THE COURT OF APPEAL

Court of Appeal Record No. 2020/262

Woulfe J.

Collins J.

Binchy J.

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

Between

A.X.

Applicant/Appellant

-and-

B.X.

Respondent

JUDGMENT of Mr. Justice Woulfe delivered on the 5th day of October, 2022

Introduction

1. This appeal was brought by A.X. ("the appellant") against the judgment of the High Court (Faherty J.) delivered on the 18th June, 2020, and the orders made in consequence thereof by her on the 13th November, 2020. The learned trial judge granted a decree of divorce pursuant to s. 5(1) of the Family Law (Divorce) Act, 1996 ("the Act"). She also made a number of ancillary orders, including an order that the

trustees of a trust which I describe as the B.X. Trust take such steps as necessary to facilitate the payment out and/or transfer to the respondent of the entirety of the funds then currently held and standing to her benefit in the B.X. Trust, and to thereafter take such steps as necessary to wind up the said Trust; an order pursuant to s.13 of the Act that the appellant pay to the respondent the sum of €160,000 by way of contribution to her costs, and certain orders pursuant to s.18(10) of the Act blocking any future applications for provision for either spouse out of the estate of the other spouse.

Background

2. The lengthy and complicated background to these proceedings has been clearly set out in the comprehensive judgment of Faherty J. The parties were married in March, 1990 in another jurisdiction. Two of their children were born in that jurisdiction, and they returned to Ireland in 1997, when the respondent was pregnant with their third child. Upon their return, they lived in rented accommodation. The appellant continued to spend one month per quarter in another jurisdiction working and also travelling to the US. During this time, he was developing his business enterprises successfully. It is common case that the appellant ultimately sold one of his enterprises to a foreign corporation some years later, which proved very lucrative and gave the parties financial security.

3. Unhappy differences arose in the marriage and the respondent commenced judicial separation proceedings in October, 2007. A decree of judicial separation was granted by order of the High Court made on the 12th November, 2010, together with certain ancillary orders, including orders relating to the joint custody of and the maintenance of the then dependent children, financial provision orders, orders

extinguishing succession rights, and an order in relation to costs, which costs order I will return to below.

Financial Provision and the B.X. Trust

4. In the High Court's judgment in the judicial separation proceedings, delivered on the 27th July, 2010, the Court considered, *inter alia*, the issue of financial provision for the parties, and in particular how a lump sum he proposed awarding to the respondent should be structured. The judgment stated as follows:

> "54. A further duty of a Court is to ensure that the resources allocated to either spouse are protected from mismanagement. In this context, there are a number of salient features.
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> 55. First, it is clear that the [respondent], objectively speaking, is not a "financially minded" person. This observation is not made in any critical sense. Nor is it made by any process of invidious comparison with the [appellant] who comes very much within that description. By way of illustration, the [respondent] appeared to have no specific recollection of the substantial financial transaction to which she herself was a party…
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> 56. The [respondent] was asked as to her long term intentions once the children have left home. She indicated that her real interest lay in astrology, a subject she would like to pursue in depth, and perhaps ultimately, become a practitioner in that area."

At para. 58, it was noted that other than having received a broad outline from her solicitor at the outset of the proceedings, the respondent took no steps to ascertain her financial exposure as to costs.

5. The High Court considered that the "resource pool" available for the purposes of making proper provision for the parties was €7,000,000, and decided that proper provision involved the transfer by the appellant to the respondent of two lump sums, with a total value of €3.10M.

6. The first lump sum of €1,650,000 was to be utilised by the respondent, firstly, in the acquisition of accommodation and in discharge of the costs associated with establishing a residence, such as expenditure on furniture. Secondly, this sum was also to provide for debts outstanding (including legal costs and expenses), and the balance was to provide for a lump sum fund which would generate some income for the respondent.

7. The second lump sum of €1,450,000 was to be used in the establishment of a trust to provide a further income for the support of the respondent into the future, which Trust became known as "the B.X. Trust". The High Court judge noted that the "resource pool" funds of €7,000,000 had been held in a trust known as the B. Trust or the BOF Trust. He went on to state as follows (at para. 79):

> "I consider that the disposition of the available assets should be carried out in as prudent a manner as possible; that is by the transfer of part of the award into a trust for the benefit of the wife. This is based on the simple proposition that this is the best way that the interests of the wife, and the children, can be protected. At a time of great volatility in the last three years, the B. Trust funds have maintained their value. This was as a result of the excellent advice of the trustees and protectors of the Trust. There is much to be said at present for such protection of large sums of money and the assurance that the interests of both parties and the children will be protected and that resources will not be unnecessarily dissipated or placed at risk."

8. In its judgment, the High Court calculated that the respondent should receive an annual income of €73,750 as a result of the two lump sum transfers, which he considered a proper maintenance provision. It appears that he envisaged that the trust fund would yield an annual return of 3%, which would then give the respondent an annual income after tax from the trust fund of €30,000. To this would be added her annual income from the balance of the €1.65M lump sum (after the purchase of a house and discharge of debts including legal fees), and an annual distribution of capital from the trust fund, leading to the overall expected annual income of €73,750.

9. In directing the establishment of the B.X. Trust Fund, it appears that the High Court sought to balance the preservation of the capital sum with some degree of flexibility in capital distribution. The B.X. Trust was subject to the terms set out in Schedule A which attached to his order dated the 12th November, 2010, and provided, *inter alia*, as follows:

> "(i) The purpose of the B.X. Trust was to provide the respondent with a secure annual income uniform after tax income from the date of establishment of the Trust until 1/1/2047.
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> (ii) It was to be established in Ireland with a protector and two trustees.
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> (iii) The trustees and protector were to be appointed by the respondent.
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> (iv) One of the trustees was to be a practising accountant.
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> (v) The respondent was to be the sole beneficiary of the B.X. Trust.
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> (vi) The trustees were to invest the capital funds in A+ investment rated funds and cash deposits so as to protect the capital of the fund and to hope to assume an annual rate of return of circa 3.0% per annum (post inflation).
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> (vii) The trustees should not place more than 40% of the value of the Trust with any single financial group at any point in time.

(viii) The trustees were to maintain a percentage of the value of the Trust equal to the beneficiary's age invested in cash investments such as term deposits.

(ix) The trustees were prohibited from the following investment activities:

(a) investing directly in individual stocks;

(b) investing in derivatives or other leveraged financial products such as futures, swaps, CFDs, *etc*;

(c) investing in currency or precious metal speculation products;

(d) making investments in private companies;

(e) making loans to individuals.

(x) The annual disbursement to the respondent should be calculated by the trustees on the basis that the remaining funds held by the Trust are capable of providing an equal or greater annual post-tax inflation adjusted income to the beneficiary for the remainder of the Trust.

(xi) The trustees were to ensure that the payments to the beneficiary in any year were as tax efficient as possible.

(xii) The B.X. Trust was to be wound up on 1/1/2047 with the remaining balance being paid to the beneficiary or in the event of the death of the beneficiary before this date, the Trust to be wound up with the balance of the Trust to be paid to the beneficiary's estate."

10. It appears that there were difficulties in implementing the order of the 12th November, 2010, in respect of the establishment of the B.X. Trust. An independent solicitor appointed to draw up the Trust Deed raised a concern that the entire annual sum which the respondent would receive would be taxed as income, notwithstanding that a portion of the income was to be funded from disbursements of capital from the capital sum. It was common case in the Court below that the flexibility in capital

distribution which Schedule A provided for was not replicated in the Trust Deed that was ultimately drawn up.

11. Clause 16.1 of the Trust Deed provided that the terms of the Trust could be altered by the trustees acting unanimously, with the consent of the respondent and the appellant. The appellant's involvement in this regard had not been envisaged by the High Court. Clause 16.2 provided for the Trust to be amended "as may be prescribed from time to time by the High Court". Save for the restrictions put on capital distributions and the provision made for its variation or amendment, the B.X. Trust was largely drawn up in accordance with the structures set out in Schedule A.

12. The €1.45m came into the B.X. Trust on the 30th January, 2012, and the monies were immediately put on deposit. Initial advice on investment strategy for the Trust funds was that the target net income payment of 3% anticipated by the High Court was not obtainable, given the parameters set out in the Trust Deed. An investment adviser was then retained, who advised that the investment strategy was too restrictive, which would lead to difficulties in securing the returns necessary to give the respondent an adequate income. He was of the view that the terms of the B.X. Trust should be altered, and that the capital repayments provided for in the Trust should be slowed down and retained for later years.

13. During late 2012 and into 2013 extensive correspondence passed between the parties regarding proposed changes to the B.X. Trust. Draft amendments were proposed which, it was believed, would provide a balance between suitable investments which would provide a reasonable yield for the respondent and the necessity to adopt a reasonably conservative investment policy. It was common case in the Court below that nothing came of the efforts to amend the B.X. Trust Deed over the course of 2012-2013. The appellant testified that he did not agree to the suggested amendments to the

Trust, as he believed that a more liberal investment criteria would constitute a threat to the capital sum. As regards the respondent not applying to the High Court to have the Trust varied at this juncture, she testified that the legal advice provided to her was that the matter could be revisited in the divorce proceedings, i.e. the present divorce proceedings which the appellant had instituted in March, 2012.

