Neutral Citation Number: [2005] IEHC 228

THE HIGH COURT

2003 No: 141M

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

BETWEEN

M.R.APPLICANT

AND

P.R.

RESPONDENT.

Judgment of Mr.Justice Quirke delivered on the 5th day of July 2005.

1. By Order of this Court made on the 12th December, 2003, the applicant was granted leave pursuant to the provisions of s.23 (3) (a) of the Family Law Act, 1995 (hereafter "the Act of 1995") to seek various reliefs including (i), property adjustment orders pursuant to s.9 of the Act in favour of the applicant, (ii), a financial compensation order pursuant to s.11 of the Act and (iii) an order for the sale of property pursuant to s.15(1) of the Act with an order providing for the disposal of the proceeds between the parties.

2. The grounds relied upon by the applicant in support of her application for leave include the following:

> 1. That proper provision was not made for her by the respondent by the terms of a Decree of Divorce obtained by the parties on the 14th October, 1996, under the civil law of Spain.That Decree has been recognised as valid in this State pursuant to section 29 (1) of the Act of 1995
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> 2. That because the respondent failed to make full disclosure in relation to his means and financial circumstances prior to and at the time of the granting of the Decree of Divorce on the 14th October, 1996, the applicant was misled into accepting a payment from the respondent's father of IR£50,000.That payment was represented to her as full and final provision for her upkeep, support and maintenance in accordance with the respondent's means at that time.
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> 3. That, after the Decree of Divorce had issued, the applicant became aware that, at the time of the grant of the Decree of Divorce in 1996, the respondent was the principal beneficiary of a trust fund.That fund on the 31st January, 2001, had a value in excess of €2,900,000.In October, 1996 therefore, the means of the respondent were far greater than was represented to the applicant.The applicant now has few assets and no regular income.She claims that, having been misled, she now has no remedy under the civil law of Spain and entitled to the relief which she seeks within this jurisdiction.

JURISDICTION

3. In her grounding affidavit sworn on the 9th December, 2003, the applicant averred that she was *"ordinarily resident in the State throughout the period of one year ending on the date on which the application pursuant to s.23(3) was brought"*.

4. In the light of that evidence and in the light of evidence adduced by the applicant in earlier proceedings herein as to her residence at material times I am satisfied that the applicant has been resident within this State throughout the period of one year ending on the date on which the application pursuant to s.23 (3) was made and that, accordingly, this Court had jurisdiction to grant leave and has jurisdiction pursuant to the provisions of section 27(1)(b) hear this application.

BACKGROUND.

5. On the 14th October, 1996, a Decree of Divorce was ordered by the Court of First Instance in Spain whereby the marriage between the applicant and the respondent was declared to be dissolved through divorce under the civil law of Spain.

6. The applicant had been married in the Registry Office in Cork within this jurisdiction on the 29th November, 1976.

7. By Order of this Court dated 8th August, 2003, the divorce obtained on the 14th October, 1996, under the civil law of Spain was declared, (pursuant to the provisions of s.29 (1)(b) and/or (e) of the Act of 1995), to be entitled to recognition as valid within this State.

8. The facts which gave rise to the marriage and to the divorce and to the recognition of the validity of the divorce are set out in full in the judgment of this Court delivered on the 8th August, 2003.It is therefore unnecessary to recite those facts but this court will refer to the facts as found from time to time.

RELEVANT LEGISLATIVE PROVISIONS

9. Section 23 of the Act of 1995 applies to a marriage which has been dissolved being a divorce (or legal separation) granted under the law of a country or jurisdiction other than the State which is entitled to recognition as valid within the State.It applies accordingly to the divorce which is the subject of these proceedings.

10. Subsection 2(a) of s.23 provides as follows:

> *"Subject to the provisions of this Part, the court may, in relation to a marriage to which this section applies, on application to it in that behalf by either of the spouses concerned ...make any order under Part II ...(in this Act referred to as a relief order) that it could have made if the court had granted a decree of judicial separation in relation to the marriage".*
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> *Subsections (b) and (c) of s.23(2) provide inter alia as follows;*
>
> *(b) Part II shall apply and have effect in relation to relief orders and applications therefor as it applies and has*

effect in relation to orders under Part II and applications therefor with the modifications that—

(i) subsections (4) and (5) of section 8, section 10 (1) (c) and section 13 shall not apply in relation to a marriage that has been dissolved under the law of a country or jurisdiction other than the State,……..

(c) Section 16 shall apply in relation to a relief order subject to the modifications that—
(i) it shall be construed as including a requirement that the court should have regard to the duration of the marriage,

(ii) the reference in subsection (2) (k) to the forfeiture of the opportunity or possibility of acquiring any benefit shall be construed as a reference to such forfeiture by reason of the divorce or legal separation concerned, and

(iii) the reference in subsection (3) to proceedings shall be construed as a reference to the proceedings for the divorce concerned or, as the case may be, for the legal separation concerned.

