's evidence and reports were far from satisfactory, that costs were of concern to the Court. The Court had no option but to patiently hear the case as it progressed, but in giving judgment the Court again emphasises that its concerns about wastage of costs and resources in this case have not abated.

This case is one to which the practice direction of the High Court relating to family law proceedings applied from beginning to end. Paragraph 1 of the practice direction sets out the objectives of this instrument as follows:

> "1. The objectives of this practice direction is to ensure that the proceedings to which it applies are determined in a manner which is just, efficient and most cost effective and, in particular that:
>
> i) save in exceptional circumstances, the hearing of such proceedings should be completed in this court within one year from the date of commencement or earlier or appropriate cases and,
>
> ii) the parties should have an opportunity of entering into productive discussions at the earliest possible opportunity."

In February, 2007, before the case had finished combined costs were approaching €1,000,000. The case lasted fifteen days to the 19th April and further costs probably have occurred. It is unreal to consider provision without taking a broad view (subject to modulation by argument of the parties) in relation to costs and in view of the foregoing preliminary observations I consider that whatever other provision might be made that the sum amounting in the region of €1,000,000 be provided to ensure the payment of the wife's costs in this action.

The Provision under the 1996 Act s. 20(2)
I consider that the investment of a sum of €4,000,000 at a net return less DIRT tax of 3%, taking high interest rates with low, gives a sum of €120,000 net out of which the wife will have a fixed income to pay her costs of living outgoings equivalent to maintenance at €50,000 rising with inflation/cost of living to cater for wealth maintenance and a contribution towards a contingency fund for an annuity purchase to guard against long old age nursing home expenses, home help expenses and medical expenses of an exceptional nature not covered by VHI. The approximate division of assets allowing for a payment of a lump sum to the wife by the husband amounts to a percentage in the region of 25%. This is less than the 37% paid to the dependant spouse in the *T. v. T*. case and the reasons for this differential in descending order of weight are:

> (a) The inherited nature of much of the marital assets on the husband's side.
>
> (b) The longer period after the separation in which the wife fended for herself without maintenance.

(c) The slightly older age of the wife than in the *T. v. T*. case.

(d) The greater sacrifice of career prospects of the doctor wife in the *T. v. T*. case than was the case with the wife in this case.

Effect of previous separation agreement
In relation to the regard the Court should have to the terms of the separation agreement of 1985 and the subsequent court order of the High Court on appeal from the Circuit Court (which on the authorities should be deemed to be part of the settlement to be considered under s. 20(3)), I find that the settlement was negotiated with the aid of experienced solicitors, accountants and counsel, and while I accept that the evidence offered by Mr. C. that the husband threatened to immigrate to Australia leaving with wife with the debts of the family and that nothing would be given to her by way of maintenance, I also find that these threats being in the nature of threats usually made in these situations, were not operative in leading the wife to sign the agreement. My conclusion of the wife's evidence under cross-examination was that she signed the separation agreement on the basis that she intended to seek to improve it. This was not evidence of bad faith as it was essentially a maintenance type of agreement and under the 1976 Family Law (Maintenance of Spouses and Children) Act, maintenance provisions could be reviewed in accordance with needs and other changes of circumstances. I find that in particular the wife's allegation that there was not a full disclosure of all the assets of the husband prior to the settlement is sustainable in relation to the proceeds of the CPO on the C.H. lands which was published in 1983 and in respect of which there was a property arbitrator's award in 1986 carrying interest of approximately £24,000.00 in respect of occupation from date of entry to date of award, making the total return on the CPO of £190,000.00.

Evidence in correspondence shown to the Court indicates that a sum in the region of £66,000.00 emerged as a capital gains tax charge against this award and that it was ultimately brought into play in the husband's business to provide working capital when he was strongly pressed by debts and demands for capital acquisitions tax and capital gains tax arising from sales and the death of his two parents, the father in 1979 and the mother in 1984.

The wife's evidence was that the CPO came first to her notice in 1988 when a letter relating to interest arrived at her door, but it appears that the husband specifically mentioned the CPO in an affidavit of discovery of 1987. The husband's case was that the CPO was published in the local newspapers as a matter of controversy in 1985 and would have been a talking point among the mothers leaving their children to the local school. His counsel cross examined the wife on the basis that she must have known about the CPO given the wide currency of controversy in the area about same, prior to the making of the settlement of the separation agreement in 1985. She replied that she did not read the local paper concerned, being more interested in a city paper instead. She knew that there was some controversy between the local authority and the husband's father down the years but did not know anything about a CPO which would result in a sale of such significance to negotiations in a separation agreement. I find on balance, that the wife's evidence is more credible, not on the basis that the husband had mislead the wife or had deliberately concealed the existence or fruits of the CPO, but rather because the CPO itself had been published in 1983 specifically designating the lands to be taken over from the husband as agricultural land. Putting the situation in a slightly macourberesque way, having lands compulsory acquired as agricultural lands meant disaster, whereas if a local authority negotiator or property arbitrator could be convinced that the lands had a development value then the situation of financial disaster could dramatically turn around to be one of significant financial gain and prosperity.

