Neutral Citation Number: [2006] IEHC 98

THE HIGH COURT

[Record No. 2000 82 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY 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 CHILDRENS) ACT, 1976, AS AMENDED,
AND IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN

D.T.

APPLICANT

AND
F.L.

RESPONDENT

Judgment of Mr. Justice William M. McKechnie delivered on the 22nd day of February, 2006.

1. On the 6th July, 2000, the applicant instituted family law proceedings against the respondent wherein she sought a number of reliefs, including a decree of judicial separation as well as several ancillary orders dealing with property, financial and related matters. At paragraph 6 of the special endorsement of claim she pleaded:-

> "that the respondent purported to obtain from the Courts of the Netherlands in or about September 1994 a decree of divorce. Neither the applicant nor the respondent herein were at any time domiciled within the jurisdiction of the courts of the Netherlands. The said purported divorce is accordingly not recognised in this jurisdiction".

The background circumstances which gave rise to this plea are as follows.

2. The parties were married on the 30th August, 1980, in this jurisdiction and have three children who were born in 1982, 1984 and 1987 respectively. The respondent, who is now a successful business man, together with his then wife and family, moved to the Netherlands in 1987 where he took up employment with a Dutch subsidiary of an Irish plc. Unfortunately, difficulties arose in the relationship between the applicant and the respondent with the result that the applicant and the children of the marriage returned to Ireland in 1992. At the end of 1993 Mrs. L., as she then was, issued proceedings in the District Court of Rotterdam 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 the applicant will shortly make a divorce application to your court".

3. By March, 1994, when no such application had been made by the wife, the respondent himself instituted proceedings, again in the District Court of Rotterdam, seeking a decree of divorce on the grounds of the permanent breakdown of the marriage. By way of response, the applicant, who did not object to this relief being granted, sought orders of maintenance for herself and her children and custody of the latter. Both parties were represented by Dutch lawyers.

4. On the 12th September, 1994, the District Court of Rotterdam, having accepted jurisdiction on the basis of the husband's residence in that country for more than 12 months, granted a divorce to the parties and made an order for spousal maintenance, in favour of the wife, in the sum of Dfl 4,000 per month. In all other respects and in particular with regard to the questions of custody and child maintenance, the Court decided that it had no authority to deal with such matters.

5. The respondent, who purely for convenience, I may refer to from time to time as the husband and likewise to the applicant as the wife, responded to the issue of proceedings in this jurisdiction by claiming a declaration that the divorce so obtained should be recognised in this State pursuant to s. 29(1)(d) and/or (e) of the Family Law Act, 1995. By agreement, Lavan J., on the 6th July, 2001, ordered, that prior to the further prosecution of the family law proceedings, this matter should be determined as a preliminary issue. Having been at hearing for five days, Morris P. in his written judgment dated the 23rd November, 2001, refused the declaration sought and the resulting order, of the same date, shows that, "the court doth find -

> "1. that the said respondent was domiciled in Ireland on 13th day of July, 1994, (stat) and,
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> 2. that residence is not a basis for recognition of a foreign divorce obtained on 13th day of July, 1994 (stat) under the relevant Act."

The reference to the date of the 13th July, 1994, was a mistake. The correct date was the 12th September, 1994.

From that judgment the respondent appealed to the Supreme Court whose unanimous decision was delivered by Keane C.J. on the 26th November, 2003. As appears therefrom, the only issue before that Court was one of domicile, as the husband did not pursue the alternative argument that the divorce decree should also be recognised through the application of a modified rule of private international law, whereunder residency, in excess of one year would be sufficient. The Supreme Court, having rejected the respondent's arguments on the ground of domicile, dismissed the appeal and affirmed the order of the High Court.

6. The husband then commenced a further challenge to the applicant's entitlement to seek a decree of judicial separation (and ancillary orders) by issuing a notice of motion dated the 28th January, 2004. In that he sought the following orders:-

> "(1) An order pursuant to the provisions of the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1968, as incorporated into Irish law pursuant to the Jurisdiction of Courts and Enforcement of Judgments Act 1998, and in particular Articles 17, 19, 12 and 22 of the said Convention that this court should decline to exercise jurisdiction in respect of the claims for ancillary relief herein set out at letters (a) to (t) [other than the claim set out at (f)] of the Special Endorsement of Claim on the Special Summons had herein.
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> (2) In the alternative an Order pursuant to the provisions of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters that this court should decline to exercise jurisdiction in respect of the claims for ancillary reliefs set out at letters (a) to (t) [other than the claim at (f)] of the Special Endorsement of Claim on the Special Summons had herein
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> (3) Further in the alternative an Order pursuant to the provisions of 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) and pursuant to the State's obligations as set out under Articles 3, 10, 18 and 39 of the Treaty of the

> European Union that this court should decline to exercise jurisdiction in respect of any relief and/or the claims for ancillary relief set out at letters (a) to (t) [other than the claim at (f)] of the Special Endorsement of Claim on the Special Summons had herein".

7. Having filed and exchanged affidavits both in support and in opposition to this notice of motion, the parties agreed that the reliefs therein sought should be determined, once again by way of preliminary issue, and in furtherance of their respective positions filed extensive written submissions for which the Court is most grateful. As a result of this manner of approach this judgment is accordingly concerned only with the issues raised in the said notice of motion.

8. Before dealing with such matters however, there is an issue, taken by way of preliminary objection, which can conveniently be dealt with at this stage. On behalf of the applicant it is submitted, that this Court should refuse to entertain these new grounds of challenge, as the same should have been raised and determined, as part of the preliminary issue previously dealt with by both this Court and on appeal by the Supreme Court. In applying the rule in *Henderson v. Henderson* [1843] 3 Hare 100, it is a requirement of justice that each party should raise, in the first or earliest set of proceedings, all matters in issue between them. Otherwise there could be multiple litigation extending over lengthy periods with no certainty or finality of conclusion. This rule equally applies where the preferred method of trial is by way of preliminary issue as distinct from further and subsequent proceedings. Given the respondent's inordinate and inexcusable delay in raising this matter, despite the availability of legal advice, and in light of the ongoing hardship experienced by the wife, it is asserted that it would be grossly unfair, unjust and indeed oppressive, particularly in the absence of proper explanation, to compel the applicant to now meet this new challenge.

9. The husband's response to this objection is to submit that this Court must apply community law whenever an issue of that legal order is raised and accordingly no rule of national or domestic law can prevent or hinder the present application. See Article 29.4 of the Constitution and also *Meagher v. Minister for Agriculture* [1994] 1 I.R. 329 *and Maher v. Minister for Agriculture* [2001] 1 I.R. 139. It is said that no principle of estoppel can operate to ground or remove jurisdiction from this Court. See *C.K. v. J.K. and Another* [2004] 2 I.R. 224 and in particular the judgment of Fennelly J. at p. 293 *et seq*. of the report. In addition it is claimed that the rule in question is a discretionary one and that following the decision of the Supreme Court in *Ahmed v. The Medical Council* [2004] 1 ILRM 372 there are no justifiable reasons for preventing the respondent from raising, and having these grounds of challenge, now determined.

10. The rule in question is that where proceedings between parties exist, those parties are obliged to have litigated within such proceedings all claims and defences which are capable of being included therein. If either should fail to so do, they will not be permitted in any later proceedings, save in special circumstances, to raise as an issue, any matter which properly belonged to and should have been litigated in the earlier proceedings. See the judgment of the Vice Chancellor at pp. 114-115 of the report *in Henderson v. Henderson* [1843] 3 Hare 100 and also *Cox v. Dublin City Distillery (No. 2)* [1915] 1 I.R. 345. The reason for this rule, which is based on public interest considerations, is to ensure that litigation between the parties is finalised as expeditiously and as efficiently as possible. Having so opined however, Lord Bingham in *Johnson v. Gore Wood and Co.* [2001] WLR 72 then went on to say the following at p. 90 of the report:-

> "It is, however, wrong to hold that because a matter could have been raised in the earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not."

See also *Woodhouse v. Consigna* [2002] 2 All ER 737.

11. This passage was expressly approved of by the Supreme Court in *Ahmed v. The Medical Council* [2004] 1 ILRM 372. The applicant in that case, who had obtained temporary registration from the Medical Council, was charged with and later acquitted of two counts of sexual assault allegedly committed against patients whilst working in the Mater Hospital. Subsequent to his trial, he again sought temporary registration with the Council. Complaint having been made by the patients in question, the applicant was notified by the Fitness to Practice Committee of its intention to hold an inquiry into allegations of professional misconduct which arose out of the same circumstances giving rise to these criminal charges. In the first set of judicial review proceedings he was unsuccessful in restraining the holding of such inquiry, which he had sought on the grounds of double jeopardy and lack of fair procedures; though he was successful in reducing the number of allegations which he faced. In the second set of proceedings, he sought a further order staying this inquiry until he had obtained legal aid or alternatively had obtained sufficient funds to permit representation at such inquiry. In applying the rule in *Henderson v. Henderson* the Supreme Court felt that this issue, as to legal aid and/or legal funding, should have been raised in the earlier set of proceedings and accordingly prevented the applicant from raising it in the second set of proceedings. At p. 386 of the report, Hardiman J., who gave the judgment of the Court on this issue, explained however that:-

> "(the) rules or principles so described cannot, in their nature, be applied in an automatic or unconsidered fashion. Indeed, it appears to me that sympathetic consideration must be given to the position of a plaintiff or applicant who on the face of it is exercising his right of access to the Courts for the determination of his civil rights or liberties. This point has a particular resonance in terms of Article 6 of the European Convention on Human Rights … in *Ashingdane v. U.K.* [1985] 7 EHRR 528 at p. 546, the European Court of Human Rights said:-
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> > "The right of access to the Court is not absolute but may be subject to limitations: these are permitted by implications since the right of access by its very nature calls for regulation by the State, regulation which may vary in time and place according to the needs and resources of the community and of individuals".

Considering the nature of permitted limitations, the same Court said *in Tinnelly and Sons Limited v. U.K.* [1999] 27 EHRR 249 at p. 271:-

> "A limitation will not be compatible with Article 6(1) if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aims sought to be achieved"."

These statements of the law are of general application and apply in this case.

12. Apart from the discretionary nature of this rule, the principal submission made on behalf of the respondent is that community law must be applied at all times, and accordingly, any provision, whether statutory or judge made, which inhibits such application, has to

yield to the supremacy of community law. Several cases were referred to in this context. In my view however it is not necessary to refer to such cases in any detail, as I fully accept that where a provision of community law is directly applicable, then that provision, which is capable of conferring rights and duties on both Member States and individuals, must be fully and uniformly applied and that as a consequence, any provision of a national legal system, whether legislative, administrative or judicial, and whether pre-dating or succeeding the entry into force of the measure in question, which impairs the effectiveness of that measure must be disregarded. See *Simmental Spa (Case C – 106/77)* [1978] ECR I-529; *Factortame (Case C – 213/89)* [1991] 1 AC 603 and *Francovich (Case C – 6/90 and C – 9/90)* [1991] ECR I-5357.