11. Subsection (3), (a) of s.23 provides as follows:

"An application shall not be made to the court by a person for a relief order unless, prior to the application, the court, on application to it ex parte in that behalf by that person, has by order granted leave for the making of the first-mentioned application and the court shall not grant such leave unless it considers that there is a substantial ground for so doing and a requirement specified in section 27 is satisfied."

12. The "requirement specified in section 27" is not relevant to these proceedings having regard to my earlier finding on jurisdiction.

13. Section 26 of the Act of 1995 provides *inter alia* as follows:

"The court shall not make a relief order unless it is satisfied that in all the circumstances of the particular case it is appropriate that such an order should be made by a court in the State and, without prejudice to the generality of the foregoing, in deciding whether to make a relief order, the court shall, in particular, have regard to the following matters:

(a) the connection which the spouses concerned have with the State,

(b) the connection which the spouses have with the country or jurisdiction other than the State in which the marriage concerned was dissolved or in which they were legally separated,

(c) the connection which the spouses have with any country or jurisdiction other than the State,

(d) any financial benefit which the spouse applying for the making of the order ...has received, or is likely to receive, in consequence of the divorce concerned or by virtue of any agreement ...

(f) any right which the applicant ...has, or has had, to apply for financial relief from a spouse ...under the law of any country or jurisdiction other than the State and, if the applicant ...has omitted to exercise any such right, the reason for that omission,

(g) the availability in the State of any property in respect of which a relief order in favour of the applicant ...could be made,(h) the extent to which the relief order is likely to be enforceable,

(i) the length of time which has elapsed since the date of the divorce ...concerned.".

14. Section 16 (2) of the Act of 1995 sets out 12 factors to which the court "*...shall have regard ...*" in deciding whether to make certain orders and in determining the provisions of such orders.The factors include the following:

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

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

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses separated, as the case may be,

(d) the age of each of the spouses and the length of time during which the spouses lived together,

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

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

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

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

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

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

(k) the value to each of the spouses of any benefit (for example, a benefit under a pension scheme) which by reason of the decree of judicial separation concerned that spouse will forfeit the opportunity or possibility of acquiring,

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

THE APPLICANT'S CLAIM.

15. It is contended on behalf of the applicant that the respondent, at the time when the Decree of Divorce was granted on the 14th October, 1996, was obliged to make proper provision for the applicant having regard to his means and, broadly, to the factors identified in s.16 (2) (a) to (l) of the Act of 1995.

16. Mr.Hegarty SC on behalf of the applicant says that in October, 1996 the applicant was misled into accepting a lump sum payment of IR£50,000 (to include costs), from the respondent's father.He says that this payment was represented to her as comprising proper provision by the respondent, having regard to his (then) means.

17. Mr.Hegarty SC says that this sum cannot be regarded as representing proper provision having regards to the means and resources available to the respondent at the date of divorce.He says that these means and resources were not disclosed to the applicant at the time of the granting of the divorce and indeed that they were probably not known to the respondent himself.

18. It is argued that on the facts as found, the applicant has, from time to time, made substantial contributions to the marriage and to the maintenance of the respondent, the applicant and their daughter.Furthermore it is contended that after a substantial period of separation, the respondent expressly encouraged the applicant and her daughter to disrupt their respective lives and lifestyles and to leave Britain in order to join the respondent in Spain for the alleged purpose of restoring their family unit and relationship.

19. It is contended that this fact and other facts found in relation to the marriage and its termination provide support for a finding that the respondent failed, on the date of the divorce, to make proper provision for the applicant in accordance with his means.It is accordingly argued that his failure and the applicant's current circumstances warrant the grant of relief of the type which has been sought.

THE RESPONDENT'S DEFENCE

20. Mr.Corrigan SC on behalf of the respondents contends that leave to make the application which is the subject of these proceedings should not have been granted pursuant to the provisions of subs.(3) (a) of section 23 of the Act of 1995.

21. A motion is before this court to be heard and determined before or concurrently with the substantive proceedings whereby the respondent seeks an order pursuant to O.19, r.28 of the Rules of Superior Courts striking out the applicants claim or dismissing it on the grounds that it discloses no reasonable cause of action.

22. In the alternative an order is sought pursuant to the inherent jurisdiction of the court striking out the applicants claim as constituting an abuse of process as a vexatious and unsustainable claim.

23. In the further alternative Mr.Corrigan argues that the grant of leave made by this Court ex parte pursuant to subs.(3), (a) of s.23 of the Act, 1995 should be set aside since there was no *bona fide* ground for the grant of such leave which could be identified as a *"substantial ground"* within the meaning ascribed to that term by the provisions of the subsection.He contends that this application must fail on the following grounds:

1. He says that the application for relief does not come within the category of case identified in s.26 of the Act of 1995 where *"it is appropriate that such an order should be made by …"* for a variety of reasons and

2. He says that on the evidence adduced during the earlier proceedings a broadly equivalent form of relief was and remains available in the court in Spain where the Decree of Divorce was granted so that the appropriate court in Spain is properly seised of the dispute in this case.