14. While efforts were being made to try and change the terms of the Trust Deed, the Trust funds continued to be held on deposit until mid-2014. In or about June, 2014 the trustees obtained a recommendation for an investment strategy for the Trust fund from financial advisers, and in August, 2014 €700,000 of the €1.45m B.X. Trust funds were provided to those advisers for investment. The funds were put into a very conservative investment portfolio (the "X portfolio"), and the advisers explained to the trustees that they felt restricted to adopting their most conservative strategy because of the terms of the Trust, and also remarked that the case for re-examining the B.X. Trust was compelling.

15. During 2015 contact was again made with the appellant with a view to changing the terms of the Trust, so as to allow for a less restrictive investment strategy. His response was to the effect that relaxation of the investment criteria would put the capital sum at risk, and that the key objective of the B.X. Trust was "preservation of capital". However, it appears clear from the correspondence that he was not averse in principle to changes being made to the B.X. Trust. In April, 2015 the appellant wrote directly to the respondent proposing an investment strategy for her, including that the B.X. Trust funds would be invested in residential property in Dublin. His letter stated that if the respondent wished to pursue this strategy, he would agree to changes to the B.X. Trust to give effect to his proposal. However, no agreement on a new investment strategy was arrived at.

16. The trial judge heard evidence from Mr. A., Manager Director of an investment management firm, as to the investment returns from the B.X. Trust assets since its inception. Mr. A. testified that while the High Court had envisaged that the amounts held in the B.X. Trust would yield an annual return of 3%, which would then give the respondent an annual income after tax from the Fund of €30,000, in fact the respondent's annual average income from the Trust was only €10,426.

17. As of 2019, the cash element of the Trust was €662,000, comprising monies held on deposit in AIB and the cash element of the X portfolio. This was earning only 0.01% interest, and thus was well below inflation. Mr. A. testified that as of the 31st December, 2018, the value of the B.X. Trust was €1,371,119, comprising the X portfolio of €706,546 and the balance of the Trust Funds of €666,794 (held on deposit with AIB). Mr. A. attributed the lower returns from the Trust to the conservative nature of the X portfolio, and the fact that half of the Trust funds had to be on deposit, a matter of equal difficulty given that deposit interest rates had fallen significantly since 2012.

18. Mr. A. testified also as to the respondent's investment of €750,000 (part of her first lump sum of €1,650,000) with other investment managers, and as to how this investment (the "Y investment") had fared better than the B.X. Trust funds, in terms of generation of income. As of the 31st December, 2018, an average annual income of circa €28,000 was received by the respondent from the Y investment. The average annual performance of the Y investment was 7.9%, compared with the 0.09% which the X portfolio part of the B.X. Trust had yielded. The value of the Y investment as of the 31st December, 2018, was circa €553,000 from the original investment of €750,000 in 2014.

19. As regards capital distributions from the B.X. Trust, Mr. A. agreed that the capital distributions made to the respondent fell short of what had been envisaged by

the High Court. Over a seven-year period from 2012 to 2019, she had received only €52,000 in capital distributions, a figure well short of what would have been achieved had the structure envisaged by the High Court been put in place. A key problem with the B.X. Trust was its rigid capital structure, and Mr. A. stated that this difficulty arose because the structure ultimately put in place was different to that directed by the High Court.

20. Mr. B., the CEO of the investment management firm, was requested by Mr. A. to look at the investment strategy of the B.X. Trust, and he prepared a report for the Court below. Mr. B. found that the Trust as set up in 2012 was "excessively conservative" even for a conservative investor, and he opined that the emphasis on cash and bonds was not conducive to positive investment returns, given the prevailing low interest rates. In his opinion the initial conservative approach of the B.X. Trust continued to be reflected in the X portfolio from 2014 on.

21. Mr. B. stated that the B.X. Trust yield for 2012 – 2016 stood at 0.49%. He felt the reason for the low yields was the over reliance on cash and the fact that the investment in Government Bonds, heretofore a good bet for a 3% - 4% yield, was now showing a negative return, a position he believed would continue into the future. His view was that the B.X. Trust's low risk portfolio might well be deemed a high risk investment, given the current environment. In those circumstances, asset allocation was very important, and his view was that more diversification was required of the B.X. Trust, a view he also held with regard to the respondent's Y investment portfolio.

22. Mr. B's recommendation for the B.X. Trust funds (€1.35m) and the respondent's Y investment portfolio (€553,000) was the creation of a medium risk portfolio, in order to achieve the returns that were once achievable from a low-risk strategy. He suggested a strategy which would include a higher proportion of equities

and alternative investments to cash and bonds, and keeping equities at circa 50 – 60% to reduce volatility, but ensuring returns of between 6 – 8% per year. In his view, this would achieve a better outcome for the respondent to enable her to have a sufficient income to fund her lifestyle, and thereby cease the need for capital withdrawals from the Y investment portfolio to make up the shortfall from the B.X. Trust, as had been the practice heretofore.

23. Under cross-examination by the appellant, Mr. B. agreed that as of 2018, when the respondent was aged 54, the cash element in the B.X. Trust was at 76% when it could have been at 54%, thereby leaving 46% for other investment vehicles. The explanation on behalf of the trustees for the higher cash element was that the overall aim was to ensure that the cash element of the Trust funds matched the requirements of the B.X. Trust. It was accepted, however, that some of the monies held on deposit in AIB could have been invested in diversified funds without breaching the requirement in Schedule A to maintain a percentage of the value of the capital of the trust funds equal to the respondent's age.

The Taxation of the Respondent's Costs in the Judicial Separation Proceedings

24. The respondent was represented in the judicial separation proceedings by Mr. Dermot Simms of DSS Solicitors. According to the respondent she did not get an indication of her estimated costs until 2010, shortly before the hearing of the judicial separation, and her costs were estimated at that time to be €430,000. In the course of the judicial separation hearing in 2010, the High Court was advised by the respondent's counsel that her costs were likely to be in the region of €500,000. As of the 27th September, 2010, post-delivery of judgment by the High Court on the 27th July, 2010,

her solicitors' costs summary "without prejudice to taxation" stood at €573,276 (inclusive of VAT).

25. By the order of the High Court dated the 12th November, 2010, the appellant was directed to pay to the respondent the sum of €100,000, being 20% of her estimated legal costs as provided to the Court. The respondent was to discharge the costs of two interim motions, and the appellant was entitled to set off those costs against the €100,000 sum he was directed to pay to her. On the 16th April, 2011, the appellant wrote to the respondent stating that her solicitors' costs bill of €573,276 could be reduced by as much as €250,000 to €350,000 if she had her costs taxed, and he offered to pay the net cost of the taxation process. The matter came back before the High Court in July, 2011, with the appellant advocating that the respondent would have her costs taxed, in circumstances where he wished to have certainty as to what those costs were for the purposes of any future divorce application.

26. The respondent was opposed to the suggestion that her costs would be taxed on a solicitor/own client basis. However, in a judgment delivered on the 22nd July, 2011, the High Court stated as follows:

> "I think there is force in what the [appellant] says in relation to whether he has a genuine interest in the question of the [respondent's] legal costs…I think it is legitimate for him to submit that the extent of [the respondent's] costs remains a legitimate concern for him in the event of the parties ultimately seeking a divorce…Thus, I am directing that [the respondent's] costs will be taxed, and that [the appellant] will be permitted to retain a costs drawer to make submissions to the Taxing Master in relation to the items of costs identified in the Bill of Costs which will be submitted by the [respondent's] solicitor…Clearly, the [appellant] will not be entitled to have access to any

> privileged documentation in the [respondent's] solicitor's legal file… I will take the [appellant's] undertaking that he will pay for the costs of the taxation and not seek access to any privileged documentation. I would point out that such costs can be significant but I am sure he has taken advice on this question. Nevertheless, I think he has a legitimate interest in seeking to ensure that the costs are minimised. The [respondent] will have to bear in mind the status of any s.68 letter in the context of whether or not there is to be a solicitor/client aspect to her legal bill. I say this in light of the fact that the [respondent's] legal bill currently stands at something in excess of €570,000. This is a very large sum of money indeed. By now, the bill may be even greater. I recognise that the [respondent's] view is that the [appellant] is a "control freak" and this is yet a further aspect of his controlling nature. However, the truth of the matter is that he does have a legitimate financial interest in these questions."

27. Accordingly, by order of the 22nd July, 2011, the High Court directed that the respondent's Costs of the substantive judicial separation hearing and the preliminary motion be taxed, that the respondent retain a Costs Drawer and that the appellant's Costs Drawer be permitted to make submissions to the Taxing Master in relation to the items of costs identified in the Bill of Costs submitted by the respondent's solicitors. Noting his undertaking to do so, the appellant was directed to bear the costs relating to the taxation. The High Court further directed that a sum of €200,000 could be paid by the respondent to her legal advisers on account, without prejudice to the rights of either of the parties *viz-a-viz* the taxation.