13. However, standing side by side with these general principles are also the following principles which are succinctly set out at paragraph 13 of the judgment of the European Court of Justice in *MIRECO'S* case *(Case C 826/79)* [1980] ECR I - 2559. There the Court said:-

> "It follows from the judgments … in the *Rewe* and *Comet* cases … that, applying the principle of cooperation laid down in Article 5 of the EEC Treaty, it is the courts of the Member States which are entrusted with ensuring the legal protection which subjects derive from the direct effect of the provisions of Community law. In the present state of Community law and in the absence of Community rules concerning the contesting or the recovery of national charges which have been unlawfully demanded or wrongfully levied, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights which subjects derive from the direct effect of Community law, it being understood that such conditions cannot be less favourable than those relating to similar actions of a domestic nature and that under no circumstances may they be so adapted as to make it impossible in practice to exercise the rights which the national courts have a duty to protect".

14. That case is but one of several which reaffirms the position of procedural rules in a domestic legal system, where there are no community rules governing the matter at issue. Another such case is *Peterbroek (Case C - 312/93)* [1995] ECR I - 4599 and again, at paragraph 12 of the Court's judgment, it is stated that such procedural rules are not in conflict with community law provided the same are not "less favourable than those governing similar domestic actions nor render virtually impossible or excessively difficult the exercise of the rights conferred by community law".

When applying these principles in *Peterbroek*, the Court was constrained to hold that community law precluded the operation of the procedural circumstances applicable to the particular facts of that case.

15. In my view it is not a correct proposition of law to suggest that the general supremacy of community provisions render, in principle, the rule in Henderson v. Henderson redundant. The case of *Peterbroek*, despite the result, did not in my opinion hold that a litigant could raise in domestic proceedings at any time and in any circumstances an issue of community law. That point was simply not decided by the European Court of Justice. Indeed, that this is so is supported by the decision of the Supreme Court in *McNamara v. An Bord Pleanala* [1998] 3 I.R. 453. In that case, the mandatory two month limitation provision, as provided for in s. 82(3B)(a) and (b) of the Local Government (Planning and Development) Act, 1963, as amended, was challenged on the basis that as a procedural rule, it applied to a European Union point of law, in a less favourable way than it applied to domestic actions, or alternatively that it rendered "virtually impossible or excessively difficult" the exercise of community rights. Having referred to *Peterbroek*, Keane J., speaking for the Court, described that submission as "clearly unsustainable" and went on to hold that the two month provision was non discriminatory as between domestic and European actions and secondly, that it did not render "virtually impossible" or "excessively difficult" the assertion of European law rights.

It follows in my view that if *McNamara* is a correct interpretation of *Peterbroek* and that line of authority, which I respectfully believe it is, it must inevitably mean that if a two month time period is not inconsistent with community law, a discretionary rule of judge made law, is also not inconsistent with community law.

16. There is no doubt in my opinion but that the grounds of challenge, as contained in the notice of motion dated the 28th January, 2004, could have been raised at an earlier point in the present proceedings, and if they had, they would almost certainly have been determined in like manner to the issue of domicile. In fact they should have been so raised. However, that does not determine the matter. This Court must nevertheless exercise its discretion in the circumstances which presently exist. In my view that discretion should be exercised in favour of permitting the respondent to proceed. I have come to that conclusion on the basis of the general importance of the issue raised and also of the particular significance to the parties of their status under Irish and/or European law, as well as the applicant's entitlement, if any, to ancillary orders in this jurisdiction. Moreover, these new issues, raise points of European Law which are of general importance and in the public interest to have determined. In addition although no satisfactory explanation has been furnished for his failure to have these matters raised earlier, I do not believe that the respondent has acted dishonestly or in a manner which could be said to be vexatious or an abuse of the system. Furthermore and this point is of considerable significance, is the fact that counsel on behalf of the respondent, having taken express instructions, gave an undertaking to this Court that no further issue or new ground of challenge would be raised by him, once the present matters were finally determined. On this basis, and for these reasons, I propose to entertain the present application of the respondent, despite some hardship which undoubtedly this conclusion may cause the applicant. In that context I note that on a without prejudice basis her situation has at least been somewhat ameliorated.

Finally, I wish to add my complete endorsement to the existence and to the general application of a rule such as that in *Henderson v. Henderson*; which rule in my opinion has equal application to multiple preliminary issues as it has to multiple proceedings. If such a rule did not exist, then considerable injustice could result to individual parties and great disturbance and inconvenience caused to the efficient administration of justice.

17. In outlining the submissions made on behalf of the respective parties, it would be useful to bear in mind Articles 2, 3, 10, 18 and 39 of the Treaty establishing the European Community ("the EC Treaty") as well as the following legislative provisions, namely, the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters, 1968, ("the Brussels Convention") which had the force of law in both Ireland and the Netherlands prior to any relevant date or event in these proceedings, Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters ("Brussels 1 Regulation or "Brussels 1", which came into force on the 1st March, 2002), 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 ("Brussels 2 Regulation" or "Brussels 2", which came into force on the 1st March, 2001), and Council Regulation (EC) No. 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No. 3147/2000 ("Brussels 2 bis Regulation" or "Brussels 2 bis", which save for some Articles which are not relevant, came into force on the 1st March, 2005).

18. Mr. Gerard Durkan S.C., together with Mr. Paul McCarthy B.L., made the following submissions on behalf of the respondent:-

As recited on the face of the Order made on the 12th September, 1994, the Court of the Netherlands had jurisdiction to deal with the questions of divorce and spousal maintenance as a result of the husband being an Irish national and of his residence within that jurisdiction for more than 12 months. That order dissolved the marriage between the parties and granted the applicant periodic maintenance for herself, which maintenance is still being paid to the date hereof. Such maintenance payments were expressly within the Brussels Convention (Article 5.2) and the fact that the obligation to pay arose out of divorce proceedings is entirely irrelevant. See *de Cavel (Case C - 120/79)* [1980] ECR I - 731 and *Van den Boogaard v. Laumen* [1997*] (Case C – 220/95)* ECR I - 1147. Being therefore an order for maintenance and thus within the scope of both this Convention and Brussels 1, it was, at the time of its granting, enforceable under the Brussels Convention, but since the 1st March, 2002, is now enforceable under Brussels 1. The fact that the order was made at the same time as the granting of a decree of divorce, which itself was not enforceable under the Convention and is not enforceable today under the Regulation, is irrelevant.

As is clear from the "reliefs" section of the special summons issued in these proceedings, the applicant is seeking, as well as a decree of judicial separation, ancillary orders which can only be described as maintenance orders or, in the precise wording of Article 5.2 of the Regulation, orders "in matters relating to maintenance". If successful in this claim any resulting order will also be covered by the same Regulation. That potential result raises the question whether any such order of the this Court would be "irreconcilable" with the maintenance aspect of the Dutch decree.

19. In *Hoffman v. Krieg (Case C – 145/86)* (1988) ECR I - 645 the European Court of Justice said that the test of "irreconcilability" should be determined by examining whether the judgments "entail legal consequences that are mutually exclusive"; see paragraph 22. It is claimed that if this action is allowed to proceed then two different and inconsistent maintenance orders, with mutually exclusive consequences, both of which are potentially enforceable under the Regulation, would exist. Faced with such a possibility it is submitted that this Court should apply the judgments outlined in *de Wolf v. Cox B.V. (Case C – 42/76)* [1976] ECR I – 1759 and in *Overseas Union Insurance (Case C – 351/81)* [1991] ECR I - 3317. In *de Wolf* the plaintiff, who obtained judgment against the defendant in Belgium, instituted proceedings involving the same cause of action seeking the same reliefs against the same person in Holland. The ECJ held that to allow the second set of proceedings to continue would be incompatible with Articles 26 and 29 of the Brussels Convention and would also offend the *lis alibi pendens* provisions of Article 21 of that Convention.

In the *Overseas Union* case, the Court at paragraph 15 of the judgment, when dealing with Article 21 of the Convention, placed emphasis on the essential aim of the Convention which was to promote the recognition and enforcement of foreign judgments and to that effect it was, in its view, "indispensable to limit the risk of irreconcilable decisions". It went on to say at paragraph 17, that the provisions dealing with *lis pendens* and related actions, were "designed to preclude, insofar as possible and from the outset", the possibility that a judgment would be refused recognition on the grounds of irreconcilability. See also *Gubisch v. Palumbo (Case C – 144/86)* [1987] ECR I - 4861. Relying on these decisions, it is urged that under the comparable provisions of the Regulation, this Court should decline jurisdiction on the applicant's claim for maintenance as otherwise orders, with incompatible legal consequences, may result.

20. The submissions above made are premised upon an assumption that the order of the Dutch court is still entitled to recognition and enforcement under community law, and is so in such a way which triggers the application of the *lis alibi pendens* rules to the present proceedings. It is claimed on behalf of the respondent that such legal consequences exists and that these flow not from the transitional provisions of Brussels 1 (Article 66) but rather from the combined effects of Article 27 (*lis pendens*), Article 33(1) ("A judgment given in a Member State shall be recognised in the other Member State without any special procedure being required") and Article 36 ("Under no circumstances may a foreign judgment be reviewed as to its substance").

21. The reason why Article 66(1) of the Brussels 1 Regulation is not relevant in this regard, is that it does not deal with judgments at all, and accordingly does not deal with judgments given prior to the 1st March, 2002. Article 66(2) covers judgments given after the entry into force of that Regulation but only where the proceedings were instituted prior to that date. Therefore no guidance is given in Article 66 as to the interplay between the *lis pendens* rules and the 1994 judgment. Such guidance however is obtainable from the case of *Von Horn v. Cinnamond (Case C – 163/95)* [1997] ECR I - 5451. In that case the Court, when interpreting a very similar transitional provision contained in the Accession Convention of Spain and Portugal to the Judgments Convention ("the San Sebastian Convention") held that *lis* provisions did apply even where one set of proceedings was instituted prior to the entry into force of that Convention. See para. 19 of the judgment which contains part of the Courts' reasoning in this regard.

22. In support of the submission that the maintenance order is enforceable under the Brussels 1 Regulation (see paragraph 18 above), it is claimed that since such order was clearly enforceable under the Brussels Convention it could not have ceased to be enforceable simply because the Regulation "replaced" that Convention. Accordingly, drawing on the reasoning outlined in *Von Horn*, the respondent submits that the maintenance element of the 1994 Order is entitled to recognition and enforcement under Brussels 1 and that as such this Court must apply to the present proceedings the *lis alibi* provisions of that Regulation.