24. He points out that the respondent is habitually resident in Spain and he complains that the failure on the part of the applicant to initiate her claim within that jurisdiction amounts to *"forum shopping"* and gives rise to a potential duplicity of proceedings.

3. Finally, it is contended on the behalf of the respondent that 7 years passed between the date of the divorce in October 1996 and the date when these proceedings were commenced.It is contended that no explanation has been offered for the delay in seeking relief.It is now 9 years since the date of divorce and it is contended that the delay was of such duration that it should, of itself, disqualify the applicant from obtaining the relief which she seeks.

THE LAW

25. To date there have, apparently, been no cases reported within this jurisdiction where consideration of s.23 of the Act of 1995 has been required.

26. However in England, the Matrimonial and Family Proceedings Act 1984 contains provisions similar to the provisions of s.23 and s.26 of the Act of 1995.

27. Section 13 of the Act of 1984 in England is similar (but not quite identical) to s.23 of the Act of 1995 and s.16 of the Act of 1984 is similar but not identical to section 26 of the Act of 1995.

28. Applications made pursuant to s.13 and 16 of the English Act of 1984 have been litigated in the English courts and some of the reported cases resulting from that litigation have been relied upon by the parties in these proceedings.

29. It should be noted also that s.18 (3) of the Act of 1984 in England incorporates into applications for ancillary reliefs on foot of foreign decrees provisions of the English Matrimonial Clauses Act 1973 which mirror corresponding provisions of s.16 of the Act of 1995.

30. It is important to note that in both jurisdictions the legislature has imposed the following significant restrictions upon the exercise of the court's discretion to grant the reliefs which have been sought in these proceedings;

1. The court must hear and determine an application made ex parte by the applicant for leave to make an application for relief,

2. The court may not grant such leave unless it considers that there is a substantial ground for so doing and

3. Having granted such leave the court may not grant the relief sought unless and until satisfied that in all of the circumstances of the particular case it is appropriate that such an order should be made by the court.

RELEVANT FACTS

31. The following facts are relevant to this application.

1. On the 14th October, 1996, when the parties were divorced under the civil law of Spain the applicant and the respondent knew of the existence of a trust fund in favour of the respondent.It is probable that neither knew the value of the trust fund or the extent of the respondent's beneficial interest in the trust fund.

2. On that date the applicant, as the (then) lawful wife of the respondent, also had a beneficial interest in the trust fund.Whilst she knew then that she had an interest in the fund neither she nor the respondent had any realistic understanding of the extent of their respective interests in the fund.

By agreeing, in return for the sum of IR£50,000, not to contest the respondent's application for divorce the applicant permanently extinguished her interest in the trust fund.The payment of IR£50,000 was made by the respondent's father.

3. The applicant stated in evidence that when she agreed not to contest the respondent's application for divorce she believed that the respondent was dying and wished to legitimise his two youngest children.She said that she thought then that he had no more than a few months to live.

4. The applicant was professionally represented and had the benefit of professional advice when she agreed not to contest the respondent's application for divorce and to accept, in return, the sum of IR£50,000.

5. When considering the respondent's application for divorce in Spain, the presiding magistrate did not acquaint himself with the financial situations of the parties.This was because he had been advised that no application would be made to him on behalf of the applicant for the payment by the respondent of any monies to the applicant.

6. At the time of the divorce no application was, in fact, made on behalf of the applicant to the presiding magistrate for the payment of any sum or sums by way of maintenance from the respondent either in respect of the applicant herself or in respect of the daughter of the marriage.

7. Ms.Pilar De Paz who is an expert in the civil law of Spain on family and divorce matters and, in particular, upon divorce law within that jurisdiction indicated, in evidence, that currently, a spouse occupying the applicant's position in Spain, may apply for maintenance payments from her former spouse *".unless it can be proved that (the applicant) .has already got money at the time (of the divorce) and it has not been reflected in the sentence"*

32. She was asked the following question:

"If there was no alimony at the time of the divorce can alimony be granted now?"

33. She answered:

"A new proceeding will have to be initiated and it will need to be proved that that person had not received any money at the time of the divorce, and that they had not applied for it.She is saying this because in Spain there are many cases where you have to pay taxes if you receive a lump sum or receive some payment from your spouse.Many people reach an agreement outside so that it is not itself in the sentence and therefore they do not have to pay taxes on it.In this case, for example, if some money was already received by..(the applicant)..then it could be.If it can be proved the money was already paid, then the Spanish court would consider this to be the payment at the time and no other payment can be applied for."