28. The taxation of the respondent's costs commenced in March, 2012 with legal costs accountants retained for both the respondent's solicitors, DSS Solicitors, and for the appellant. The respondent's solicitors' Bill of Costs as presented for taxation was

€557,756.68. On the 6th March, 2012, the respondent emailed her solicitor and stated that while she deeply regretted running up such a large fee for legal work, it was not her wish to contest it.

29. The trial judge highlighted two particular disputed issues which arose at the taxation hearing. Firstly, there was a dispute between the respective cost accountants as to whether a bill amounting to €36,656 (inclusive of VAT) paid to Z & Partners (an accountancy firm that was retained by the respondent in the judicial separation proceedings), and originally listed in the respondent's solicitors Bill of Costs, was subject to taxation. The Taxing Master held that the fees had in fact been paid directly by the respondent to Z & Partners, and on that basis had "effectively been taxed by her". Accordingly, he found that he had no jurisdiction to intervene in the matter.

30. Secondly, there was a dispute over a claim by the respondent's solicitors (for €46,000 plus VAT) for work carried out from 2006 to June, 2008, at a time when Mr. Simms was a solicitor in Rutherfords Solicitors. There was some debate as to whether a Bill of Costs of around €12,000 had been mentioned to the respondent by Rutherfords for the period in question. The Taxing Master, having considered the file in its entirety, found no reference to any costs having been sought by Rutherfords at the time of change of solicitors. He was informed that the respondent's file was transferred from Rutherfords to DSS "on the basis that the value transferred with it". In his substantive ruling on the costs dated the 11th October 2012 ("Ruling No. 2"), the Taxing Master allowed a sum of €25,000 plus VAT for this item of work.

31. In his Ruling No. 2, the Taxing Master noted that the respondent "has no issue with the amount of fees which are claimed in the Bill".

32. Following Ruling No. 2 the appellant emailed the respondent on the 26th October, 2012, stating that what had been stated in the taxation process regarding the

Rutherfords issue contradicted her sworn testimony in the judicial separation proceedings, i.e. that she had agreed to settle with Rutherfords for €12,000. On the 26th November, 2012, he wrote to her solicitors querying the difference between the respondent's testimony in the High Court and the €46,500 which they had claimed in respect of the period in question. The respondent's solicitors replied on the 26th November, 2012, stating that the Taxing Master had ruled on the issue.

33. Both the appellant and the respondent's solicitor carried in objections to Ruling No. 2. On the 13th December, 2013, in advance of the Objections hearing, the respondent emailed her solicitor reiterating, *inter alia,* that she had never wanted the taxation process in the first place as she had tried to tell the Court, and that she had only ever wanted "to pay a fair and proper price for [her] legal fees and move on from [her and the appellant's] incredibly acrimonious separation process".

34. In his ruling dated the 29th May, 2014 ("Ruling No. 3") the Taxing Master disallowed the Objections of both parties. In the course of his Ruling he stated, in response to the appellant's Objection submissions, that the respondent's wishes regarding taxation had to be taken into account and that doing so "was not in any way contrary to the judgment of the Court". As regards the Rutherfords issue, by the time of the Objections hearing, the appellant had obtained a letter sent by Rutherfords to the respondent dated the 17th June, 2008. The letter was a response to a letter from the respondent dated the 5th June, 2008, advising that she was retaining DSS Solicitors and requesting a bill for the costs incurred between 2006 and June, 2008. In the letter the respondent was advised that Rutherfords believed that the sum of €10,500 plus VAT (€12,705) would be a fair professional fee, and they agreed to accept an undertaking from DSS to discharge the sum upon termination of the judicial separation proceedings.

35. The Taxing Master was satisfied, however, that the evidence established that neither Mr. Simms nor his cost accountant had received a copy of this letter until after Ruling No. 2. Although the matter had been referred to by the client during the judicial separation hearing, he did not think that Mr. Simms attached any importance to the letter nor did he consider it to have any relevance to him. He did not believe there had been any intention to mislead him in any way in relation to this letter.

36. The appellant then sought a review of the taxation by the High Court, pursuant to s.27(3) of the Courts and Court Officers Act 1995. In a judgment delivered in 2015, the High Court held that the appellant had failed to establish any error by the Taxing Master in the allowance or disallowance of any of the items contained in the respondent's solicitor's Bill of Costs. The High Court judge went on to comment as follows:

> "24. Whilst that disposes of the application, it is in my opinion appropriate that I should express my view as to the manner in which this application was conducted by the [appellant]. As I have noted, [the appellant] made extremely serious allegations against the solicitor for the costs. Not only were these unsupported by evidence but they were in effect flatly contradicted by the client whose bill is the subject of the taxation [the respondent]. I have already alluded to the fact that the order of MacMenamin J. was unusual and quite possibly unique. Indeed, the Taxing Master in one of his rulings stated that he had never encountered such an order.
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> 25. The order was quite specific in permitting a costs drawer to be retained by [the appellant] to make submissions in relation to the items of costs identified in the bill. I do not think that the court intended by making this order that [the appellant] in person should have been entitled to participate in this matter in the

> manner in which he has. [The appellant] invites the court to conduct a form of forensic investigation into the professional relationship between [the respondent] and her solicitor, a matter in respect of which he has no legitimate interest and no conceivable *locus standi*. Even were that not so, I have already concluded that the Taxing Master was correct in determining that he had no jurisdiction to, in effect, embark on the trial and determination of these issues."

37. By order dated the 25th November, 2015, affirming the decision of the Taxing Master, the High Court directed the appellant to pay to the respondent the costs of the review application when taxed and ascertained. The appellant was also directed to pay the respondent within six weeks the sum of €81,105.93, which represented the High Court's award to the respondent of €100,000 party and party costs, less the taxed costs of two motions in the judicial separation proceedings. The appellant was also directed to pay the respondent within six weeks the sum of €61,822.48, in compliance with his undertaking to pay the costs relating to the taxation of the respondent's costs.

The Current Proceedings

38. The current proceedings involved an application by the appellant for a decree of divorce, pursuant to s.5 of the Act. Both parties sought a decree of divorce in circumstances where they had lived apart for the requisite period required by the Act, and where there was no prospect of reconciliation.

39. By way of proper provision in these proceedings, the respondent sought the unwinding of the B.X. Trust together with a lump sum order in her favour in respect of the legal costs which she had incurred, by what was claimed to be the unnecessary prolonging of these divorce proceedings by the appellant. The respondent claimed that her costs in these proceedings would be in the region of €400,000. The request to

dismantle the B.X. Trust was based on (i) its underperformance as a source of income for the respondent, and (ii) the respondent's contention that the appellant had used the existence of the B.X. Trust as a tool to control and demean her.

40. The appellant opposed the winding up of the B.X. Trust, and asserted that the respondent was incapable of managing her own and financial affairs, and contended that if the B.X. Trust were unwound he might in the future be called upon to make further financial provision for the respondent. As a basis for his contention in this regard he pointed, in the first instance, to the High Court's supposed "finding" in the judicial separation proceedings that the respondent was not a "financially minded" person and, secondly, to the manner she had utilised that portion of the first lump sum awarded to her in 2010 over which she retained control, including decisions made by her in and about the discharge of her costs in those proceedings, the taxation of those proceedings and the manner in which she had managed the costs she had incurred in the within divorce proceedings.

Discovery in the Within Proceedings

41. The respondent swore an affidavit of discovery in these proceedings on the 16th March, 2017. It became apparent from same that on top of the €200,000 which the High Court had directed could be paid on account to her solicitors, by his order dated the 22nd July, 2011, she had also paid her solicitors a further sum of €260,000 in December, 2011. On the 23rd March, 2017, the appellant wrote to the respondent's solicitors querying whether the €460,000 which the respondent had paid by December, 2011 was in full settlement of the Bill of Costs dated the 28th October, 2011, for the amount of €557,756.68. The respondent's solicitor ultimately replied by letter dated the 9th June, 2017, and advised that the taxation process was only concerned with costs

up to November, 2010, and that the further costs incurred by the respondent after that date were not the subject of the taxation.

42. The issue of the fees paid to Z & Partners, as mentioned earlier in this judgment, resurfaced at this juncture. In his letter dated the 23rd March, 2017, the appellant also sought vouching documentation from the respondent in relation to the fees discharged to Z & Partners. On the 9th June, 2017, the appellant learned that the full balance of the Z & Partners bill had been discharged, on the respondent's instructions, out of funds held in her solicitor's client account. By letter dated the 27th June, 2017, DSS advised the appellant that the Z & Partners costs were paid "directly (a term used by the Taxing Master and not by this firm) in the sense that they were paid from [the respondent's] own funds held in the client account of Dermot Simms".