As the husband, in his evidence given much later than when the wife was cross examined, regaled the Court with the herculean efforts which he and his father made to out negotiate and out-wit the county manager in relation to the designation of the land at C.H. as development land, it is more than probable that prior to the settlement of 1985 the husband was not at all convinced that he would be successful in any attempt to attain a development land value in compensation for the lands to be compulsory required by the local authority. Thus in all probability the proceeds of the CPO lands were lost to the parties negotiating the 1985 separation agreement. Whether that loss resulted in a loss of a lump sum provision in addition to the maintenance for the wife or a larger maintenance for the wife is very difficult to say as the 1989 Act had not then come into force and the sensitivity of negotiators to such additional capital resources would not be the same as arose in later years as might be exemplified in the treatment of the court in the case *N. v.O'D.,* 2006 IEHC 452, as an information deficit loss (IDL). Also the newspaper reports for 1985 settlement indicated resistance by the local community to the route and not financial bonanza.

I conclude that the separation agreement did not contribute any more to the wife in terms of actual occupation and enjoyment on a day to day basis of marital home assets than she would have had had the marriage continued. The effect of the settlement is manifestly not to have effected the provision proposed to be made pursuant to s. 20 sub.s 1 and 2 of the 1996 Act except insofar as the separation agreement has had the effect *de facto* to add to the pool of capital resources available to the couple in the form of the dwellinghouse of the wife.

I find that there has not existed between the parties hereto a normal marital relationship for four out of the five years prior to the institution of the proceedings herein. There is no possibility of reconciliation and in accordance with this judgment proper provision will be made in accordance with the Constitution of Ireland and the Family Law (Divorce) Act, 1996. Accordingly I grant a degree of divorce in respect of the marriage of the parties. As so called ancillary provisions relating to the decree of the divorce I will make the following orders.

1. An order pursuant to s. 13(1)(c) that the husband shall make to the wife a lump sum payment in the sum of €4 million on or before the 1st December, 2008.

2. An order pursuant to s. 13(1) (a) that the husband shall make to the wife periodical payments in respect of maintenance in the sum of €1,500.00 per week gross of tax payable by weekly standing order into an account nominated by the wife, the first such payment to commence on the Wednesday after the date of this judgment and to be paid on each successive Wednesday by such standing order until the payment in full of the lump sum ordered to be paid by the husband to the wife.

3. In the event of the said lump sum or any part of the periodical payments for maintenance pending the payment of lump sum not being made on or before the 1st September, 2008 the Court directs and orders pursuant to s. 19 that the investment property at S. street be sold for the purpose of securing payment of such lump sum and/or periodical payments or parts thereof and in the even to the sale price of the said shop at S. street exceeding the sum of €12 million after deduction of all taxes and costs of disposal the excess of such sum shall be paid out in the form of an additional lump sum pursuant to s. 13(1)(c) to the wife to the intent that such lump sum shall constitute the same lump sum as ordered in order 1 above to the intent that the parties hereto shall share any surplus from the sale of the investment

property at S. street over and above €12 million plus taxes and cost of disposal in a manner consistent with the overall provision and division between them in this order.

4. An order for the solicitors for the defendant would have carriage of sale of the investment property at S. street unless the wife applies to this court upon the making of this order that the solicitors for the parties have joint carriage of such sale.

5. An order that the Registrar of the county in which the property at S. street is situate is to signed and execute all deeds, transfers and documents necessary for the purpose of effecting the order or any part thereof, in event at default of either party.

6. Liberty to the wife to apply for an order pursuant to s. 24 of the 1996 Act directly that any periodical payments be effected through the local District Court Clerk.

7. Such further or other orders as may be necessary and appropriate.

8. An order directing the husband to pay to the wife the costs of these proceedings including any reserved costs.

I do not consider that the judgment of the Supreme Court in *T. v. T.* is authority for the proposition that the Court may make provision for the parties on the basis that it is to be in full and final settlement of all claims of the parties against each other. In my view the judgment in *T. v. T.* only permits or mandates the Court to do so in the event of the parties agreeing and requesting that it would.

As there is no agreement in this case between the parties that the provision would be in full and final settlement notwithstanding that I consider that the resources provided for each party are ample enough to do so. I do not propose to declare the provision to be full and final. However, in the event of the parties agreeing that the provision is to be in full and final settlement I grant liberty to them to apply to the court so that such order may be added to the provision and adjudication of the court.

I await submissions of counsel in relation to finalisation of the order and modification of the costs structure proposed.