8. Upon her father's death within the past two years M.R.received a bequest in the amount of €120,000 before tax.

9. The respondent's mother died on the 17th May, 2001.By her will (proved on the 14th June, 2002,) she bequeathed a sum in excess of IR£300,000 to the respondent.

APPLICATION TO SET ASIDE LEAVE OR STRIKE OUT PROCEEDINGS.

34. On behalf of the respondent Mr.Corrigan S.C.claims that, on the evidence, the applicant's claim discloses no cause of action and is bound to fail.

35. In the alternative he argues that the order of this Court made on 12th December, 2003, granting the applicant leave to seek the reliefs sought herein should be set aside because, on the evidence, no *"substantial ground …"* within the meaning of s.23(3)(1)(a) of the Act of 1995 exists which empowered the court to grant that leave.

36. He says that the order was made on foot of an *ex parte* application and can be set aside after consideration of all of the evidence which is relevant.

37. In support of his contention he relies upon the decision of the Court of Appeal in the case of *Holmes v.Holmes* [1989] FAM 47 (C.A.) and in particular the following extracts from the judgment of Purchas L.J:

"the phrase 'substantial ground for the making of an application for such an order' is clearly central to the issues in this application …[i]n particular when the court comes to consider such an application, it will have to take into account under s.16(1) whether in all the circumstances of the case it will be appropriate for such an order to be made by a court in England and Wales.If it is not satisfied that it would be appropriate (and that is a positive onus), the court shall, as a matter of mandatory instruction, dismiss the application.

In my judgment that section reflects the fundamental rule of comity as between competent courts dealing with matters of this kind.Of course s.16 is to be considered on the application itself.Mr.Bond very properly drew the distinction between the criteria which the court should take into account if it decides to entertain the application and those which the court has to consider on the application for leave to make the application.Nevertheless, if on the application for leave to apply it is clear that if leave were given the application must founder at the first hurdle of s.16(1), then it would clearly be wrong for the court to grant leave to apply in the first instance.So it is not possible to isolate the considerations which arise under this group of sections".

38. Later in his judgment Purchas L.J.observed that:

"...the purpose of this Act is generally apparent, namely, that it is there to remit hardships which have been experienced in the past in the presence of a failure in a foreign jurisdiction to afford appropriate financial relief.The obvious cases are those jurisdictions where there simply are not any provisions to grant financial relief to wives or children or, maybe husbands and children.In such cases, although the dissolution of the marriage has taken place in a foreign jurisdiction according to foreign laws, then the courts in this country are empowered by Parliament to step in and fill the gap.For my part I do not believe that the intention of Parliament in passing this Act was in any way to vest in the English courts any power of review or even correction of orders made in a foreign forum by a competent court in the whole matter had been examined in a way exactly equivalent to the which examination which would have taken place if the application had been made in the first instance in the courts here.That is not the object of this legislation at all".

39. I would respectfully adopt the foregoing passages as applicable to the similar provisions of the Act of 1995 within this jurisdiction.

40. However, in the instant case it has not been established that the application for relief "must founder at the first hurdle .."

41. The *"first hurdle"* within this jurisdiction is s.26 of the Act of 1995 which provides that the court shall not *"...make a relief order unless it is satisfied that in all of the circumstances of the particular case it is appropriate that such an order should be made by the court ...".*

42. On the evidence, the court in Spain did not consider the question of the applicant's upkeep, maintenance or welfare or that of N.No request was made for the court to do so.The court did not conduct any enquiry into or examination of the financial means and circumstances of the applicant or of the respondent at the time when the divorce was granted.Accordingly the respondent's means and resources were not disclosed to the court or to the applicant or to her advisors.

43. Ms.Pilar de Paz stated clearly that, having regard to the nature of the proceedings before the court in Spain in October, 1996, Spanish law now precludes the applicant from making any further application for maintenance or other payments from the respondent.

44. Must this court, on those uncontested facts, inevitably conclude that it is not *"appropriate"* to make a relief order in favour of the applicant?

45. In these proceedings the applicant is not seeking to review or to rectify a decree of divorce which has been obtained under the civil law of Spain and is recognised as valid in this State.The applicant is seeking specific relief pursuant to legislative provisions made in this jurisdiction which are intended to provide relief where it is alleged that hardship, inequity and injustice has resulted from the grant of a Decree of Divorce in another jurisdiction which cannot be rectified by any relief available within the courts within that jurisdiction.

46. In this case it cannot be suggested that the court in Spain in 1996 examined the issues which are before this *court "...in a way exactly equivalent to the examination which would have taken place if the application had been made in the first instance in the courts here ...".*

47. There was no provision for divorce within this jurisdiction in 1996.

48. Accordingly an application for divorce could not have been made on that date within this jurisdiction.

49. The provisions of Part II of the Family Law (Divorce) Act, 1996 require inter alia that where an application is made for a decree of divorce within this jurisdiction the court must be satisfied that… *"…such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent members of the family,…"* (see s.5(1)(c) of the Act).