43. The appellant then sought further discovery by notice of motion dated the 20th July, 2017. The respondent's solicitor, Ms. Clare Downes (by then the Principal of DSS) swore a replying affidavit on the 15th September, 2017. Ms. Downes averred, *inter alia*, that the appellant's contention that the additional payments made by the respondent in December, 2011, and a further payment of €100,000 made in September, 2013, were *prima facie* in breach of the High Court order of July 2011 was not the case as the monies were paid into the client's account and were thus not fees paid to DSS. She also averred that the fees of Z & Partners were not encompassed by the taxation process, and thus were not constrained by any High Court order or undertaking given to the Court, and that the fact that they were discharged out of the respondent's solicitor's client account was one and the same as the respondent having discharged them from her own resources.

44. The discovery application ultimately resulted in a judgment and order of the High Court in 2017, refusing the appellant's motion. In the course of the judgment,

however, the High Court found that as of October, 2017, the respondent had in fact paid €636,000 over to DSS, to include a further payment of €76,822.48 made in March, 2016. In all of the circumstances the Court considered that the information before the Court raised concerns not just with the amount of legal fees paid by the respondent, but also with the manner in which she paid them and more precisely the manner in which they were represented to have been paid, which the judge felt led to them being excluded from a possible reduction on taxation for the benefit of the respondent and the indirect benefit of the appellant. The Court felt that the information required clarification, and by order dated the 26th October, 2017, it directed Ms. Downes to swear an affidavit addressing concerns raised in his judgment dealing, *inter alia*, with what other legal fees had been paid since the 22nd July, 2011, (the date of the High Court order) by the respondent, whether by transfers to or from the solicitor's client account or otherwise, which related in any way to her family law proceedings, and to outline the manner in which those fees had been paid.

45. Ms. Downes duly swore the required affidavit on the 30th November, 2017. She averred that as of the 28th November, 2017, the respondent had paid €724,045.48 (inclusive of VAT) in respect of costs, fees and outlay in respect of which €25,428.26 was held to her credit, leaving a net payment of €698,617 (inclusive of VAT). €142,928.41 of the total figure paid by the respondent was money paid to the respondent directly by the appellant on foot of cost orders made in her favour. She also averred that (as of the 30th November, 2017) the respondent was entitled to recover yet more costs from the appellant, namely the costs of the application to the High Court for a review of taxation, the costs of the then pending appeal to the Court of Appeal against the High Court decision to refuse same, when determined, the costs of a contempt motion, and the costs of a transcript motion.

46. Ms. Downes averred that the Bill of Costs for the judicial separation proceedings to the date of judgment in July, 2010 taxed at €462,809.68, resulting in a reduction of €114,950 in the Bill of Costs. The balance of the total amount paid of €724,045.48 arose from litigation since July, 2010, including difficulties encountered in relation to the drawing up of and finalisation of the judicial separation order, the establishment of the B.X. Trust, the divorce proceedings, the taxation of costs, the application for a review of taxation and the appellant's then pending appeal to the Court of Appeal.

47. As regards the payment by the respondent of the additional €260,000 in December, 2011, Ms. Downes stated that it was clear from the judgment of the High Court judge, that he had interpreted the 2011 High Court order. as placing a limit of €200,000 on the fees which the respondent could pay to her legal advisers until the taxation was completed. She stated that this was not the interpretation which her office took in relation to the meaning and effect of the order, and their interpretation was that the order did not contain any restriction on the respondent's right to utilise the monies awarded to her by the Court as she saw fit. However, this was subject to the *caveat* in the order that any monies expended on legal costs was "without prejudice to the rights of the parties *vis-a-vis* the taxation". Her office interpreted this to mean that the rights of the respondent and the appellant were preserved, and when the matter was determined by the Taxing Master, any balance due would be discharged or if the costs were subsequently reduced on taxation below the level actually paid out, the respondent would be entitled to be refunded any fees which were overpaid. She stated that this interpretation was made in good faith and based upon a reasoned analysis of the intentions of the Court.

48. Ms. Downes further stated that in advance of the €260,000 payment, the respondent had repeatedly expressed her desire that she wished to finalise and discharge the costs of her professional advisers so that she could have certainty in her financial position. She averred that the respondent expressed the view that she felt morally and ethically bound to pay her legal costs, and that although they were very significant they had been properly incurred and charged. She stated that it was in those circumstances that the respondent's solicitors advised the respondent that she was entitled to discharge the fees sought by her legal and financial advisers as she so wished, and that any overpayment would be refunded to her once the taxation process was completed. These averments were confirmed by the respondent in an affidavit sworn by her on the 30th November, 2017, which addressed the fees she had paid to her solicitors as of that date. At para. 15 she averred that she definitely would not have made the payment if she thought that by doing so she would was breaking a Court order, but she believed it was her right to discharge her legal costs.

49. As regards the Z & Partners issue, Ms. Downes accepted that the respondent's written submissions in the High Court review did refer to the fees being "directly paid". She stated that these submissions were prepared on junior counsel's initiative, and simply adopted the language used in the Taxing Master's ruling. These submissions were briefly reviewed by her office, but no real significance was attached to the wording used. She hoped that this explanation demonstrated that there was absolutely no question that the respondent or her office sought to mislead the High Court or the Taxing Master in relation to the Z & Partners payment, or at all.

The Appeal of the Order of the High Court refusing review of taxation

50. As mentioned above, the appellant appealed the order of the High Court dismissing his application for a review of taxation. The Court of Appeal dismissed the appeal in a judgment delivered in 2018. The Court's judgment rejected the appellant's contention that, for the purposes of the taxation, he was to be treated as "standing in the shoes" of the respondent, and that she therefore had no role to play in the process before the Taxing Master, the High Court or the Court of Appeal. The Court opined that the propositions advanced by the appellant misunderstood the effect of the order of the High Court which permitted the involvement of the appellant in the taxation process, but did not permit him to replace or to be substituted for his former wife for all purposes in the process. Because of the unusual nature of the order, the express terms permitted what would normally not be the case, i.e. that a party other than the party paying the costs would have liberty to address and make submissions to the Taxing Master regarding the costs. However, the appellant was not "representing" his former wife in the instant appeal nor did he, in the course of the taxation or for the purposes of the review, act "in place of" his former wife, as he argued. The Court later stated that the appellant was "to be treated as a third party or outsider in the taxation process".

51. The Court rejected the five grounds of appeal advanced by the appellant. It upheld the ruling of the High Court that he could not review the Z & Partners costs, as they had not been part of the taxation. It also rejected the appellant's arguments regarding the Rutherfords issue, noting that Mr. Alexander of Rutherfords had testified before the Taxing Master that the figure of €12,705 set out in the letter of the 17th June, 2008, had been an "educated guess". It held that the Taxing Master had ample evidence on which he could reject the assertion that Mr. Simms failed in his professional duty of candour which, in her view, was not borne out by any reasonable view of the evidence.

The High Court Judgment

52. The trial judge considered under a number of headings the principal contention advanced by the appellant, *i.e*. that proper provision required the retention of the B.X. Trust, albeit with modifications to ensure that it would yield the respondent the income envisaged by the High Court, essentially because the respondent was not a "financially minded" person. The headings most relevant to the present appeal are dealt with below.

The opinion expressed by the High Court in July 2010

53. As regards the appellant's reliance on the opinion of the High Court as expressed in July, 2010 that the respondent was not a "financially minded" person, Faherty J. felt that this reliance on a view expressed almost ten years ago was misguided. In her opinion the view arrived at by the High Court judge was against the backdrop of a particular factual matrix and could not be the decisive factor some ten years on in considering whether the B.X. Trust should be unwound, and what the Court must have most regard to were events subsequent to the parties' separation and the relevant financial considerations.

The respondent's opposition to having her costs taxed

54. The appellant argued that the respondent's staunch opposition in 2010 to having her costs taxed was of itself evidence that she was not a financially minded person. The respondent stated in her evidence that she believed she had received a fair and honest account of her costs from her legal team, and she did not want to challenge the Bill of Costs. Moreover, by 2011 she wished to get on with her life. She testified that her opposition to having her costs taxed and her desire to get on with her life did not equate

to her not being a financially minded person. In her view, as of 2011, her legal team had provided an exceptional service to her, and by that time they were out of pocket in terms of their fees for four years. It was in those circumstances that she opposed the taxation process.

55. As regards her email to her solicitor dated the 6th March, 2012, stating that it was not her wish to contest the Bill of Costs as provided for taxation, the respondent defended the sending of this email on the basis that it was in her interest to do so, as she wished to appraise the Taxing Master of the great service her solicitors had provided. She stated that she had written this email because she was frustrated that the taxation process was still ongoing by March, 2012, and she was upset at the claims being made by the appellant in that process. She stated that the prolongation of the taxation process was delaying the divorce case in the High Court, where the issue of the B.X. Trust could have been revisited at an earlier date. It was in those circumstances that she instructed her solicitor to bring her wishes in this regard to the attention of the Taxing Master.

56. As regards her later email to her solicitor dated the 13th March, 2013, reiterating *inter alia* that she had never wanted the taxation process in the first place, she accounted for this email on the basis that she wished to have her voice heard in order to air her frustration at the prolonged taxation process. She stated that when she advised her solicitor, Mr. Simms, of her upset and frustration at the taxation process, he had advised her to put her views in writing for the Taxing Master to see. She again denied that this email was against her financial interest or that it was an indication of her not being financially minded. It was put to her that she had sent this email in the teeth of the substantial reduction of over €100,000 which had been made in respect of her solicitor's Bill of Costs.