To opt for enforcement and recognition under the Regulation, instead of under the Convention, is consistent with Recital 19 of the former which reads "Continuity between the Brussels Convention and this Regulation should be ensured, and transitional provisions should be laid down to that end". It is also more consistent with the European Communities (Civil and Commercial Judgments) Regulations, 2002 (S.I. 52/2002). In conclusion therefore on this point, the 1994 Order when dealing with maintenance, covers exactly the same relief as the applicant now seeks in these proceedings, and as such, this Court, by virtue of the relevant provisions of the Regulation, must decline jurisdiction in that regard.

23. Council Regulation 1347/2000, Brussels 2, which came into force in both Ireland and the Netherlands on the 1st March, 2001, applies *inter alia* to "civil proceedings relating to divorce, legal separation or marriage annulment". See Article 1.1(a). In accordance with its transitional provisions it applies *inter alia* to "legal proceedings instituted … after its entry into force" (Article 42.1) and also to judgments given after that date in proceedings instituted before that date, if certain jurisdictional requirements are met (Article 42.2). It is accordingly claimed that any order for judicial separation which this Court might make, would be within the Regulation and therefore would be subject to the provisions thereof.

Article 11 of Brussels 2 is contained in Chapter II, Section 3 of the Regulation. The relevant Article is entitled "*Lis pendens* and dependent actions". It is claimed that at the date of the 1994 judgment, which as regards status is absolute between the parties, the courts of the Netherlands were seized of the matrimonial dispute between the applicant and the respondent, and accordingly by virtue of Article 42.2 of Brussels 2, any future judgment of an Irish court dealing with status, would not be recognised in any other Regulation State. By reason of this, the Irish court should now apply Article 11 and should decline jurisdiction as otherwise it would be in breach of the Brussels 2 Regulation.

The above arguments on Brussels 2 equally apply to Brussels 2 bis.

24. As appears from paragraphs 1 and 4 above, both the institution of the present proceedings and the decree of divorce, predated the entry into force of Brussels 2. Therefore the temporal application of this Regulation must be considered. Again *Van Horn v. Cinnamond* was relied upon (see para.21 above). Applying the Court's judgment in that case, in particular its decision at paragraphs 9, 10 and 14-21 of the report, the respondent submits that the Court of the Netherlands, when granting the decree of divorce, did so on jurisdictional rules which accord with those now found in Chapter II of Brussels 2 and accordingly, when dealing with the claim for judicial separation this Court must now apply the *lis pendens* provisions of this Regulation. If such provisions are applied this Court must decline jurisdiction as otherwise irreconcilable judgments will follow. Such a result would be in clear breach of the solidarity and mutual cooperation which each Member State must show to each others judicial systems. In addition, to do otherwise than to decline jurisdiction would be a failure to honour the State's obligations under Article 65 of the Treaty.

25. The third limb of the respondent's submissions relate to the free movement of workers, in this case meaning the respondent himself. In 1987, the husband, exercising his right as a worker and as a national of a Member State, moved his place of employment to and went to reside in the Netherlands where he stayed, as a worker, until 1994. At that time he returned to Ireland and has been employed here ever since. At present he is in a second relationship and if free to do so would like to re-marry. However, if he was to so do in Ireland, he would be committing bigamy as the Supreme Court has refused to recognise his decree of divorce. He believes that the legal regime under which this conclusion came about, is unlawful, as the pivotal ground for the Court's refusal to recognise was one based on "domicile" which was directly related to his nationality and to his decision to return to Ireland as a worker. The decision of that Court is therefore *prima facie* incompatible with the Treaty provisions allowing free movement of workers.

26. In support of this view it is pointed out that the respondent holds a very senior position with a substantial plc which has business interests in many countries of the European Union. It is claimed that, in any of its Member States he must be free to establish himself, or to serve as an employee, and to do so without having to face obstacles which would inevitably follow, the making of an ancillary order as the same would have to be incompatible with the decision of the 12th September, 1994. Any such second order would therefore interfere with his freedom to move and to establish and/or to provide services. In addition such an order might force him to terminate his existing employment and to move to some other Member State where it is said, that despite the order of the Supreme Court, the 1994 decree would be recognised. If however in such circumstances he was ever to return to Ireland he would be compelled to honour any award which this Court might make or else face enforcement action in respect thereof. This possible scenario would likewise constitute a restriction on his freedom of movement as a worker.

27. It is claimed on his behalf that at present in any Member State other than Ireland he would be free to marry and to take up residence therein. Marital status is a significant factor for a worker in areas such as taxation and other conditions of employment. In this regard reference was made to *Diatta v. Land Berlin (Case C-267/83)* [1985] ECR J-567 where the Court said, "It must be added that the marital relationship cannot be regarded as dissolved so long as it has not been terminated by the competent authority. It is not dissolved merely because the spouses live separately, even where they intend to divorce at a later stage". As an Irish national, on his return to this jurisdiction, the respondent should not be disadvantaged simply because he exercised his right to work abroad in another Member State. A sharp distinction must be made between a person in his situation and a non-worker who simply obtains a foreign divorce to whom the relevant Treaty provisions would not apply. See the *Queen v. Immigration Appeal Tribunal and Surinder Singh (Case C-370/90)* [1992] ECR I-4265. In support of the above submissions, Articles 39 and 18 of the EC Treaty were referred to as well as Council Regulation 1612/68EEC, including the third and fifth recitals thereof. As also was the case of *Pusa v. O.K.V. (Case C-224/02)* of the 29th March, 2004.

28. The final heading of the respondent's submissions was based on certain Articles of the EC Treaty, in particular Articles 2 and 10, when read in conjunction with Articles 3 and 61. It is claimed that under these provisions, Ireland is obliged to facilitate the creation of an internal market, to display solidarity and sincere cooperation with other Member States and to promote mutual respect between the various judicial organs of government.

Article 10 of the EC Treaty reads:-

> "Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty".

Article 61 provides that the Council shall adopt "(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65".

29. To suggest that the Brussels Convention or the Regulations, Brussels 1, Brussels 2 or Brussels 2 bis, created, for the first time a new obligation of recognition and enforcement in the areas covered by such instruments, is an incorrect view of the true legal position. These obligations derive directly from the Treaty provisions (see Article 61 and 65), and are not dependent on later legislation. The purpose of the Convention and the Regulations is to facilitate a speedier and simplified method of recognition and enforcement as well as creating certainty in a number of jurisdictional matters. That this is so is evident from Article 293 (formerly Article 220) of the EC Treaty and also from certain recitals and other provisions of the Convention and the subsequent Regulations. Accordingly even if these facilitating provisions had not been passed the basic obligation to recognise and enforce, even if procedurally more diverse and difficult, would exist.

Reliance is also placed on the Vienna Convention on the Law of Treaties, in particular Article 18 thereof, and on the case of *Inter-Environment Wallonie ASBL v. Regional Wallonne (Case C-129/96)* [1997] ECR I-7411.

30. Based on these Articles of the EC Treaty, and in light of the above Regulations, it is suggested that the obligation to promote mutual assistance and sincere cooperation would be disregarded and that the creation of an internal market and the furtherance of mutual judicial respect, would be undermined, if an Irish court should issue a judgment which potentially could be irreconcilable in any way, including the issue of status, with the 1994 order of the court of the Netherlands.

31. Mr. Gerard Hogan S.C., together with Mr. David J. Hegarty S.C. and Ms. Maire R. Whelan S.C., made the following submissions on behalf of the applicant. He started by saying that it was an acknowledged fact that neither the Brussels Convention or the Brussels 1 Regulation applied to the question of status involving natural persons. As a result the only measure which could have relevance to the Dutch decree of divorce is the Brussels 2 Regulation (or its successor, Brussels 2 bis). That Regulation came into force on the 1st March, 2001, some six and a half years after the judgment in question and more than one year after the institution of the present proceedings. As of 1994 the question of recognising a foreign divorce was, both in Ireland and in the Netherlands, a matter which fell to be determined in accordance with that country's domestic rules of private international law. In Ireland those rules were to be found

in the Domicile and Recognition of Foreign Divorces Act, 1986, which came into force on the 2nd of October of that year and which applied to all divorce decrees granted after that date. Under s. 5 of that Act, a foreign decree of divorce would be recognised in this jurisdiction if either party was domiciled in the Country where that decree was obtained. In applying those rules, the Supreme Court in its judgment of the 26th November, 2003, decided that since the respondent was not domiciled in Holland in 1994, (there being no question of the applicant being so domiciled), the divorce decree from the Dutch courts could not be recognised in this jurisdiction.

32. As above stated, Brussels 2 came into force on the 1st March, 2001, a date which evidently was substantially after the 1994 decree and also after the institution of the present proceedings. As a result it is claimed that on several grounds this Regulation could have no application to the divorce decree of September, 1994. In the first place there is a general rule of community law, that instruments such as regulations should not be given retroactive effect unless this clearly follows from the specific terms of the measure in question or from the objectives of the scheme as a whole, of which they form part. In *Firma A Racke v. Hauptzollamt Mainz (Case C-98/78)* [1979] ECR I-69, the European Court of Justice made this point forcibly when it said at p. 84 of the report "a fundamental principle in the community legal order requires that a measure adopted by the public authorities shall not be applicable to those concerned before they have the opportunity to make themselves acquainted with it".

33. Secondly, there are several other reasons of a general nature as to why Brussels 2 should be given a prospective meaning only. Article 2(1) and Article 2(1)(a) of the Regulation affected a very significant relaxation of the rules which previously applied to the Recognition of Foreign Divorces. After Brussels 2 for such recognition to take place it was sufficient to establish "habitual residence" as a basis for jurisdiction as distinct from domicile. This change took place even in countries where that concept previously was a mandatory requirement. Given the significance of the change it would be completely contrary to legal certainty if this Regulation should apply retrospectively. In addition such a construction could result in great doubt and ambiguity and could cause great unfairness in many situations. An example of this might be if a person, like the applicant, who having obtained legal advice, decided to ignore her husband's foreign divorce decree, in the certain knowledge that the "habitual basis" of jurisdiction would not be recognised in her residential and domiciliary home. To have her status, in that jurisdiction, as a married woman changed to that of a divorced person, perhaps many years later, would be grossly unjust. Therefore on these grounds alone, which are entirely unrelated to the transitional provisions of the Regulation, Brussels 2 should not be read as applying to the respondent's divorce decree. Accordingly there is no prohibition on an Irish court from issuing a judgment in the present proceedings which may be irreconcilable with the 1994 decree.

34. On the specific side of this argument there are also reasons why Brussels 2 does not apply. Article 42 of that Regulation, which is headed "Transitional Provisions", and in particular paragraph 1 thereof, states that its provisions, *inter alia*, apply only to legal proceedings instituted after the 1st March, 2001. Article 42(2) can be of no assistance to the respondent as it applies only to judgments given after the 1st March, 2001. Consequently by virtue of these express provisions it is evident that the Regulation cannot apply to the divorce decree. This situation equally pertains in respect of the Brussels 2 bis Regulation.