50. However, on 14th October, 1996, that Act had not come into full force and effect.

51. It follows that no examination was conducted by the court in Spain in 1996 in a way which was equivalent to any similar examination required by Irish law 1996.

52. Section 23 (3) (a) of the Act of 1995 precludes an application for relief of the type which has been sought in the absence of leave granted ex parte.It provides that *"the court shall not grant such leave unless it considers that there is a substantial ground for so doing…".*

53. Referring to the identical provisions of s.13 of the Matrimonial and Family Proceedings Act, 1984 Russell L.J.declared (in *Holmes v.Holmes* [1989] Fam.47 (C.A.)) that *"[p]rima facie the order of the foreign court should prevail save in exceptional circumstances, and a good case for any interference with it or adjustment of it or any supplementation of it should be apparent before any leave is granted under s.13 where the foreign court is properly seized of the dispute, as it was in this case.So far as is possible, duplicity of proceedings should be avoided in this as in all other fields in the interests of the parties and their children as well as in the interests of justice and the comity of nations."*

54. I am satisfied that there are *"exceptional circumstances"* present in this case.

55. Those circumstances include the failure of the respondent to disclose the means and resources available to him at the date of divorce, the applicant's current reduced circumstances and means of livelihood and, in particular, the fact that, on the evidence, no remedy is now available to the applicant under the civil law of Spain where the decree of divorce was granted.

56. The "*ultimate objective"* of the legislation in England was declared by Bodey J.to be "*… to provide for a very small residuum of cases where the English Court, bearing in mind all the warnings and cautions set out in the authorities, nevertheless feels that the outcome achieved in the foreign jurisdiction is simply not a just one as between the parties … [t]hat must ultimately turn on the circumstances of each individual case and raise issues essentially of fact and degree.")* See *A .v.S.*(*Financial Relief after Overseas U.S.Divorce and Financial Proceedings*) [2003] 1 F.L.R.431 (at p.451).

57. I am satisfied that it will be "*appropriate*" for the court to intervene in the manner contemplated by s.26 of the Act of 1995 only in exceptional circumstances and when the court is satisfied by way of evidence, that the outcome achieved in foreign proceedings has been unfair or unjust in the circumstances and that no remedy is available to the applicant within the foreign jurisdiction.

58. The case made out on behalf of the applicant in the instant proceedings must be deemed sufficient to require this court to enquire whether the outcome of the divorce in Spain was a fair and just outcome in the circumstances.

59. Accordingly this court is satisfied that the applicant has proved that a " *substantial ground"* exists for the grant to the applicant leave to seek the relief which has been sought in these proceedings.Accordingly the court declines to set aside the order dated 12th December, 2003, granting leave.

60. The court is satisfied also that the applicant's claim as constituted discloses a reasonable cause of action and is not vexatious or frivolous within the meaning ascribed legally to that term.

61. The court, therefore, declines to strike out the claim on those grounds.

The substantive application
62. Section 26 of the Act of 1995 provides that this court shall not grant the relief sought "*unless it is satisfied that in all of the circumstances of the particular case it is appropriate …" to grant such relief*.

63. In making that determination the court "*… without prejudice to the generality of the foregoing"* is required *to* "*..have regard to.."* to the provisions of sub-sections (a) to (i) of section 26 of the Act.

64. If the court, having had regard to those matters is satisfied that it is appropriate to make such an order then it is empowered to make " *… any order under Part II … (in this Act referred to as a relief order) that it could have made if the court had granted a decree of judicial separation in relation to the marriage."* (See sub-s.2 (a) of section 23 of the Act).

65. Sub-sections (b) and (c) of s.23(2) of the Act of 1995 apply, as modified to such orders in the manner outlined earlier herein.

66. I have already indicated that I am satisfied on the evidence that at the time when the parties were divorced on 14th October, 1996, the applicant knew of the existence of a trust fund.It is probable that neither she nor the respondent had any realistic understanding of the extent of their respective interests in that fund.

67. By agreeing, in return for the sum of IR£50,000 not to contest the respondent's application for divorce, the applicant permanently extinguished her interest in the trust fund.

68. It is probable also that the applicant agreed not to contest the respondent's application for divorce because she believed the respondent was dying and wished to legitimise his two youngest children.I accept on the evidence that she agreed to dissolve the marriage in order to accommodate the wishes of the respondent whom she believed was dying.She was, at that time, misled, perhaps inadvertently, as to the full extent of the respondent's means at the date of divorce.

69. Mr.Hegarty S.C.says that the respondent failed to make proper provision for the applicant under the terms of the decree of divorce in 1996.He says that the applicant is now suffering financial and other hardship as a result of that failure and has no remedy available to her under the civil law of Spain.