57. Evidence was given to the Court below by Mr. James Flynn, former Taxing Master, on behalf of the appellant, purportedly in his capacity as an expert witness. However, prior to his retirement as a Taxing Master he had in fact given a ruling on a preliminary issue relating to the taxation of the respondent's costs. In addition, Mr. Flynn's son's firm, Flynn & O'Donnell, acted for the appellant in the taxation process. Furthermore, following his retirement as Taxing Master, and while working as a barrister, Mr. Flynn was consulted by his son's firm in relation to the taxation of the respondent's costs. Faherty J. was of the view, given his post-retirement involvement in the taxation process, that it could not be said that Mr. Flynn's testimony was that of a truly independent expert witness. While she did not doubt his obvious expertise in the taxation of costs, his prior involvement had to bear on the weight to be given to his testimony.

58. Mr. Flynn stated in evidence that the present case was unusual in that the respondent, as the client, did not oppose the Bill of Costs and raised no issue as to quantum. In his view, the reduction in her costs at the taxation of 19.9% of the Bill of Costs was below the average reduction in costs at taxation for a recent five year period of approximately 30%. He testified that this was probably due to the fact that the respondent had not opposed the Bill of Costs, as had been noted by the Taxing Master.

59. Mr. Flynn stated that it was clear from the Taxing Master's Rulings that he had taken account of the respondent's email dated the 6th March, 2012, and his belief was that this email had a detrimental impact on the Taxing Master's decision and the level of reduction achieved. He stated that the sending of the email could never have been in the respondent's financial interest as it was totally contrary to what the taxation of costs ought to achieve, *i.e.* a favourable result for the respondent by way of a reduction in her costs. He testified that he also did not believe that her email of the 13th December,

2013, was in her financial interest, nor did he believe that her actions in relation to the review of the taxation were in her financial interest.

60. In her judgment, Faherty J. held that while it was debatable whether, absent the email of the 6th March, 2012, a greater reduction in the Bill of Costs would have ensued, she felt it must be taken by the Court that the Taxing Master applied the correct principles to the taxation process, particularly in circumstances where no fault was found with the taxation process, either by the High Court or the Court of Appeal. In the Court's view, there were a number of factors which influenced the respondent's opposition to the taxation of her costs, not least her desire to remove herself from litigation, something she made known to her solicitor, and what came across was her general weariness in the wake of the judicial separation proceedings. The respondent had testified that she was not pressurised into sending the emails of the 6th March, 2012 and the 13th December, 2013, and Faherty J. accepted her evidence in this regard. It was, nevertheless, unfortunate that the emails were sent in circumstances where the taxation process had been ordered by the High Court and could not be undone. The sending of these emails, clearly for the purpose of their being brought to the Taxing Master's attention, had only served to consolidate the appellant's view that he may be at risk in the future of a further application by the respondent for financial relief.

61. Notwithstanding the above, Faherty J. found that the respondent's opposition to having her legal costs taxed did not equate to a scenario that if the B.X. Trust were unwound she would be incapable of managing her finances and that, therefore, the retention of the Trust was the necessary or only proper provision in this case.

The respondent's payment of €260,000 to her solicitors in December 2011

62. The trial judge noted that, upon receipt of the first lump sum in August, 2011 the respondent's immediate action was to pay her solicitor the €200,000 on account, which the High Court judge had sanctioned in his order dated the 22nd July, 2011. As already set out above, her affidavit of discovery showed that within three months she had paid another €260,000 to her solicitors before the taxation process had commenced. The appellant asserted that this additional payment contravened the High Court order, and contended that the respondent's action in paying this sum at the time she did was indicative of her not being a financially minded person.

63. Faherty J. felt that the salient issue in this aspect of the case was the respondent's testimony that she wished to settle her costs, and where she was advised by her solicitors that in paying the €260,000 she would not be in breach of MacMenamin J'.s order. In that regard she was reasonably entitled to rely on her solicitor's advice, such that no question of her being in breach of the order could arise. The trial judge held that the payment of the €260,000 was not some reckless action on the respondent's part, as she made the payment upon the request of her solicitor and on the said advice, and on the understanding she would be reimbursed if she overpaid. While Faherty J. felt that it was unfortunate that the respondent was asked to pay €260,000 at that time, she accepted that the respondent did so only after being requested by her solicitors and having received the said advice. Accordingly, Faherty J. did not accept that the payment of the monies brought into question her financial mindedness, especially in circumstances where she understood that she would be reimbursed if she had overpaid.

The respondent's involvement in the High Court Review

64. The appellant queried how it could have been in the respondent's financial interest to seek to prevent him from challenging the Taxing Master's rulings, and later to make unhelpful submissions in the review. Faherty J. noted that, in the High Court review, the High Court duly awarded the respondent her costs and similarly an award of costs had been made in her favour by the Court of Appeal. Moreover, the respondent's right to participate in the review was upheld by the High Court and the Court of Appeal, and in those circumstances Faherty J. was not persuaded by the appellant's argument.

The Rutherfords issue

65. The facts regarding the Rutherfords' Bill of Costs, for work carried out by that firm of solicitors from 2006 to June, 2008, have been set out earlier in this judgment. The appellant's pursuit of this matter in the Court below was couched in terms of the respondent's acceptance of the €46,500 figure as claimed in the Bill of Costs, rather than the €12,705 figure sought by Rutherfords on the 17th June, 2008, as going to the question of her financial mindedness. Faherty J. held that this was in reality an attempt by the appellant to re-open matters upon which the Taxing Master had ruled in circumstances where he had the benefit of evidence from all relevant parties on the issue, as was clear from his Ruling No. 3. It was not now appropriate for him to seek to circumvent the findings of the Taxing Master, especially where the Court of Appeal had found that the Taxing Master had ample evidence on which to base his finding that there was no concluded agreement on the costs which accrued between 2006 and June, 2008. In any event, the Taxing Master had reduced the fee claimed to €25,000 plus VAT.

The respondent's failure to buy a house

66. The appellant contended that the respondent had acted contrary to her own financial interests in failing to purchase a house. He testified that in 2011 the respondent had the first lump sum of €1.65m, out of which the High Court had envisaged that she would purchase a house to the upper limit of €725,000. Despite this she had chosen to remain in rented accommodation, for which to date she had expended over €166,000 in rent, when she could have bought a house in the period 2011/2013 when the property market was favourable to her. An auctioneer called to give evidence by the appellant testified that the respondent could have bought a house similar to her then five-bed rented accommodation for between €440,000 and €580,000 in 2011-2013, and he believed that the period 2011-2013 was a good time to buy a house, given that it was in the depths of the property crash.

67. In her evidence, the respondent explained her failure to purchase a house since 2010 in the following terms. It had been her intention to buy a house following the judicial separation, however, that plan had to be put on hold when it became apparent that the expected income yields from the B.X. Trust were not forthcoming. Efforts were then set in train to try and vary the Trust, and her efforts to achieve the appellant's agreement to a variation (which were not successful) coincided with the taxation of costs process. In those circumstances, her instinct was to let the taxation process take its course (which she expected would take a few months) and then, once her legal costs bill settled, she would be in position to know what funds were left from her first lump sum of €1.65m. She testified that in circumstances where the taxation process had not finished, and where the B.X. Trust had not performed as expected, her decision not to purchase a house was the correct decision for her.

68. Faherty J. held that in all the circumstances of this case, especially the undisputed fact of the underperformance of the B.X. Trust thereby requiring the respondent to draw on her first lump sum to meet her living expenses, she did not find the respondent's decision to defer the purchase of accommodation to be unreasonable or suggestive that she was not a "financially minded" person or otherwise incapable of managing her affairs. While another person in her position may well have purchased accommodation, the respondent, by dint of her personal autonomy, made a different choice and that must be respected. This was not a case where the respondent was now seeking provision from the appellant to secure accommodation. She merely wished that unrestricted access to her own funds in order to manage her own affairs as she saw fit which, as she had testified, included a plan to buy a house if the B.X. Trust were unwound. She believed that once the B.X. Trust were unwound, thereby enabling those funds to be invested in a manner that would generate an annual income close to what the High Court had originally envisaged, her other resources could be utilised for the purchase of accommodation.

How the respondent had managed her finances

69. The trial judge next considered the respondent's financial mindedness under the heading of how she had managed her finances in recent years. She looked first at the large amount of monies paid by the respondent since 2006 to her solicitors in respect of legal costs, fees and outlay. She noted that part of these monies represented monies paid over to the respondent by the appellant on foot of cost orders made in her favour, and there were further such costs still to be recovered from the appellant.