35. The second aspect of the 1994 judgment was that part of it which related to maintenance. Assuming that this element is capable of separation from the divorce section, the question then arises as to whether, under community law such element is enforceable today, and if so, is it, in such a way which triggers the application of *lis alibi pendens* rules. As with the transitional provisions of Brussels 2, Article 66(1) of Brussels 1 makes it clear that this Regulation applies only to legal proceedings instituted after its entry into force which was the 1st March, 2002. Again similar to what is contained in Article 42(2) of Brussels 2, Article 66(2) of Brussels 1 admits of a limited exception to this general rule which is that the Regulation may apply, in certain circumstances, to judgments given after the 1st March, 2002. It is therefore said that with some obviousness this Regulation cannot apply to any part of the judgment obtained in the Netherlands.

36. This conclusion is not affected by the case of *Von Horn* which is not, contrary to what the respondent may suggest, an authority for the proposition that the maintenance element of the 1994 judgment is "covered" by the Brussels 1 Regulation. Having outlined the facts of that case and having cited the transitional provisions (Article 29) of the San Sebastian Convention (with which the case was concerned), the applicant referred the Court to paragraphs 9, 10, 11, 14, 15, 16 and 17 of the judgment of the European Court of Justice and submitted that two essential points emerged from that judgment. Firstly it was pointed out that whilst the Court was concerned with *lis alibi pendens* rules, it was so only as between Portugal and the United Kingdom, and that in these circumstances such rules were special procedural rules, which, *ex hypothesi*, necessarily meant that the Court had to take account of the other proceedings. As a result the judgment is therefore not one of general application. Secondly, it is said that *Von Horn* turned on the ambiguous nature of the transitional rules contained in the San Sebastian Convention as these dealt with the *lis alibi* situation. On the other hand it is claimed that no such ambiguity exists with Article 66 of Brussels 1 and accordingly this case can be regarded as having been decided on its own facts. Consequently, it is of no help to the respondent and therefore the Regulation does not apply.

37. On the assumption however that the maintenance element of the Dutch decree is covered by the Brussels Convention (though not the Regulation), it is submitted that such element of the judgment cannot be recognised in this jurisdiction by virtue of Articles 27(3) and 27(4) of that Convention. This is because the making of the maintenance order was predicated on the parties being divorced, whereas following the Supreme Court's decision in its November, 2003 judgment, the parties in Irish law are still married. Therefore, under Article 27(3) the Irish courts are obliged not to recognise the maintenance judgment as that is irreconcilable with the Supreme Court's judgment. In support of this proposition reliance is placed on *Hoffman v. Krieg (Case C-145/86)* [1988] ECR I-645 and also on *Macaulay v. Macaulay* [1991] 1 W.L.R. 179.

38. In addition, it is claimed that Article 27(4) of the Convention also obliges the Irish court to refuse recognition of the maintenance order. Applying that subparagraph, it is said that the Dutch court, in ordering maintenance, decided a preliminary question of status, namely that the parties were no longer married to each other. That decision is of course in direct conflict with the Irish rules of private international law as applied by the Supreme Court. As the same result, namely the divorced status of the parties, could not be reached by the application of Irish private international law, it follows that under the provisions of Article 27(4) there is no Convention bar to an Irish court now pronouncing on the issue of maintenance.

Therefore, in conclusion on this aspect of the case, it is claimed that the Dutch maintenance order does not prevent the continuation of the maintenance aspect of the present proceedings.

39. The respondent's argument based on the direct application of certain treaty provisions is answered by the submission that if the same was correct, then Article 293 (ex Article 220) of the EC Treaty would be wholly irrelevant as would several amendments to the Amsterdam Treaty. Moreover the Brussels Convention and the Regulations referred to, would be wholly odious and furthermore Denmark, despite the Protocol on the position of that Country annexed to the Treaty of the European Union and to the Treaty establishing the European Community, whereunder it did not participate in the adoption of either Brussels 1 or Brussels 2, would be bound by the entirety of those Regulations as if it was a direct party to it. It is therefore said that this argument is simply unsustainable.

On the question of the rights afforded to a worker under Community law, in particular to that of free movement, it is submitted that the respondent has failed to have regard to the fact that he remains lawfully married to the applicant in this jurisdiction. In such circumstances the obligations imposed by Article 41 of the Constitution must be satisfied as before this Court can exercise its divorce jurisdiction. What in effect the respondent is seeking is that this Court should grant a divorce decree without making proper provision for his wife. This argument constitutes an unjust attack on the applicant's entitlement to ensure that if a decree of divorce should be granted, proper provision, as a pre-condition thereof, should be made for her and any dependent child of their marriage.

40. There are two matters of law in this case which, in my view, are largely uncontroversial and accordingly I propose to deal with them at this stage. The first is what constitutes 'maintenance' for the purpose of the Convention and the Brussels 1 Regulation, and the second is whether 'a maintenance order' is within the provisions of the Convention and the Regulation, if it has been granted in conjunction with and as part of a divorce decree. For these purposes there is no distinction between the relevant provisions of either of these instruments and the principles enunciated apply equally to both. The reason why the Convention must be considered as well as the Regulation becomes clear in a moment.

Brussels 1 Regulation applies to all 'civil and commercial' matters save for those which are excepted under Article 1.2, which at subparagraph (a) thereof excludes "the status or legal capacity of natural persons, rights in property arising out a matrimonial relationship, wills and succession".

That "maintenance" is a civil matter cannot be disputed and accordingly by virtue of the above definition and also by the express terms of Article 5.2 of the Regulation it is covered by the provisions thereof. The difficulty which has arisen is to distinguish "matters relating to maintenance", which are within the Regulation and "rights in property arising out of a matrimonial relationship" which are not.

41. The judgment of the European Court of Justice in *Van den Boogaard v. Laumen* sets out the manner in which the answer to this question must be approached. Paragraphs 21 to 23 inclusive, which contain the relevant test read as follows:-

> "21. Owing precisely to the fact that on divorce an English court may, by the same decision, regulate both the matrimonial relationships of the parties and matters of maintenance, the court from which leave to enforce is sought must distinguish between those aspects of the decision which relate to rights in property arising out of a matrimonial relationship and those which relate to maintenance, having regard in each particular case to the specific aim of the decision rendered.
>
> 22. It should be possible to deduce that aim from the reasoning of the decision in question. If this shows that a provision awarded is designed to enable one spouse to provide for himself or herself of if the needs and resources of each of the spouses are taken into consideration in the determination of its amount, the decision will be concerned with maintenance. On the other hand where the provision awarded is solely concerned with dividing property between the spouses, the decision will be concerned with rights and property arising out of a matrimonial relationship and will not therefore be enforceable under the Brussels Convention.
>
> 23. It makes no difference in this regard that payment of maintenance is provided for in the form of a lump sum. This form of payment may also be in the nature of maintenance where the capital sum set is designed to ensure a pre-determined level of income".

See also the *de Cavel* case and in particular paragraphs 3 and 5 of that judgment.

42. It seems therefore that once the purpose, focus or intention of the decision is to make provision for the needs of one party, having regard to the resources of the other, then the resulting order will be within Article 5(2) of the Brussels 1 Regulation. Provided that the intention of the decision is as I have specified, the actual form of the award is immaterial. It matters not whether the order is for the payment of a periodic sum, a lump sum, or the transfer of ownership of moveable or immoveable property. Provided that the court is not simply dividing property in a matrimonial context, but rather is looking after the needs of one party by reference (at least in part), to the assets of the other party, then that is sufficient to constitute 'maintenance' for the purposes of the Regulation.

43. The second issue arose directly in the *de Cavel* case (*supra*). As formulated in that case the question is whether a maintenance order, given in the context of divorce proceedings, is entitled to inclusion within the Regulation, as being a civil matter and also by virtue of Article 5(2) thereof, or whether as being ancillary to divorce proceedings it is excepted from the scope of the Regulation by reason of Article 1(2)(a) thereof. (See para.40 as above). The answer to this problem is to be found at paragraphs 7 to 9 of the judgment which state:-

> "7. Insofar as its field of application is concerned, no provision of the Convention links the treatment of ancillary claims to the treatment of principal claims. On the contrary, various provisions confirm that the Convention does not link the treatment of claims classified as "ancillary" to the treatment of the principal claim. In particular, such is the case with Article 42 which provides that, where a foreign judgment has been given in respect of several matters and enforcement cannot be authorised for all of them, the Court shall authorise enforcement for one or more of them, and with Article 24, which provides that application for such provisional, including protective, measures – which are, by definition, ancillary measures – as may be available under the law of a contracting State may be made to the courts of that State, even if, under this Convention, the courts of another contracting State have jurisdiction as to the substance of the matter.
>
> 8. These provision demonstrate unequivocally that the general scheme of the Convention does not necessarily link the treatment of an ancillary claim to that of a principal claim. In accordance with that principle, and in regard precisely to the Convention's scope, a criminal court, the judgments of which, when given in its proper area of activity, are clearly excluded from the scope of the Convention, has jurisdiction conferred upon it by Article 5(4) of the Convention to entertain an ancillary civil claim, with the result that a judgment given on that claim will benefit from the Convention as regards its recognition and enforcement. That provision thus expressly provides that a claim ancillary to criminal proceedings, which are obviously excluded from the scope of the Convention, comes within it.
>
> 9. Ancillary claims accordingly come within the scope of the Convention according to the subject-matter with which they are concerned and not according to the subject-matter involved in the principal claim. It was by way of applying that rule that the Court held in its judgment of 27th March, 1979 in *Case 143/78 de Cavel* [1979] ECR 1055, involving the same parties, … that an application in the course of divorce proceedings for placing assets under seal did not come within the scope of the Convention, not on account of its ancillary nature, but because it appeared that, having regard to its true function, it concerned, in that case, rights and property arising out of the spouse's matrimonial relationship".

See also paragraph 22 of the *Van den Boogaard* decision (*supra*) where, having made the distinction between "rights in property arising out of a matrimonial relationship" and "in matters relating to maintenance", the Court went on to say that in accordance with Article 42 of the Convention (Article 48 Brussels 1), the latter part of the same judgment was enforceable whereas the former was not.

44. Accordingly, where in the same set of proceedings, there are what might be described as 'ancillary claims' as well as 'principal claims', the court must look at the subject matter of the claim in respect of which enforcement is sought and if it is demonstrated that such subject matter is within the Regulation then the same is subject to the provisions thereof. This applies even where the principal claim is, according to its subject matter, excluded from the operation of the Regulation. Accordingly if in divorce proceedings a court should, as ancillary to a divorce decree, grant an order for maintenance, as that term is understood in Community Law, then that order is within Article 5(2) of the Regulation, and therefore is subject to the full scope of its entire provisions.