70. In determining whether it is appropriate for this court to grant the relief sought the court must have regard to the matters set out in s.26(a) to (i) of the Act of 1995.

71. In that regard it is of some significance that the parties were married in Ireland and the applicant is presently resident here.The parties have, however, rarely lived together within this State.

72. The respondent's principal asset (the trust fund) is located within or is accessible from this jurisdiction.The respondent has been domiciled and resident in Spain (where the marriage was dissolved) for most of the time which is material to this application.

73. The applicant is a French national who enjoys dual French and Irish citizenship.She received IR£50,000 (IR£46,000 after deduction of costs) as a consequence of the divorce.She has never received any other financial benefit or payment from the respondent towards her upkeep, welfare or maintenance or towards the upkeep, welfare and maintenance of N.during the marriage or thereafter.She would appear now to have no right to apply for financial relief from the respondent under the civil law of Spain.

74. Mr Corrigan, S.C., places particular reliance upon the provisions of sub-ss.(g), (h) and (i) of s.26 of the Act of 1995 in support of his contention that the applicant should not be granted the relief which she seeks.

75. He says that this court must have regard to

> *(g) "… the availability in the State of any property in respect of which a relief order in favour of the applicant … could be made …"*
>
> *(h) "… the extent to which the relief order is likely to be enforceable …" and*
>
> *(i) "the length of time which has elapsed since the date of divorce..." .*

76. He says that the respondent is domiciled and resident in Spain and has no property within this jurisdiction in respect of which a relief order in favour of the applicant can be made.He argues that, for that reason, a relief order is unlikely to be enforceable against the applicant.He says that in the circumstances, having regard to those two factors, this court should not make a relief order in favour of the applicant.

77. In the earlier proceedings it was established in evidence that by the 1966 deed of trust the respondent's father settled certain monies, investments and property upon trustees for the benefit of his "… children, their respective wives, husbands and issue …" on particular terms.

78. In November, 1999 sub-trusts were created whereby the trust fund was divided in a manner intended to provide individual trust funds for certain parties, including the respondent.In consequence, a separate sub-trust comprising three-sixteenths of the 1966 trust fund was established for the benefit of the respondent *"… his wife and issue including N."*.This sub-trust is entitled *"The P … R … Trust Fund"* and it is located within or accessible from this jurisdiction.

79. In evidence during the course of the earlier proceedings the respondent's solicitor, who was and remains a trustee in respect of the fund, indicated that the trust would comply with any order of this court affecting the assets and property of the trust.

80. In *T.M.v.T.M.*(Unreported, the High Court, McKechnie J., 22nd June, 2004) held that an instrument of trust comprised a "settlement" within the meaning of s.9(1)(c) of the Act of 1995 and was susceptible to a property adjustment order made under that section.

81. I am satisfied, in the light of that authority and on the evidence in this case, that the *"P.R.Trust Fund"* comprises property which is available within or accessible from the State in respect of which a relief order in favour of the applicant can be made.

82. Mr Corrigan says that the respondent has recently been the beneficiary under the terms of his late mother's will of an amount exceeding IR£300,000.

83. In response, Mr.Corrigan points out that no evidence has been adduced indicating the whereabouts of that bequest.Anecdotally he has indicated that the proceeds of the bequest have now been dissipated by the respondent.

84. In light of my finding as to the status of the trust fund it is unnecessary for me to consider that bequest.

(i) "the length of time which has elapsed since the date of divorce..." .

85. Almost 9 years have now elapsed since the date when the parties were divorced in Spain in October of 1996.That fact has a relevance to the court's determination having regard to the provisions of section 26 of the Act

86. On the evidence adduced in the earlier proceedings the applicant lived in Spain between 1996 and the year 2000 when she came to Ireland following the birth of her grandchild.

87. In October of 1996 when the applicant agreed not to contest the respondent's application for divorce in Spain, she believed that the respondent was dying and wanted a divorce in order to legitimise his two youngest children.

88. After the divorce the applicant lived in Spain until the year 2000.Thereafter she travelled to Ireland and subsequently to France and back to Spain.

89. In November of 2001 she returned to Ireland.She has been principally resident within this jurisdiction, living in rented accommodation, since that date.

90. It is of significance that in the divorce proceedings issued by Special Summons dated 6th April, 2001, the applicant sought relief which was broadly analogous to the relief which has been sought in these proceedings.

91. The contentions advanced on her behalf in those proceedings were similar to those advanced in these proceedings.The applicant can scarcely be criticised for the fact that those proceedings were not concluded until August 2003.She commenced the instant proceedings in December 2003.

92. The respondent complains that five years elapsed between the date of the decree of divorce in 1996 and the date when the applicant issued her earlier proceedings on the 6th April, 2001.