70. In all of the above circumstances, while Faherty J. had reservations about the respondent's overall approach to her legal bills, she did not find that the respondent had

mismanaged her first lump of €1.65m in the manner in which she had conducted herself *vis-a-vis* the discharge of litigation costs. The fact that her judicial separation costs were ultimately found to be in excess of €462,000 (a figure that no doubt would make most people gasp) did not, however, stem from any mismanagement by the respondent, given that this figure was arrived at in a taxation process which had been upheld by the Court of Appeal. The vast portion of the other monies paid by the respondent to her solicitors to date had been or would be funded by the appellant by dint of his failed review of the taxation process, a review in which the respondent was entitled to participate.

71. The trial judge then turned to the respondent's management of her monies in arenas outside of the Courts. The respondent had testified that she enjoyed meeting her advisers in the Y investment firm with whom she had invested €750,000 of her first lump sum, and stated that she had been happy to take their advice. She stated that she was seeking the unwinding of the B.X. Trust in circumstances where it was not performing as originally envisaged by the High Court, and where the unwinding of the Trust would finally give her financial autonomy and the means of removing the appellant from her life. Faherty J. was satisfied that if the B.X. Trust were unwound then the respondent would take the appropriate advice, as she had done with regard to her personal investments.

72. As well as being a trustee of the B.X. Trust, Mr. C. was also the respondent's personal accountant. He testified that in his opinion the respondent had a very good understanding of financial matters, and he had no concerns regarding her ability to deal with her finances. Mr. A. also testified as to the respondent's financial capabilities and gave his opinion that the respondent had acted prudently in respect of the funds over which she had control. In his view, the returns received by her from the Y investment

were reasonable. While the €750,000 initially invested had been depleted to €533,000, this was accounted for by the respondent having to withdraw monies to cover her living expenses, given the deficits in the B.X. Trust yields.

73. Overall, the trial judge was satisfied from the respondent's evidence, and that of her experts, that she had dealt with the investments from her first lump sum in a reasonable and prudent manner. She noted the evidence as to the better returns generated by the Y investment when compared with the B.X. Trust. While she accepted that the latter's performance was related to its rigid investment structure, nevertheless the fact that the respondent was able to procure much better returns for her personal investment was, in the view of Faherty J., ample evidence that the respondent could manage her financial affairs.

74. In all the circumstances, Faherty J. could find no basis for the appellant's contention that the respondent was not a "financially minded" person. She stated that undoubtedly the respondent had made decisions along the way that some would not have made, but as an individual she had the right to make choices and indeed had to be allowed to take responsibility for her choices and bear the consequence if they do not work out. She also stated that the appellant, likewise, had made choices that perhaps others would query. For example, the expenditure (estimated at €800,000) by the BOF Trust (which she was satisfied the appellant controlled) on the construction of a very large edifice, in which the appellant resided, on lands for which there was no residential planning permission could well be said to raise questions about his financial mindedness. Moreover, his decision to pursue a review of taxation that went beyond the scope of the High Court order of July 2011, thereby leaving him exposed to a costs order against him if he was unsuccessful, as proved to be the case, could seem to many to have been unwise.

75. The trial judge then considered the respective financial positions of the parties.

The appellant's financial position

76. The appellant's most recent affidavit of means was sworn on the 14th March, 2019. It disclosed assets in his name totalling €363,265, comprising an apartment he had purchased in another jurisdiction (valued at €232,772), cash amounts in bank accounts, two motor vehicles and some furniture. It noted that he was settlor and beneficiary of the BOF Trust, the value of which was said to be €3.537m as of the 31st December, 2018. His annual income as of that date from the Trust was €255,609 (based on 2018 figures). It was made up of income distribution of €40,000 from the BOF Trust, capital distributions of €216,000 from that Trust and rental income from his overseas apartment of €5,609.

77. The appellant listed his liabilities as of the 31st December, 2018, at €2.575m, made up of a mortgage for the overseas apartment of €206,252, a contingent capital gains tax ("CGT") liability of €2.15m, a liability of €109,266 for the payment of the respondent's legal costs arising from his review of the taxation process, a liability of €71,463 in respect of a costs award to the respondent arising out of his appeal of the High Court review judgment, other legal costs of €14,235, with the balance made up of credit card liabilities and a Revenue bill. The appellant listed his monthly outgoings at €11,800.

78. When questioned about the BOF Trust, the appellant stated that it was set up in 1997/1998. At that stage the beneficiaries were the appellant, the respondent and the children of the marriage. The appellant described himself and his brother H. as vested beneficiaries of the Trust, and the three children of the marriage and other siblings of the appellant and the Red Cross as non-vested beneficiaries. He stated that he received

monies from the Trust upon sending a letter of request to the trustees following which monies were disbursed to him.

79. A document produced in evidence by the appellant dated the 11th May, 2019, referred to €3.537m as standing in the BOF Trust as of the 31st December, 2018. This sum was made up of cash of approximately €2.21m, loans of €713,699, an investment property valued at €550,000 (the appellant's residence in County X), and other assets valued at €63,130. The appellant testified that the €713,699 comprised loans given to his siblings on which interest was charged, although he did not know the applicable interest rate. One of these loans represented a sum of €500,000 to facilitate his mother staying in her family home, and he testified that this sum would be repaid to the BOF Trust when that family home was sold.

80. An issue arose at the trial about a claimed contingent CGT liability of approximately €4.3m, as appeared in a document produced by the appellant in the course of his evidence. This figure exceeded the €2,159,083 figure for the same contingent liability that had appeared in his affidavit of means sworn on the 14th March, 2019. The appellant testified that this liability might arise if his domicile in 2006-2007 were to be found by the Revenue to be in Ireland, although his belief was that his domicile was that of another jurisdiction. The appellant asserted that neither he nor the BOF Trust had the means to meet a Revenue demand for a sum of approximately €4.3m.

81. Faherty J. held that it was difficult for the Court to come to any definite conclusion on this issue of a possible contingent CGT liability. She could not, however, rule out the possibility of such a liability arising. That being said, it seemed to her that the appellant had overstated his concern in this regard given the passage of time that had elapsed since provision was made by the High Court for such contingency, and

where there had been no demand made by Revenue, or indeed any inquiry made by Revenue as regards the appellant's domicile in 2006/2007.

82. There was a dispute between the parties as to the market value of the premises and lands in County X in which the appellant resided, which property was owned by the BOF Trust. The appellant's valuer valued the lands and buildings at €550,000, while the respondent's valuer put a value of €1.2m on the property. Faherty J. felt that while it was difficult for the Court to put a value on that property, she was inclined to the view that the valuation put on the property by the appellant might be somewhat understated but perhaps not substantially so. Allowing for some minor uplift in the property market value of the property, she would value the total assets in the BOF Trust as being in the region of €3.75m.

The respondent's financial position

83. The respondent's affidavit of means sworn on the 13th March, 2019, indicated that her net worth was €1.92m inclusive of her Y investment lump sum (€554,253), the B.X. Trust (€1.371m), a share in her late father's house valued at €47,290 (not immediately realisable), legal costs due to her from the appellant and further anticipated costs already awarded to her, together with other cash assets. Her net income was set out as €27,279 (inclusive of the yields from her Y investment and the B.X. Trust income yield and capital disbursement), and she stated that she had monthly outgoings of €6,956.

84. The respondent's liabilities largely related to the costs accrued to the 14th March, 2019 (estimated at €190,000) in respect of the within proceedings, and she expected her total costs to be in the region of €400,000. She had no pension.

Proper provision for the parties

85. The trial judge then turned to the factors set out in s.20(2)(a) – (l) of the Act, being the factors which the Court must have regard to in deciding what is "proper provision" for the purposes of s.5(1)(c) of the Act. Again, the factors most relevant to the present appeal are dealt with below.

86. As regards financial resources, as referred to in s.20(2)(a), Faherty J. was satisfied that both parties were in the fortunate position of having relative financial security. However, the respondent's capacity to benefit from the B.X. Trust (which comprised the greater proportion of her €1.92m net worth) was being hampered by the Trust's under performance. The deficiencies in the Trust structure had been set out by her earlier in her judgment, and she had found that the B.X. Trust as presently structured was not delivering the income or capital distribution which the High Court had envisaged back in 2010. As a result of the Trust's underperformance, the respondent had to withdraw significant sums from her Y investment in order to meet her living expenses and other liabilities. If matters continued as they were, the respondent's resources would continue to diminish. There was therefore a compelling case for the B.X. Trust to be revisited, be that by way of amendment thereof or by its dismantling.

87. Section 20(2)(b) required the Court to have regard to the financial needs, obligations and responsibilities which the parties had or were likely to have in the future. The respondent's immediate financial obligation was her legal costs deriving from these proceedings, and Faherty J. was satisfied that these costs might impact upon her future ability to buy a house. The appellant's financial obligations comprised a mortgage on his overseas apartment, and costs liabilities relating to his failed challenges to the taxation process. He also had a CGT contingent liability, but for reasons already set out she was not persuaded that she should give great weight to this contingency.

88. The appellant relied strongly on the provisions of s.20(2)(i), which requires the Court to have regard to the conduct of each of the spouses, if that conduct is such that in the opinion of the Court it would be in all the circumstances of the case be unjust to disregard it. He contended that the respondent's approach to the taxation of her judicial separation costs and her handling of costs generally constituted conduct which must be taken into account by the Court when considering proper provision. For example, he contended that her failure to advise him in December, 2011, or at any point during the taxation process, that she had paid a further €260,000 to her solicitor over and above the €200,000 on account permitted by the High Court, went to her conduct for the purposes of this provision.