45. In the present application the respondent seeks to persuade this Court that without a substantive hearing on the merits, it should refuse to entertain the reliefs sought in the special summons issued herein. Fundamental to the success of this submission is a requirement to prove that the *lis alibi pendens* rules of the Convention/Regulations, or rules having equivalent effect, apply, and that the judgment of 1994 is subject to such rules. That judgment it would be recalled dealt with a question of status and also a question of maintenance. The reliefs sought by the applicant in these proceedings can likewise be said to involve a question of status and a question of maintenance. In the first instance she seeks a decree of judicial separation and secondly a series of ancillary orders which can be regarded as "matters relating to maintenance" as that term is understood in both the Convention and Regulation sense. It will therefore be convenient to separately consider this primary submission of the respondent in terms of both the divorce aspect and the maintenance aspect of the aforesaid judgment.

46. Section 8 of Title II of the Brussels Convention, which is headed "*Lis Pendens* – Related Actions", contains Article 21 which specifies the relevant *lis* rule for present purposes. That reads as follows:-

> "Article 21.
>
> Where proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, any court other than the court first seised shall of its own motions stay it proceedings until such time the jurisdiction of the court first seised is established.
>
> Where the jurisdiction of the court first seised is established, any court other than the court first seized shall decline jurisdiction in favour of that court".

The comparable provisions of the Brussels 1 Regulation are contained in Article 27 which for all practical purposes are indistinguishable from the provisions of Article 21.

47. Similar provisions are to be found in the Brussels 2 Regulation, although the precise wording of Article 11 is somewhat different. That Article reads as follows:-

> "Article 11.
>
> 1. Where proceedings involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay it proceedings until such time as the jurisdiction of the court first seised is established.
>
> 2. Where proceedings for divorce, legal separation or marriage annulment not involving the same cause of action and between the same parties are brought before courts of different Member States, the court second seised shall of its own motion stay it proceedings until such time as the jurisdiction of the court first seised is established.
>
> 3. Where the jurisdiction of the court first seised is established, the court second seised, shall decline jurisdiction in favour of that court.
>
> In that case, the party who brought the relevant action before the court second seised may bring that action before the court first seised".

See also Article 19 of Brussels 2 bis for similar provisions.

48. Arising out of these provisions there are a number of principles which can be stated with some certainty whilst others are more contentious. The rationale for the existence of the lis rules is now firmly established as part of community law. In G*ubisch v. Palumbo (supra)* the European Court of Justice not only outlined the basis of these provisions, but also, when invoked, the manner of their application. Paragraph 8 of that judgment encapsulates the essential points. It reads:-

> "8. According to its preamble, which incorporates in part the terms of Article 220, the Convention seeks in particular to facilitate the recognition and enforcement of judgments of courts or tribunals and to strengthen in the Community the legal protection of persons therein established. Article 21, together with Article 22 on related actions, is contained in Section 8 of Title II of the Convention; that section is intended, in the interests of the proper administration of justice within the Community, to prevent parallel proceedings before the courts of different Contracting States and to avoid conflicts between decisions which might result therefrom. Those rules are therefore designed to preclude, insofar as is possible and from the outset, the possibility of a situation arising such as that referred to in Article 27(3), that is to say the non-recognition of a judgment on account of its irreconcilability with a judgment given in a dispute between the same parties in the State in which recognition is sought".

49. These principles have been reaffirmed in several subsequent cases including *Overseas Union Insurance Limited and Others v. New Hampshire Insurance Company (supra).* In addition, the Court in the Overseas case empathically rejected the argument that the very existence of Article 27(3) (see para.37 above) of the Convention showed that these *lis* rules could not prevent irreconcilable judgments from being given in certain cases in different contracting States. In response to this suggestion the Court reaffirmed, speaking of Article 21, re-emphasised the necessity of applying that provision, as early as possible, so as to preclude or limit the risk of irreconcilable judgments. These decisions, although given in Convention cases apply, equally to Regulation cases.

50. There can be no doubt therefore but that where, as a matter of community law these provisions apply and where the facts of a case require their application, a national court, when called upon to exercise its jurisdiction, must apply such provisions and must do so, at the first available opportunity which the presenting circumstances allow. In addition it is clear in my view that Article 21 (and 22) of the Convention are complimentary of the provisions governing recognition and enforcement and that in turn the latter are equally complimentary of the *lis pendens* rules. I therefore would have no choice but to apply these provisions (whether of the Convention or the Regulations) if the respondent can prove that as a matter of law and fact they apply to his circumstances.

51. As previously stated, when the divorce decree was granted questions of status were not included in the Brussels Convention or indeed in any Community Regulation. That situation changed as and from the 1st March, 2001, when matters relating "to divorce, legal separation or marriage annulment" (Article 1.1(a)) became the subject matter of the Brussels 2 Regulation. That Regulation in turn has now been "repealed" by Article 71 of Council Regulation 2201/2003 (Brussels 2 bis) which came into force on the 1st March, 2005. This last mentioned instrument, which also deals with matters relating to "divorce, legal separation or marriage annulment", effectively replaced and extended the scope of Brussels 2.

52. A central question in this case is whether the divorce segment of the 1994 judgment is within Brussels 2 or Brussels 2 bis and in particular whether it is covered by either of these Regulations for the purposes of invoking the *lis alibi pendens* rules which each contained. Concentrating for a moment on the Brussels 2 Regulation, it seems clear from Article 42, which is the Transitional Provision, that the Regulation itself applies firstly "only to legal proceedings instituted after its entry into force" (the 1st March, 2001) and secondly to judgments given after that date in proceedings which were instituted prior to that date, but only if in such circumstances the jurisdiction of the court was founded upon certain rules. From the text of the English version, which was the only one referred to, it seems evident, perhaps abundantly evident, from the express wording of this Article, that the Regulation does not apply to the 1994 decree. Simply put both the proceedings and the judgment in that case, fall outside the domain of the Regulation ratione temporis. Subject therefore to the case of *Von Horn* next mentioned and to the correct meaning of the transitional provisions, it is essential in my view that what is sought to be relied upon, namely the divorce decree, should be, *inter alia*, within the temporal framework of this Regulation. That this is a pre-condition to the Regulation applying is confirmed at paragraph 2.19 of *Civil Jurisdiction and Judgments*, 4th edition, of Briggs and Rees when discussing the jurisdictional provisions of Brussels 1, and even more to the point, by a passage in Dicey and Morris, *The Conflicts of Law*, at para.12.40 where it is stated that the *lis alibi pendens* provisions of the Brussels Convention, will not apply where the proceedings are outside the Convention *ratione temporis*. I respectfully agree with the views of both authors and find their conclusion entirely understandable and correct. As the dates conclusively establish, this case is therefore not within the provisions of Brussels 2. Equally so it is not within the Transitional Provisions (Article 64) of the Brussels 2 bis Regulation.

53. In my view the correct interpretation of the transitional provisions of the Brussels 2 Regulation, and its successor, should at least in general be guided by the following:-

> (a) Article 42 is a transitional provision and is intended to regulate the temporal domain of the Regulation,
>
> (b) In the first paragraph of that Article the phrase "The provisions of this Convention shall apply only"… is used, and by its express wording (emphasis added), is mandatory as to the legal consequences which it attaches to those proceedings which are included and excluded from its ambit. Proceedings other than those specified must be taken by implication as being excluded.
>
> (c) Article 42 has placed considerable emphasis on "time", that is when legal proceedings have been instituted, as a factor in determining what proceedings are covered by it. Paragraph 1 uses this element to distinguish between legal proceedings instituted before and after the entry into force of the Regulation. Paragraph 2, which creates an exception to paragraph 1, also uses the mechanism of time or dates as a divisional element in distinguishing between those proceedings/judgments which are within and those which are excluded from the Regulation.
>
> (d) As this last mentioned paragraph expressly applies only to judgments given after the date of entry into force of the Regulation, it must necessarily follow, by, implication, that judgments given before that date are excluded therefrom.
>
> (e) To suggest that the Regulation applies to all proceedings which are "pending", (which is not even the situation in this case), irrespective as to when they were instituted, would be to rewrite, by inclusion or deletion, certain core aspects of Article 42. Furthermore it would mean that the existence of such proceedings, would, by that fact in itself, and alone, determine the application or non application of the Regulation. Neither of these consequences could possibly have been envisaged by the Regulation parties.

I therefore do not believe that as a matter of construction Article 42 of Brussels 2 or Article 64 of Brussels 2 bis, can be read in the manner suggested.

54. This interpretation of the transitional provisions must however be looked at again, in light of the decision in *Von Horn v. Cinnamond (supra)*, a case on which the respondent heavily relies. Involved in that case were certain provisions of the "San Sebastian Convention". On the 27th August, 1991, Mr. Cinnamond instituted civil proceedings against the plaintiff in the Circuit Court in Portimão seeking a declaration that he was not indebted to her in the sum of £600,000. She defended and counterclaimed for a declaration that he was so indebted. On the 9th November, 1992, Freifrau Von Horn instituted proceedings in England seeking payment of this sum. The respondent challenged jurisdiction. The House of Lords referred a number of questions to the European Court of Justice one of which only is relevant for present purposes. That question asked "Does the Brussels Convention (as amended) and/or any applicable accession Convention lay down any, and if so what, rules as to whether the proceedings in State B may or may, be stayed, or jurisdiction to client, on the ground of pending proceedings in State A".

55. The answer to that question depended on the correct interpretation of Article 29 of the San Sebastian Convention (the Transitional Provision), which did not differ in any important respect from the Transitional Provisions of either the Brussels Convention (Article 54) or the Brussels 2 Regulation (Article 42). The issue arose because when the first set of proceedings were instituted, the San Sebastian Convention was not in force between Portugal and England but by November, 1992, when Von Horn issued her proceedings in England, it was. In such circumstances the critical issue was whether the Portuguese proceedings could be taken into account for the purposes of applying the *lis pendens* provisions of Article 21 of the Brussels Convention, which was inserted without a material difference into the San Sebastian Convention by Article 8 thereof.

56. The Court, before coming to its conclusion, made a number of general observations which are of importance and which can be summarised as follows:-

(a) Although Article 29 of the San Sebastian Convention governs the "temporal application" of Article 21 of the Brussels Convention, that Article did not determine whether *the lis pendens* provisions of Article 21 apply where the first set of proceedings were instituted before the entry into force of the Convention and the second set instituted after that date, or whether both sets of proceedings had to be brought after the San Sebastian Convention acquired the force of law in both Portugal and England,

(b) It acknowledged that both of these interpretations were unsatisfactory and that either could produce consequences which were contrary to an essential aim of the Brussels Convention, which was to facilitate the reciprocal recognition and enforcement of foreign judgments,

(c) Therefore, the Court being faced with this situation, suggested the following as a solution to these difficulties:-

(i) Where the first set of proceedings have been instituted prior to the relevant date the court second seised must stay its proceedings and if and when the jurisdiction of the court first seised is established, it must decline jurisdiction. In that way any potential conflicting judgment would be avoided.