93. Undeniably the nine year period between the date of the divorce and the date of these proceedings is a very substantial period of time.This Court is required to take the entire of that period *"into account"* when reaching a determination as to whether or not it is *"appropriate"* for this Court to make a relief order in the circumstances.

94. However, the fact that more than four years of that period elapsed through no fault attributable to the applicant is relevant to the *"..length of time which has elapsed since the date of the divorce"* and to the requirement that the court take that factor into account.

95. In *Lamagni v.Lamagni* [1995] 2 F.L.R.452 (CA) the Court of Appeal in England (Butler-Sloss L.J.) considered similar provisions of s.16(2)(1) of the English Act, 1984.

96. She observed (at p.455) that:

> *"The issue of delay is one which the court will have to have regard to if the matter comes to be litigated under the Act, but it does not seem to me to be a matter which should preclude her from having at least an attempt to claim financial relief from the husband.As Mr.Clarke has said, she has never had a chance to put forward her claim.The judge, in denying her relief, has taken a Draconian step which is not justified on the face of it from the analysis of all the circumstances.In my judgment he was wrong to deny her the opportunity to be heard, although undoubtedly the delay upon which he pinned his decision to deny her that opportunity is a highly relevant factor in the eventual hearing and may be decisive."*

97. In that case the court held that a wife who was ..."*prima facia ...entitled to make an application for financial relief with some*

prospect of success if the husband had any assets from which she could obtain such financial relief…." should not have been refused leave to make an application for relief for want of a *"substantial ground"* because a period of 13 years had elapsed between the date of divorce and the date of application for leave.It is not without significance that Butler-Sloss L.J.also observed (at p.454) that:

> *"The judge was entirely right to consider the issue of delay.However, the major cases which have come before these courts since the implementation of the 1984 Act have been in relation to wives who have obtained orders in ... (foreign)...courts which they have then felt to be inadequate and have come to the English courts for a more generous order.Those applications have been, if I may respectfully say so, very properly dismissed in these courts, particularly on the grounds that there should be no two bites at the one cherry, and a litigant has no right to go..(forum)...shopping and, having obtained one order in one jurisdiction, to try and obtain an order in another...[t]he judge did not analyse the circumstances in which the delay took place."*

98. The requirement within this jurisdiction for the court to have regard to the provisions of s.26(i) of the Act of 1995 must be construed also as requiring the court to analyse the circumstances which gave rise to any apparent delay in seeking relief.

99. In this case on the evidence it has been established that at the time of the divorce in October of 1996, the applicant believed that the respondent was dying.He had been diagnosed HIV positive and was extremely unwell.

100. His lifestyle in Spain was unstable and it continued to be characterised by drug abuse.

101. Although the applicant lived in Spain between 1996 and 2000 she had no contact with the respondent.She came to Ireland in the year 2000 following the birth of N.'s child.

102. The applicant commenced proceedings seeking relief under the Act of 1996 on the 6th April, 2001.

103. The respondent's actual means and financial circumstances were not fully disclosed to the applicant until an *"affidavit of means"* was delivered on behalf of the respondent during those proceedings.On the evidence, therefore, it is probable that the applicant did not become aware of the full extent of the respondent's means and financial circumstances until some time in 2001.

104. If the outcome of the divorce proceedings in October 1996 has worked an injustice upon the applicant then the length of time which has elapsed between the date of the divorce in 1996 and the date when these proceedings were commenced in 2003 should not preclude her from seeking the relief which she has sought.

105. The elapse of that period of time is explicable having regard to the applicant's state of knowledge and to the other proceedings upon which she embarked in this jurisdiction in April 2001.

THE SUBSTANTIVE RELIEF

106. This court is now required to determine whether the outcome of the proceedings in Spain in October, 1996 was *"unjust"* in the circumstances so as to require intervention by this court in the manner sought.

107. The evidence in these and the earlier proceedings has established that the parties lived together for less than 8 years.During that time their relationship was volatile, their lifestyle was unstable and characterised by drug abuse and they drifted from location to location with no obvious source of income and no fixed abode.Neither party assumed responsibility for the upkeep, welfare or maintenance of the other.

108. The marriage subsisted for 20 years.During that time the parties co-habited for approximately 3 years.

109. At all material times throughout the marriage the applicant was required to make provision for her own upkeep, accommodation, welfare and maintenance and for that of the daughter of the marriage who was N.

110. A striking feature of the earlier proceedings and of these proceedings is the fact that no evidence has been adduced indicating that any financial or other contribution has ever been made by or on behalf of the applicant towards the upkeep welfare and maintenance of N.Some evidence has been adduced indicating that between 1989 and 1996 the respondent's mother made some intermittent educational arrangements for N.in Ireland.In the main, however, throughout the duration of the 20 years of marriage the upkeep, accommodation, welfare and maintenance of N.has been provided by and at the expense of the applicant without assistance from the respondent.