89. Faherty J. was satisfied that the appellant was fundamentally misguided in seeking to assert that the respondent's opposition to the taxation process or the making of the December, 2011 payment constituted conduct to which s.20(2)(i) relates. Whatever label one might put on her actions, they did not constitute "gross and obvious conduct" in the sense articulated by Irvine J. in *Q.R. v. S.T.* [2016] IECA 421.

90. The appellant also pointed to different versions given by the respondent regarding whether she had agreed costs with Rutherfords for the period 2006 to June, 2008 as relevant conduct for the purposes of s.20(2)(i). Faherty J. was satisfied that the case made by the appellant on this issue under the guise of "conduct" constituted a concerted attempt by him to re-open issues which had already been conclusively determined against him in the taxation process, findings which had been upheld by the High Court and on appeal by the Court of Appeal. She rejected the submission that the respondent's actions in and around the Rutherfords issue met the threshold of "gross and obvious" conduct.

91. The appellant also argued that the respondent and her solicitors misled the Taxing Master, and the High Court in the review of taxation, in relation to how the fees of Z & Partners were discharged, and that this was also conduct under the relevant provision. As set out earlier, this issue related to how the Taxing Master was advised that the Z & Partners fees had been paid directly by the respondent, but it later transpired that these fees had been paid from the respondent's client account. The respondent testified that she understood the reference to "directly" as not meaning that the fees had been paid by her directly, but rather they had been paid directly out of her client account.

92. Faherty J. was not satisfied that the respondent's handling of the Z & Partners fees met the threshold of "gross and obvious" conduct. However, Faherty J. was also of the view that the respondent, having decided that she wished to make a submission in the High Court review of taxation (as was her entitlement as found by the High Court and the Court of Appeal), had an obligation to set out exactly how the fees were discharged. In the overall scheme of things, while Faherty J. attached some weight to her failure to set the record straight, given the amount of money involved (€36,656), she did not believe that the issue should be the deciding factor in deciding whether proper provision required the retention of the B.X. Trust.

The unwinding of the B.X. Trust as proper provision?

93. Having regard to the entirety of the evidence and submissions in the case, and the factors to which the Court must have regard, Faherty J. was satisfied that proper provision for the respondent required the winding up of the B.X. Trust. She had already found that the evidence of the expert witnesses established that the Trust had not performed in the manner originally envisaged by the High Court. Indeed, the appellant did not dispute the underperformance of the Trust, albeit he laid the blame in part on

the removal from the Trust of the capital distributions flexibility which Schedule A of the High Court order had allowed for.

94. In reaching her decision that the B.X. Trust should be dismantled, the Court had regard to an open "settlement offer" which the appellant made to the respondent on the 19th February, 2019, proposing changes to the B.X. Trust. The salient features of this settlement offer included a proposal that capital from the Trust would be returned in equal parts to the respondent over the next twenty years, thereby providing her with an annual tax-free capital distribution of €69,180. In addition, the respondent would receive the annual income generated by the Trust investments each year. The appellant proposed a number of changes to the "Powers of Investment" set out in the Trust Deed. He also proposed that the proviso at Clause 16.1 of the Trust deed, which required his consent to the variation of the Trust terms, be removed.

95. Faherty J. held that even accepting, as she did, that the capital distribution provisions would be more flexible if the appellant's proposal were accepted, it remained the case that it was the respondent's desire that the B.X. Trust would be wound up. In circumstances where she was now a certain age and wished to have control of her finances, and in circumstances where the evidence established that she had adopted a prudent approach in the investments she herself had made with the monies over which she had control, and where the Court had rejected the appellant's arguments that she was not a "financially minded" person, Faherty J. did not believe that the solution outlined in the appellant's settlement offer could be said to be proper provision in this case.

96. As already set out, the appellant's overarching argument in seeking to keep the respondent confined to a Trust structure was his fear that if the B.X. Trust was unwound, the respondent might dissipate her assets, and that at some unspecified time

in the future she would return to Court seeking further financial provision from him. While the appellant had this concern, the trial judge accepted the submission from counsel for the respondent that if this contingent liability argument were to prevail in relation to provision in every case, no dependent spouse could ever be entrusted in their own right with money or property. She accepted counsel's submission that this had never been the approach of the Irish Courts to the issue of proper provision.

97. The trial judge was satisfied that the appellant's apprehension was misconceived when one considered the *dicta* of Hardiman J. in *W.A. v. M.A.* [2004] IEHC 387. In that case, a separation agreement executed between the parties made provision for the equal division of assets and property. Post the separation agreement, the husband's financial circumstances improved significantly as a result of careful investment, but the wife's financial situation worsened. In later divorce proceedings brought by the husband, the wife counterclaimed for financial relief most of which was refused by the High Court on appeal. In refusing relief, Hardiman J. attributed the husband's prosperity to his "shrewd investment" and found that "the wife's worsened position is due to the fact that she did not work her substantial holding in an assiduous manner". He went on to find the wife's difficulties "wholly of her own making and… the husband has contributed to them in no way whatsoever. Equally the wife contributed to the husband's present state of prosperity in no way whatsoever". Accordingly, Hardiman J. did not believe it proper to make any ancillary order against the husband. In the view of Faherty J., given the likely approach of the Courts to the reckless or wanton dissipation of assets in a post-separation or divorce scenario, the appellant had not made out a case for the retention of the B.X. Trust based on a feared contingent liability to the respondent.

98. Even allowing for the legal impossibility of making provision for a "clean break", Faherty J. found that the appellant's case for the retention of the B.X. Trust had not been made out, and for all the reasons already set out by her, she was satisfied that proper provision in this case required the dissolution of the B.X. Trust. She was also satisfied that the respondent had made a compelling case that her future personal prospects required that she be permitted to plan her own life, without oversight from the appellant, or indeed without a Trust structure.

Proper provision: the appellant's costs

99. Finally, the trial judge considered the respondent's other claim, namely that proper provision would not be made for her unless a lump sum payment to cover her costs of these proceedings, estimated at €400,000, were awarded to her, pursuant to s.13 of the Act. Her counsel submitted that if she simply obtained an order for costs in the usual way, the appellant would use the taxation process to continue to litigate his grievances against her and her legal advisers and so delay her financial independence. Faherty J. accepted that the respondent was worn down by the prolonged taxation process in the judicial separation proceedings. In those circumstances, if there was to be some provision made for her costs, Faherty J. was satisfied it should be by way of a lump sum order, and she then turned to the merits of the application.

100. The trial judge was satisfied that the appellant was written to by way of open correspondence on the 9th June, 2017, and advised that the respondent's sole requirement in these proceedings was the unwinding of the B.X. Trust and the payment out to her of her own monies. The respondent had achieved that objective in the within proceedings. In those circumstances, and noting the appellant's assertion at the trial that if the B.X. Trust was dissolved by the Court that could sound against him in costs,

and the Court being satisfied that a good portion of the hearing was taken up by the appellant seeking to go behind clear findings made by the High Court and the Court of Appeal in the review of taxation, the trial judge felt that some provision had to be made to assist the respondent in discharging her costs. Moreover, at every turn, the appellant had clung to the notion that the respondent was not a financially minded person, which the Court had rejected.

101. Albeit that this case was an "ample resources" case, and while mindful that such cases should not ordinarily call for a costs order, Faherty J. was satisfied, in all the circumstances of the case, that proper provision for the respondent required a lump sum order to assist in the discharge of her legal costs. However, she was not satisfied that the entirety of her costs (estimated at €400,000) should be visited on the appellant by way of a lump sum award. It appeared to her that it was a near certainty that when the respondent was furnished with a Bill of Costs in these proceedings, she would not seek to tax them on a solicitor/own client basis, and indeed it was unlikely that she would even question them. Faherty J. questioned why the entirety of her costs bill should be visited on the appellant by way of a lump sum order, when the likelihood was that the respondent would not question her legal costs.

102. Therefore, Faherty J. did not believe that proper provision for the respondent required the making of an order granting her a lump sum to cover the full amount of her costs. In all the circumstances of this case, she felt the justice of the matter (taking account also of the manner in which the respondent dealt with the Z & Partners fees in the taxation) would be met by a lump sum award of €160,000 to the respondent, by way of contribution to her costs. Faherty J. had no doubt that her costs would be considerably more than the lump sum to be awarded, but she felt that the respondent must take responsibility for her unquestioning approach when it came to her legal bills.

She noted that it was, of course, open to her to have her costs taxed on a solicitor/own client basis, without any involvement on the part of the appellant.