(ii) If however in the circumstances just mentioned the jurisdiction of the court first seised was not based on rules which accorded with the provisions of Title II of the Convention, or with the provisions of a separate Convention then in force between the respective contracting States, any judgment of that court will not be recognised or enforced in the contracting state of the court second seised. If that should be the situation, the court second seised should dis-apply Article 21 and proceed to judgment. That judgment should be recognised and enforced in contracting State No. 1 unless it is, in itself incompatible with a judgment given between the same parties in that State.

(iii) If, when the court second seised is called upon to apply Article 21, the jurisdiction of the court first seised has not been established, then Article 21 must be applied provisionally and the second set of proceedings stayed. The jurisdiction of the court first seised is then determined in the same manner and with the same consequences as outlined in the sub paragraph immediately proceeding.

This solution, which the Court recognised admits of an undesirable exception to the prohibition on one court reviewing the jurisdiction of another court, was however justified in the particular circumstances.

57. At paragraphs 26 and 27 of the judgment the Court then gave its conclusions:-

"26. Lastly, it must be emphasised that the above rules apply only on a transitional basis to resolve the difficulties deriving from the entry into force of the Brussels Convention and only for so long as proceedings brought before that entry into force are still pending in a Contracting State. Consequently, the principle referred to in paragraph 23 above suffers no lasting injury [the review exception].

27. The answer to the national courts questions must therefore be that Article 29(1) of the San Sebastian Convention must be interpreted as meaning that where proceedings involving the same cause of action and between the same parties are pending in two different Contracting States', the first proceedings having been brought before the date of entry into force of the Brussels Convention between those States and the second proceedings after that date, the court second seised must apply Article 21 of the Brussels Convention if the court first seised has assumed jurisdiction on the basis of a rule which accords with the provisions of Title II of that Convention or with the provisions of a convention which was in force between the two States concerned when the proceedings were instituted, and must do so provisionally if the court first seised has not yet ruled on whether it has jurisdiction. On the other hand, the court second seised must not apply Article 21 of the Brussels Convention if the court first seised has assumed jurisdiction on the basis of a rule which does not accord with the provisions of Title II of that Convention or with the provisions of a convention which was in force between those two States when the proceedings were instituted".

58. The judgment of the European Court of Justice in the *Von Horn* case does not in my view lend any credence to the respondent's submission to have the divorce decree brought within Brussels 2 or Brussels 2 bis in this regard. On the contrary I believe that it offers support to the apposite view. At the outset it must be recognised that the decision in *Von Horn* was not simply one dealing with the interpretation of the Transitional Provisions of the San Sebastian Convention. Rather it was reviewing Article 29 to determine how that Article applied the *lis pendens* provisions of the Brussels Convention. It was not therefore a case solely on the issue of the Convention's domain.

As appears from its facts the second set of proceedings were instituted after the entry into force of the San Sebastian Convention and accordingly such proceedings themselves were clearly capable of attracting the provisions of Article 21 of the Brussels Convention. This of course is not the situation here, where as a crucial point of distinction the second set of proceedings were also instituted prior to the 1st March, 2001, the relevant date for the purposes of the entry into force of the Brussels 2 Regulation. Secondly, the court recognised that it was dealing with an exceptional situation but given the limited number of contracting parties involved, it was prepared to create the exception which it did. This was achieved by a purposeful interpretation of Article 54 to Article 21. Thirdly, the question submitted to the Court in *Von Horn* did not address the multiple 'date' problem in this case and neither did the reasoning, analysis or conclusion of the Court so do. In fact the question was not even addressed let alone determined. Either, therefore the case is of authority whatsoever on the point or else the following inference may be drawn. In my view at least on one reading of its decision, the Court may be taken as having definitively dealt with the uncertainty which it found to exist within Article 21 and accordingly to have resolved that issue. If it intended its judgment to cover the existing situation, or even leave that question open, it could have expressly so done or at least could have chosen its wording in a more general and informal way. Deliberately in my opinion it may have decided not to so do. One way or the other however I cannot see how the respondent can rely upon it.

Although that case dealt with the transitional provisions of a different instrument, its judgment equally applies to the present case as the relevant provisions are not in any way materially different. See *Davy International Limited & Others v. Voest Alpine* [1999] 1 All ER 103.

59. In addition there is one further point of major distinction between *Von Horn* and this case. At paragraph 26 of the judgment, which I quoted at paragraph 57 above, the Court emphasised certain matters one of which was that the proceedings instituted prior to the entry into force of the San Sebastian Convention were "still pending in a Contracting State". Under no permissible rule of

construction could it possibly be said that the proceedings which led to the 1994 judgment are still "pending" in a Member State. Therefore on this ground alone it is exceedingly difficult to see how *Von Horn* can assist the respondent.

60. I therefore do not believe that the decree of divorce comes within Brussels 2 or Brussels 2 bis or that by analogy with *Von Horn*, it can be considered as relevant for the purposes of the *lis alibi pendens* rules contained in either Regulation. In addition I cannot see how the provisions dealing with a "duty to recognise" and the "non review" of foreign judgments, can in any way, alter this conclusion.

61. The point mentioned at paragraph 59 above, raises a significant issue of general importance regarding the correct interpretation of *lis pendens* rules, irrespective of the instrument in which they are found. It will be recalled, taking Article 21 as an example, that it applies where proceedings *inter alia* "are brought" in courts of different Contracting States. Given that the first set of proceedings in this case have proceeded to judgment, can it nevertheless be said that, in principle and disregarding other difficulties the same still falls within the provisions of the *lis pendens* rules? It is claimed on behalf of the respondent that since Article 21 undoubtedly applies where proceedings are "concurrent", then a *fortiori* it must with greater force apply where judgment in the first set of proceedings has already been given. Reference is made to the *de Wolf v. Harry Cox BV* in support of this proposition (See para. 19 above). In that case it will be recalled that Mr. de Wolf, who had earlier obtained judgment against the defendant in the Courts of Belgium, instituted a second set of proceedings concerning the same cause of action and involving the same subject matter, in the defendant's home country of the Netherlands. He did so because to proceed in this way was less expensive than attempting to enforce the first judgment in Holland. Having made a reference to the European Court of Justice, that Court held that the second set of proceedings were incompatible with Articles 26 and 29 of the Convention. At paragraph 10 of the report it also stated: …

> "it (its conclusion) also results from Article 21 of the Convention, which covers cases in which proceedings involving the same cause of action and between the same parties are brought in the courts of different contracting states, and requires that a court other than the first seised shall decline jurisdiction in favour of that court, that proceedings such as those brought before (the Netherlands Court) are incompatible with the objectives of the Convention."

See Article 27 of Brussels 1, Article 11 of Brussels 2 and Article 19 of Brussels 2 bis where the words "are brought" are also used.

62. As I have earlier pointed out, one of the fundamental aims of the Convention is to promote the recognition and enforcement of judgments in Member States other than the State in which they issued. The *lis pendens* provisions are part of the scheme under which this is to be achieved. Those provisions are designed "to prevent parallel proceedings between the courts of different contracting states and to avoid conflicts between the decisions which might arise therefrom". See the cases of *Gubish* and *Overseas Union (supra).* The way in which this is achieved is by compelling the court second seised to stay and thereafter decline jurisdiction, if the jurisdiction of the court first seised is established. These restrictions permit the court first seised to proceed to judgment, which judgment then becomes subject to all of the relevant provisions dealing with recognition and enforcement. When judgment has been given by the court first seised that court must be *functus officio* and accordingly, it is extremely difficult to see how it could still be "seised" of the proceedings. At that point in time the continuing usefulness of the *lis* rules is not apparent. There is no longer in existence a first set of proceedings and accordingly, there are no longer in existence "parallel proceedings" which might result in conflicting decisions. In such circumstances the provisions dealing with recognition and enforcement come into play. In my opinion therefore there must be in existence proceedings which are concurrent before the *lis* rules can apply. Accordingly I do not believe, on this ground alone, that the respondent could rely on the relevant convention provisions, in respect of the 1994 judgment.

63. This view is I think in accordance with a number of important contributors in this area. In his report on the Convention, Professor Jenard said: "As there may be several concurrent international jurisdictions, and the courts of different states may properly be seized of a matter … it appears necessary to regulate the question of *lis pendens*". At paragraph 2.205 of Briggs and Rees on *Civil Jurisdiction and Judgments*, 4th Edition, at paragraph 2.205 it is stated:-

> "If the foreign court was seised first, but is no longer seised when the English proceedings are instituted, there appears to be no bar to the exercise of jurisdiction by the English court. If the dis-seising of the foreign court has come about through a successful challenge to its jurisdiction, the English court may proceed to hear the case: this is precisely what Article 27 requires. If the foreign court was seised first but has given its judgment, and is *functus officio* by the time the English proceedings are instituted there is also no barrier to the exercise of jurisdiction by the English court, but the obligation under Chapter III of the Regulation to recognise the foreign judgment may affect the course of the English proceedings".

At paragraph 12.054 of Dicey and Morris, *The Conflicts of Laws*, 13th edition, the authors concur in this view by stating:-

> "Article 21 requires that the action be still pending in the court first seised when the proceedings are commenced in the courts second seised. So if the proceedings in the first court have terminated by judgment and are no longer pending, or if they have been discontinued, or if they have been struck out … Article 21 will be inapplicable".

64. This view is also I believe supported by authority. See *Prudential Assurance Company Limited v. Prudential Insurance Company of America* [2003] 1 WLR 2295 and *Netherlands Aviation Lease BV v. CAA* (1977) 1 Lloyds Report 80. The latest case which I find can on this issue is *Tavoularaes v. Tsavliris and Sons Maritime Company* (2005) EWHC 2140 (Comm). In that case the first set of proceedings were instituted in Greece on the 8th December, 2001, with the court proceeding to judgment on the 22nd October, 2004. On the 16th August, 2004, however the second set of proceedings were instituted in England and on the 4th of October an application was made, to apply to both sets of proceedings, Article 27 of the Brussels 1 Regulation. The trial judge, having decided that Article 27 could in principle apply, sought further submissions on how that conclusion was effected by the fact that judgment had previously given in the Greek proceedings, though the period for appeal had not expired. Having reviewed some of the authorities and having heard the parties, he concluded that in such circumstances the provisions of *lis alibi pendens* had no application. Indeed, it was accepted by the moving party that if judgment had preceded the date of the institution of the second set of proceedings then Article 27 could not conceivably apply. His only point was whether the decision should be taken as of the date of the institution of the proceedings or as of the date when the court made its decision. Based on the foregoing I believe that the respondent cannot rely on *the lis alibi pendens* provisions of the Convention or of the Regulations.