111. In 1989, the respondent travelled to Glastonbury where the applicant had established a home with N.On the invitation of the respondent the applicant permanently vacated her home in Glastonbury and travelled with N.at the respondent's expense to Spain where they lived with the respondent and his new family for a brief period.Thereafter the applicant resumed responsibility for her own upkeep, accommodation and welfare and for that of N.

112. In 1996, the applicant agreed not to contest the respondent's application for divorce in Spain.She did so primarily because she believed that the respondent was dying and wished to legitimise his younger children.The applicant's substantial means were not disclosed to the applicant at that time.

113. The marriage between the applicant and the respondent followed a 5 year relationship and the birth of a daughter.It was not a satisfactory or harmonious marriage.Nonetheless it remained in existence for 20 years.The obligations and responsibilities which are freely undertaken by those who marry were known to the parties when they married and when their marriage was dissolved.Those obligations and responsibilities rarely end when the marriage ends.That is especially so when there is a child or children of the marriage.

114. Arrangements and provision made by the parties at the dissolution of a marriage for the upkeep, welfare and maintenance of the affected spouses will almost invariably take into account the means of the parties.That will usually require an enquiry or investigation into those means.No such enquiry or investigation was undertaken by the court in Spain during the divorce proceedings in 1996.

115. That was because the court was advised that the divorce was not contested and the civil law of Spain does not require any further enquiry by the court in such circumstances.The outcome arising from the grant of the decree of divorce has been that the applicant now has no remedy within the courts in Spain for any wrong or injustice which may have resulted from the fact that the means the respondent were not disclosed to her at the time of the divorce.

116. On the evidence, the outcome achieved by the Court in Spain in October 1996 was unfair and unjust to the applicant in the circumstances.Having regard to his means and financial circumstances at that time the sum of IR£50,000 (from which the applicant received IR£46,000) was inadequate to discharge the respondents financial and other obligations to the applicant arising out of their marriage.

117. Since the applicant may not now apply to the Court in Spain for relief I am satisfied that this Court should intervene in order to seek to redress an apparent injustice.

118. In deciding whether to make relief orders of the type sought in these proceedings this court is required to have regard to the 12 factors set out in section 16 (2) of the Act of 1995.

119. On the facts of these proceedings the most important of those factors are those identified at subparas.(a), (b), (c), (d), (f) and (l) of section 16 (2).On the evidence the respondent has no earning capacity but has financial resources which will provide him with a reasonable income.The applicant has very limited earning capacity.She has, however, been the beneficiary of a bequest from the estate of her father recently.

120. Neither of the parties enjoyed a good standard of living throughout their marriage.

121. The respondent has obligations and responsibilities towards his wife by his second marriage (which has apparently now failed) and to the two children of that marriage.The financial needs of the applicant include her own upkeep and maintenance and the capacity to make some small familial contributions towards N.(whose needs are accommodated by the existence of a trust called *"the N.R.Trust").*

122. The parties are now both in middle age.

123. It is of relevance to this application that the parties lived together for only 8 years and for 3 years throughout the duration of the 20 years of the marriage.The respondent is in very poor health.

124. It is undeniable that the applicant contributed, throughout the duration of the marriage, to the welfare of the family out of her limited financial resources and by accommodating and caring for N.No such contribution was made by or on behalf of the respondent.

125. It follows from what I have earlier found that I am satisfied that the applicant is entitled to relief of the type which has been sought.

126. This court in granting the relief seeks to redress the apparent injustice which has resulted from the failure on the part of the respondent to disclose the full extent of his means and financial resources in 1996.

127. In the circumstances of this case it is not appropriate for this court to grant relief based upon the concept of what would in 1996 have been *"proper provision"* for the applicant's upkeep, maintenance and welfare arising out of the dissolution of the marriage.

128. The court is required to take into account all of the circumstances of the case (including the statutory factors identified in sections 16 and 26 of the Act of 1995).It should do so as they exist and can be considered at the date of the grant of relief and not at the date of divorce.

129. The statutory relief granted is not intended to compensate the applicant for past financial or other hardship or inequity.It is intended to alleviate present inequitable financial or other hardship or reduced circumstances caused by a seemingly unjust outcome resulting from divorce proceedings in another jurisdiction where no comparable remedy is now available to the applicant.It is intended to do so in a just and equitable fashion.

130. In granting relief this court will take into account the factors required by statute and otherwise including the fact that the respondent now has an obligation to contribute towards the upkeep, welfare and maintenance of his (now estranged) second wife and to his two children by his second marriage.

131. Having regard to those factors, which include the respondent's ill health, the extent of the resources available and the comparatively brief period during which the parties actually lived together the relief to which the applicant will be entitled will necessarily be limited.

132. In order to establish the full extent of that relief it will be necessary for me to hear evidence on behalf of the parties and submissions from Counsel.