65. Moreover, having re-read the decision in *de Wolf*, I am convinced that the judgment of the Court can and should properly be understood as dealing with a "duty to recognise" situation and not one dealing with *lis pendens* at all. In the passage quoted at paragraph 61 above, the Court is simply drawing attention to the fact that the conclusion reached by reference to Articles 27 and 29 is consistent with the application of Article 21. I therefore do not believe that this case offers any support for the contrary conclusion.

66. Finally in this context could I also make a reference to the present set of proceedings. Brussels 2 is now undoubtedly repealed and in its place stands Brussels 2 bis. Article 64 is the Transitional Provision. Paragraph 1 applies only to legal proceedings instituted after the date of its application, namely the 1st March, 2005. Paragraph 2 applies to proceedings which were instituted after the 1st March, 2001 and before the 1st March, 2005, where judgment is given after the 1st March, 2005. Paragraph 3 applies to proceedings instituted after the 1st March, 2001, where judgment has been given before the 1st March, 2005, and finally paragraph 4 covers proceedings instituted before the 1st March, 2001, where judgment has been given after the 1st March, 2001, but before the 1st March, 2005. If I interpret this Article correctly it does not cover the present set of proceedings or even allow for an argument which might have been available under Article 42.2 of Brussels 2. As with many other transitional provisions, it is very difficult indeed to how a judgment which could well be enforceable within Brussels 2, is not now even mentioned by its successor which repealed it. Once again the resulting uncertainty is to be seriously regretted.

67. The second aspect of the Dutch decree is that dealing with maintenance. Applying both *Van de Boogaard v. Laumen* and *de Caval v. de Caval (supra)* it would appear that in principle the maintenance element of the Dutch decree came within Article 1 and Article 5(2) of the Brussels Convention: which undoubtedly had the force of law in both Ireland and in the Netherlands, in 1994. As a result, it would on that assumption, be entitled in principle to recognition and enforcement under Articles 26 and 33 respectively of the Convention. That Convention as we know has been 'replaced' by the Brussels 1 Regulation which came into force on the 1st March, 2002. The question which therefore must be asked is what legislative provisions of community law (if any) now govern the recognition and enforcing of that maintenance judgment.

68. One could immediately be forgiven for believing that the answer to such an obvious set of circumstances would be found in the Transitional Provisions of Brussels 1. That is Article 66. The provisions of that Article are extremely similar to the Transitional Provisions of the other Instruments above discussed, namely the Brussels Convention, the San Sebastian Convention, the Brussels 2 Regulation and to a lesser extent the Brussels 2 bis Regulation. Article 66, as with the others, apply to legal proceedings instituted after the 1st March, 2002, and, subject to certain jurisdictional requirements, to judgments given after that date but in proceedings instituted before that date. Evidently none of these circumstances apply to the 1994 judgment. On its face therefore the Regulation does not apply.

69. However, it simply cannot be the situation that the 1994 judgment, if enforceable under the Brussels Convention has ceased to be enforceable under community law, purely because that Convention has been replaced by Brussels 1. The judgment in question in this case, must be one of a great number given in like circumstances throughout the Contracting States to the Convention. It is therefore scarcely feasible to believe or realistic to accept that this category of judgment was inadvertently or deliberately ignored by the Council when enacting the Brussels Regulation; and yet, without obvious explanation, it would appear that no express provision has been made to cover such judgments in this transition between the Convention and the Regulation.

70. In my view, noting the essential aim and purpose of these measures, if the judgment was enforceable under the Convention it must as a matter of community law remain so enforceable. There are in my opinion only two possible options in this regard. Either the Convention continues to apply or else the provisions of the Brussels 1 Regulation covers it. Two of the most influential commentators in this area have conflicting views as to which instrument should apply but neither suggest that the judgment has evaporated. At p. 167 of the third supplement to the 13th edition of Dicey and Morris, the authors say:-

> "The Regulation (Brussels 1 Regulation) will apply to the recognition of judgments given on or after March 1st, 2002 by courts in the Member States of the European Union, excluding Denmark (the Regulation Stage). But it will also apply to judgments from the courts of a Regulation stage which were given before March 1st, 2002 if when the proceedings were instituted the adjudicating and recognising state were both contracting states to the 1968 Convention or Lugano Convention".

On the other hands Briggs and Rees, in both the 3rd and 4th edition of Civil Jurisdiction and Judgments, come to the contrary conclusion. At paragraph 7.29 of the 4th edition it is stated:-

> "(b) If the judgment was from the courts of a Member state, and was given before 1st March, 2002, the transitional provisions in Article 66(2) of the Judgments Regulation cannot apply to it, but the judgment may be recognised and enforced under one or the other of the Conventions".

Neither textbook gave any reason or quote any authority for their respective positions. Continuing this divide, counsel for the respondent favours the Regulation whereas counsel for the applicant opts for the Convention.

71. It seems to me that for the reasons set out at paragraph 52 – 65 (inclusive) above, where similar transitional provisions of other instruments are discussed, I cannot accept that the Regulation applies, as by no interpretation of its Transitional Provisions, namely Article 66, can the 1994 judgment be brought within its framework. Again as previously discussed I do not believe that *Von Horn* is of any assistance in this regard. I therefore believe that, if once within the relevant provisions of the Convention, the judgment remains within such provisions. Some support is obtained for this view from the wording used in Article 68 of Brussels 1, which says "this Regulation shall, as between Member States, *supersede* (emphasis added) the Brussels Convention …". This at least permits an argument that if the Regulation does not cover matters which previously were within the Convention, then insofar as such matters are concerned, it cannot be said that the Regulation "supersedes" the Convention. One may contrast that form of wording with the wording of Article 71 of the Brussels 2 bis Regulation where it expressly states that Brussels 2, "shall be repealed as and from the date of the application of this Regulation". Whilst evidently it would be much more satisfactory if the answer to this question was based on more definitive reason and logic, nevertheless a basis must be found to which judgments, like that of 1994, can belong. The absence of legislative certainty in this regard is to be seriously regretted.

72. The above discussion and conclusion has been arrived at on the assumption that, in principle, the maintenance decree came within the Brussels Convention and therefore all of its provisions, including those dealing with recognition and enforcement, applied to it. But therein lies the problem. As a matter of law it seems to me that if the order qualified for recognition in 1994 it retains that right of recognition today. The reverse equally applies and therefore if by reason of any Convention provision, it was not capable of recognition in 1994 it is not capable of recognition to day. In this context two points must be noted. Firstly, it appears to me that given my conclusions on the *Von Horn* case, the respondent must satisfy this Court that the maintenance judgment should be recognised, and thus capable of enforcement, under Title III of the Convention. Secondly, the country in which recognition is necessary is Ireland and therefore for the purposes of Articles 26, 27 and 33 of the Convention the Member State addressed is this country and not any other Contracting State.

73. What therefore is the legal position in this jurisdiction of that 1994 order? This question brings the case of *Hoffman v. Kreig (supra)* directly into focus. Mr. Hoffman, who married the respondent in Germany in 1950, went to and settled in the Netherlands in

1978. As a separated woman the respondent obtained a maintenance order from the German courts on the 21st August, 1979. In the year following Mr. Hoffman obtained a divorce decree in the courts of the Netherlands which was not recognised in Germany. On the 29th July, 1981, the respondent tried to enforce the maintenance order in the courts of the Netherlands. Arising out of those facts a number of questions were submitted to the European Court of Justice which gave its decision in 1988. The first question was answered by the Court stating that when a foreign judgment has been recognised under Article 26 of the Brussels Convention, then in principle, that judgment must "have the same effects in the State in which enforcement is sought as it does in the State in which judgment was given".

(See paragraph 9 of the judgment). The second question sought:-

> to establish whether a foreign judgment whose enforcement has been ordered in a Contracting State pursuant to Article 31 of the Convention must continue to be enforced in all cases in which it would still be enforceable in the State in which it was given even when, under the law of the State in which enforcement was sought, the judgment ceases to be enforceable for reasons which lie outside the scope of the Convention".

That question had its foundation in the fact that the maintenance order from the judgment court treated the respondent as a married though separated woman and secondly, that the country which issued such judgment refused to recognise the divorce. On the other hand under the law of the Netherlands the applicant was a divorced person and for non Convention reasons the maintenance order was not enforceable there although it continued to be enforceable in the Member State of origin. Paragraphs 14, 15, 16 and 17 must be quoted in full to understand the Court's answer to the second question. These read as follows:-

> "14. Consideration should therefore be given to whether the dissolution of that matrimonial relationship by a decree of divorce granted by a court of the State in which the enforcement is sought can terminate the enforcement of the foreign judgment even when at judgment remains enforceable in the State in which it was given, the decree of divorce not having been recognised there.
>
> 15. In that connection it must be observed that indent -
>
> > (1) of the second paragraph of Article 1 of the Convention provides that the Convention does not apply *inter alia* to the status or legal capacity of natural persons. Moreover, it contains no rule requiring the court of the State in which enforcement is sought to make the effects of a national decree of divorce conditional on recognition of that decree in the State in which the foreign maintenance orders is made.
>
> 16. That is confirmed by Article 27(4) of the Convention, which excludes in principle the recognition of any foreign judgment involving a conflict with a rule – concerning *inter aila* the status of natural persons – of the private international law of the State in which the recognition is sought. That provision demonstrates that, as far as the status of natural persons is concerned, it is not the aim of the Convention to derogate from the rules which apply under the domestic law of the court before which the action has been brought.
>
> 17. It follows that the Convention does not preclude the court of the State in which enforcement is sought from drawing the necessary inferences from a national decree of divorce when considering the enforcement of the foreign maintenance order".

74. The Court then answered the question as follows:-

> "thus the answer to be given to the national court is that a foreign judgment whose enforcement has been ordered in a Contracting State pursuant to Article 31 of the Convention and which remains enforceable in the State in which it was given, must not continue to be enforced in the State where enforcement is sought when, under the law of the latter State, it ceases to be enforceable for reasons which lie outside the scope of the Convention".

See also the case of *Macauley v. Macauley* [1991] 1 All ER 865.

75. This case in principle has a striking parallel with the present case though on the facts there are evidently, a number of differences. The foreign judgment in *Hoffman* was the maintenance order whose State of issue did not recognise the Dutch decree of divorce. The order sought to be recognised and enforced was the maintenance order with the Member State addressed being the Netherlands, whose domestic courts had by then issued the divorce decree. The reverse, in terms of which State issued what order is the situation in this case. The divorce decree was granted by the courts of the Netherlands, which decree is sought to be recognised and enforced in Ireland. The courts of this jurisdiction however have issued a domestic judgment as a result of which that decree is not recognised here. But these differences do not in my view affect the principle which the European Court of Justice laid down in *Hoffman*. Acknowledging that the maintenance order remained enforceable in the Member State of origin, the crucial question was to identify the position of the Member State addressed, where a court of that State had issued a judgment irreconcilable with the maintenance order, whose recognition and enforcement was sought in that country. In other words, simply because the maintenance order continued to be enforceable in Germany, did it likewise have to remain enforceable in the Netherlands, notwithstanding the existence of an inconsistent judgment. The European Court emphatically said no to this question. It confirmed that there was no obligation on the court of the Member State addressed, to adjust a domestic decision of its judiciary so as to ensure that it was recognised in the Member State of origin, in that case Germany where the maintenance order was granted. Furthermore, and I believe this to be of direct relevance to the present case, the Court went on to declare that the court of the Member State addressed could take into account a decision of its own court when considering the enforcement of the foreign decree, which decree for reasons outside the convention had ceased to be recognised in that State.

76. Applying that judgment to the present case it seems to me that I am perfectly entitled to take into account the decision of the Supreme Court and to draw from it all permissible and reasonable inferences which are relevant to the question of recognising the maintenance aspect of the 1994 order. Relying on the test of "irreconcilability", as set out in *Hoffman*, and indeed in applying the contents of paragraph 24 of the judgment in that case, it seems to me that for the reasons set out at para. 78, it is to be an inescapable conclusion that the basis upon which the maintenance judgment issued, is irreconcilable with the decision of the Supreme Court. See Article 27(3) of the Convention.

77. In addition there is also s. 27(4) of the Convention which in my opinion independently leads to and supports this conclusion. That article denies to a foreign judgment the benefit of recognition and enforcement if that judgment conflicts with a rule of private international law, involving, *inter alia* the status of persons, in the State where recognition is sought. It is precisely by the application

of the domestic rules of private international law that the Supreme Court felt obliged to refuse recognition to the divorce aspect of the Dutch judgment. As the European Court of Justice said, again in *Hoffman*, when dealing with Article 27(4) of the Convention, "… that provision demonstrates that, so far as the status of natural persons is concerned, it is not the aim of the Convention to derogate from the rules which apply under the domestic law of the court before which the action has been brought." See paragraph 16 of the judgment.

78. The maintenance order in question is predicated on the divorced status of the parties. As declared by the court of the Netherlands, in its judgment of September, 1994. That decision was arrived at in circumstances covered by Article 27(4) of the Convention. The recognition and enforcement of that judgment, in this State, could only take place on the basis that both parties are divorced in this country. Quite evidently, that proposition is diametrically opposed to the conclusion reached by the Supreme Court, namely that the parties remain validly married in this jurisdiction. Thus to enforce the maintenance order would be directly in conflict with the decision of the Supreme Court. That being so, I don't believe that it could ever have been recognised in this jurisdiction under the Brussels Convention. Accordingly, the maintenance order is not a provision for the purposes of applying Article 21 of the Convention. Therefore if this court should proceed with the present case, and make ancillary orders, when granting a decree of judicial separation that, judgment in respect of such orders will not be in conflict with any other judgment for the purposes of Article 21 of the Convention.

79. It might be suggested that the relationship between the maintenance order of 1994 and the Supreme Court's decision should be looked at rather differently to that considered above. It could be argued that when made, the 1994 order was entitled to recognition in this State and that such recognition continued until the decision of 2003. The question may therefore be asked as to how such order, could, by virtue of the Supreme Court decision loose that right of recognition.

In my view this would not be a correct way of approaching the matter. In 2003, the Supreme Court ruled that the 1994 divorce had no effect in Ireland. It did not say that it was effective up to 2003, but then ceased to be effective. Rather it declared as a matter of Irish law that the divorce never had the effect of dissolving the marriage of the parties. It therefore said, by necessary implication, that the maintenance decree was inconsistent with what as a matter of Irish law, had always been the status of the parties. A delay in clarification does not change that fact. I would therefore reject any argument along these lines.

80. In conclusion, the maintenance aspect of the 1994 Order does not qualify for recognition in the jurisdiction and therefore this Court has jurisdiction to deal with such claims in the present proceedings.

81. The respondent has made two further subsidiary submissions which must be dealt with, (See paragraphs 28 to 30 above and paragraph 39 for the applicants response). The first is based on the alleged direct effect of certain treaty provisions. These provisions include Article 2 of the EC Treaty, which sets out the Community's tasks, one of which is to promote economic and social cohesion and solidarity amongst Member States, and Article 10 which is quoted in full at paragraph 28 above. In addition, Article 61 obliges the Council to adopt "(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65". That Article specifies certain matters which should be taken into account as part of such measures including, the:-

> "(a) improving and simplifying:
>
> - The recognition and enforcement of decisions in civil and commercial cases, including decisions in extra judicial cases".

See also Article 293 (Ex Article 220) of the Treaty.

82. Based on these provisions, in particular Articles 61 and 66, it is alleged that directly arising out of the Treaty, there is and has always been a fundamental obligation on Member States to mutually recognise foreign judgments and to achieve that end, to apply rules equivalent to the legislative *lis pendens* rules. Accordingly, irrespective of the legal position under the Brussels Convention and the above Regulations, it is claimed that this court must recognise the 1994 judgment and must apply the *lis* rules or their equivalent, to the present proceedings.

83. In my view this submission is not well founded and I cannot see how the State would be in breach of the requirement of sincere cooperation or guilty of undermining the creation of an internal market, if this court should proceed with the present action. The Treaty Articles above identified do not in my view afford the respondent any separate ground of complaint in respect of the recognition and enforcement of the 1994 decision. In addition I cannot accept that Article 61 or Article 65, either alone or in conjunction with each other, can be read as creating a separate and independent source of enforceable personal rights with regard to the recognition of judgments; let alone importing into such provisions, rules with equivalent effect to the *lis pendens* rules contained in the instruments above mentioned. On this point I have not been referred to any specific or directly relevant, authority.

84. It appears to me that Articles 61 and 65, even if against the background of Articles 2, 3 and 10 of the EC Treaty, are not capable, in the context of the rights as asserted, of having direct effect, as these measures do not meet the judicial requirement for such effects. See *Van Gend En Loos (Case C-26/62)* [1963] ECR I-1. In particular further implementing measures are expressly envisaged by these provisions. In fact Article 61 mandates the Council to adopt measures in the relevant field, with Article 65 simply specifying a number of matters which should be covered by such measures. These Articles, as well as Article 293, are expressed in general non specific terms and clearly lack the specificity which would be required for direct effect. Although speaking in a different context the words of Advocate General Mancini, to quote from his opinion in *Zaera v. Institutio Nacionale de La Seguridad (Case C-126/86)* [1987] ECR I-3697, are apt. He said "(The provisions) contain expressions of intent, propose and motive, rather than rules that are of direct operative effect". I therefore would reject the respondents submission in this regard.

85. In addition, in my view this State has in fact fully complied with the provisions of Articles 61 and 65 by becoming a party to the Brussels Convention and, of course, by being subject to the Regulations as the same came into force. These instruments, in my opinion, have established within their scope, a full legal system of rules on Jurisdiction and on the Recognition and Enforcement of Judgments. Moreover I agree with what the applicant says when she points that if this argument was correct it would mean that this legislative regime is entirely unnecessary. Finally it would cast serious doubt on the legal effectiveness of the Protocol on the position of Denmark, and indeed also of the Protocol on the position of the United Kingdom and Ireland, in respect of measures taken under Title IIIa (now Title IV) of the EC Treaty, as added by the Treaty of Amsterdam. I therefore do not see any sustainable argument under this heading of complaint.

86. The last submission made relates to the Treaty provisions dealing with free movement of persons, or more accurately, of persons as workers, as found in Title III and in particular Article 39 (formerly Article 48) of the EC Treaty (See paragraphs 25 – 27 above where details of this argument are set out and paragraph 39 where the response is outlined). In my opinion, having considered Article

39 of the Treaty and having regard to what has been urged by the parties, the following is my conclusion on this issue.

(i) The factual circumstances of this case do not disclose any real or probable basis for invoking the provisions of Article 39, in that there is no serious suggestion that the respondent contemplates moving, as a worker, to another Member State.

(ii) The fact that he was able to, and did avail of, the Dutch matrimonial law in obtaining a divorce in 1994, was not dependent on his work status in that country; rather the court's jurisdiction was founded on residence, not occupation. It was incidental therefore that work was the motivating factor in his decision to move there in 1987.

(iii) The respondent is free to travel to any other Member State and serve as an employee or establish himself in business, in the knowledge, that if his submission is correct, that State will recognise the 1994 decree to the exclusion of the Irish decision.

(iv) The rules of private international law, which the Supreme Court applied in 2003, were not discriminatory, either directly or indirectly, on the grounds of nationality. The same rules would apply to any person who sought Irish recognition for a foreign divorce.

(v) These rules of national law which then applied, did not place nationals at a disadvantage in respect of others, simply because they exercised their freedom to move and establish and/or to work in another Member State. When such rules dealt with the question of status, there was no inequality of treatment between nationals and non-nationals, whether they had moved as workers or not and whether they had obtained foreign divorce decrees or not. Therefore, I do not believe that the principles outlined in *Pusa v. Osuuspankkien (Case 224/02)* (Unreported judgment, 29th April, 2004) apply. In that case Mr. Pusa's complaint was that as a Finnish National, but as one who had moved to Spain, he received less favourable treatment under the laws of Finland than he would have received if he had not settled in Spain. That case is entirely different from the present case, a fact evident from the judgment itself: see paragraphs 18 – 23 thereof.

(vi) The decision of the Irish court means that the respondent was and remains lawfully married in this State. There is nothing preventing him, like any other person subject to Irish law, from applying for a divorce under the provisions of the Family Law (Divorce) Act, 1996. If he was to so do, the same rules would apply to him as they would to any other person.

(vii) There is no provision in the community instruments above mentioned, which compel one Member State to recognise a foreign divorce or maintenance judgment, in all circumstances, even where that judgment is not enforceable in the Member State addressed or is incompatible with an existing judgment of that country. See *Hoffman v. Kreig, (supra).*

(viii) The Brussels 2 Regulations and Brussels 2 bis are community instruments with direct effect and as such are intended, within their scope and domain, to regulate matters of status. The 1994 decree however, for the reasons above outlined, does not fall within the provisions of these Regulations.

(ix) There is no rule at community law, at least to my knowledge, which obliges one Member State to automatically give effect to a judgment of another Member State, irrespective of circumstances, on the basis that this will promote the principle of the free movement of workers. The case of *Singh (supra)* at paragraph 27, can be regarded as having been decided on its own facts.

For these reasons I do not believe that the argument based on Article 39 of the EC Treaty is sustainable.

87. In conclusion, I will refuse the reliefs sought by the respondent in the notice of motion dated the 28th January, 2004.