The Winding up of the B.X. Trust

103. The High Court refused an application for a stay on the Court's order, including the order for the winding up of the B.X. Trust, and the appellant did not appeal the refusal of a stay. The B.X. Trust was then wound up in November 2020, with all monies transferred out to the respondent. It was argued in the respondent's written submissions that this fact rendered elements of the appeal moot, but the mootness argument was not really pressed during oral submissions. Irrespective of mootness, this fact is clearly of significance in this appeal, as the appellant is required to persuade the Court not only that he has a good ground of appeal but also that it is necessary and/or appropriate that a new trust structure should be established as a result.

Notice of Appeal and Submissions on Appeal

104. The appellant appealed to this Court by a notice of appeal dated the 11th December, 2020, on eleven stated grounds. In his written submissions, however, he limited the scope of his appeal to four grounds which can be summarised as follows:

(i) Whether the conduct of the respondent in relation to the Rutherfords costs issue constitutes "gross and obvious" conduct for the purposes of s.20(2)(i) of the Act;

(ii) Whether the trial judge was correct to find on the evidence that the respondent was a "financially minded" person in the light of her approach to her participation in the taxation of costs process;

(iii) Whether the trial judge erred in law in finding that the appellant had not made out a case for the retention of the B.X. Trust based upon a concern as to a contingent liability arising from a potential claim by the respondent for further provision in the future; and

(iv) Whether the trial judge erred in finding that the payment of a sum by the respondent over and above the sum of €200,000 referred to in the order of the High Court dated the 22nd July, 2011, was not a factor which the Court should give weight to in assessing whether the B.X. Trust should be dismantled.

Ground (i): The Rutherfords Costs Issue

105. The appellant submits that the respondent knowingly made written submissions to the High Court review of taxation, and on appeal to the Court of Appeal, in relation to the Rutherfords costs issue that she knew to be untrue. He refers in particular to her evidence in the judicial separation hearing in 2010 that she had agreed to a figure of around €12,000 for the work in question, and states that her evidence before Faherty J. was that to her memory she had written to Mr. Alexander, the then managing partner of Rutherfords, agreeing to the suggested fee of €10,500 plus VAT as set out in his letter dated the 17th June, 2008. Yet at the High Court review of taxation, it is stated, she resiled from this evidence and submitted that at no time did she understand that a concluded agreement for €12,705 had been entered into with Rutherfords.

106. The appellant refers to the requirement that the Court shall have regard to the conduct of each the parties, and he notes how Irvine J. held in the *Q.R.* case that only conduct that is "gross and obvious" is material to the Court's consideration of proper

provision. He submits that the respondent's conduct here can be construed as being "gross and obvious" on the basis firstly that she intentionally misled the Courts in her review of taxation submissions, and secondly that as a consequence he incurred a substantial financial loss in having to pay her costs of those proceedings, which has impacted on his capacity to make proper provision for her.

107. The respondent submits that the appellant is impermissibly asking this Court to overturn the outcome of the review of taxation proceedings, including the award of costs against him, in the light of the respondent's evidence in these divorce proceedings. Without prejudice to same, the respondent rejects out of hand the allegation that she misled, or made false submissions to, the Courts in the review of taxation proceedings. She submits that her evidence during these proceedings confirms the salient facts surrounding the Rutherfords' fees, *i.e.*, the respondent did not recall discussing the fees actually sought by Rutherfords with Mr. Simms, and there was no binding agreement in place. The respondent also notes that the Rutherfords fee issue formed only one part of the appellant's wide-ranging challenge to the Taxing Master's rulings, and that the Courts also rejected several other grounds of challenge to same.

108. As regards the conduct factor, the respondent submits that the appellant's claims that her attitude to the Rutherfords letter amounted to gross and obvious conduct are wholly unsustainable and utterly ridiculous, and that the evidence does not remotely support the contention that she set out to (or did) mislead the High Court or the Court of Appeal. Even if the respondent's conduct was considered by the High Court to have been gross and obvious (which the respondent submits it was not), that finding would not of itself be the sole determinant of whether the Trust structure should be reinstated. Rather, any such finding would sit among the other findings of fact made by the trial judge in relation to the factors set out in s.20(2) of the Act. The respondent also submits

that, even on its own terms, it is impossible to see how the Rutherfords fee issue could have any bearing on the appellant's ability to provide proper provision to the respondent, where the only provision sought by her was the unwinding of the B.X. Trust and the release of her own monies.

Ground (ii): "Financially Minded Person"

109. The appellant submits that the trial judge erred in rejecting his arguments that the respondent is not a financially minded person. Firstly, he states that she erred in finding that the legal costs accountant, Anthony E. McMahon, had been retained for the respondent in the taxation of costs. He refers to having brought a motion under the slip rule, and the trial judge having corrected this error in her subsequent Ruling dated the 13th November, 2020, by finding that in fact they had been retained by the respondent's solicitor to defend the Bill of Costs. Secondly, he argues that the trial judge failed entirely to consider the significance of the respondent's evidence that she was advised by her solicitor that she had to be represented at the review of taxation proceedings. He refers to the uncontroverted evidence of Mr. Flynn that she did not have to be represented at those proceedings, and his further uncontroverted evidence that the respondent's written submissions to the review of taxation were against her own financial interests. Finally, he points to the trial judge's statement that it is a near certainty that the respondent will not seek to have her divorce costs taxed, despite the potential for a significant saving on taxation, and submits that this is clearly in direct conflict with the finding that she is a financially minded person.

110. The respondent submits that the appellant's submissions under this ground amount to no more than a rehash of the objectionable proposition that his ex-wife simply cannot be trusted with her own money or to manage her own financial affairs.

As regards the slip rule matter, it is submitted that the amendment in question does not have any bearing whatsoever upon the findings of the Court in relation to the taxation process, or the necessity in the interests of justice to unwind the B.X. Trust. As regards the representation of the respondent in the review of taxation, she argues that the appellant's submissions again amount to an impermissible collateral attack on the Court of Appeal decision. As regards the costs of the divorce proceedings, it is stated that following the release of the funds from the B.X. Trust after the High Court decision, the respondent discussed and entered into an agreement with her legal advisers in relation to the costs of the divorce, securing a reduction in her fees. In circumstances where agreement was reached, there was no necessity for adjudication.

Ground (iii): Contingent Liability

111. The appellant submits that the trial judge erred in law in finding that, in the event of the B.X. Trust being wound up, he does not have a reasonable concern as to a contingent liability arising from a potential claim by the respondent for further proper provision at any time in the future. As regards the trial judge's citation of the *W.A.* case, he states that she failed to note that although the wife was unsuccessful in securing a further lump sum from the husband, she was successful in securing a periodic maintenance order. He submits that should the respondent fully dissipate her lump sum funds through mismanagement, then she could make a claim for further proper provision under s.13 of the Act. He relies on the Court of Appeal decision in *C.C. v. N.C.* [2016] IECA 410, in support of his argument that whereas the Courts may be reluctant to make further lump sum orders in post-divorce applications, it is clear that they may entertain further applications for maintenance.

112. In the respondent's submissions the jurisdiction to revisit the issue of proper provision at a later stage in appropriate cases is acknowledged. However, it is argued that the theoretical possibility that the respondent could at some future stage seek further provision from the appellant as a result of financial mismanagement cannot justify the reconstitution of the Trust structure. The respondent submits that she is more than capable, as an adult with full capacity, of managing her own financial affairs and making decisions in relation to her own welfare. She considers the appellant's paternalistic insistence that she is not financially minded, and is somehow incapable, to be abusive and sexist. It is submitted that the trial judge was entitled to find on the evidence that the respondent had made a compelling case that she should be permitted to plan her own life without a Trust structure, and that there is no basis upon which this Court should set aside her decision.

Ground (iv): The Payment of Fees over €200,000

113. The appellant refers to the additional payment by the respondent of a further €260,000 to her solicitors in December, 2011, over and above the €200,000 which the High Court had directed could be paid by the order dated the 22nd July, 2011. He submits that this additional payment amounted to a breach of an undertaking given by the respondent's solicitor on behalf of his client to the High Court, and also a breach of the subsequent High Court order. It is submitted these are matters that the Court should have given weight to in assessing whether the respondent was financially minded, and whether a costs order against the appellant was just in all the circumstances.

114. The respondent notes that the order of the High Court was not expressed in terms of any undertaking given by the respondent's solicitor, as repeatedly suggested by the appellant. She submits that the trial judge found on the evidence that the respondent had made the additional payment on the advice of her solicitor that she

would not be in breach of the High Court order in so doing. The payment was made on the understanding that she would be reimbursed if she had overpaid, and in fact her costs taxed at a sum which roughly equated to the total fees paid by her at that point in time. In these circumstances the trial judge was entitled to conclude that the payment of the €260,000 was not a factor which should weigh in assessing whether the B.X. Trust should be dismantled or the respondent's financial mindedness.

Decision

The First Ground

115. The appellant's first ground of appeal relates to the Rutherfords costs issue, and the respondent's conduct in making what the appellant describes as untrue or misleading written submissions to the High Court and the Court of Appeal in relation to a possible agreement on costs with Rutherfords for the period 2006 to June, 2008. The appellant contends that the trial judge should have had regard to this conduct, pursuant to s.20(2)(i) of the Act, when considering proper provision.

116. It is important to note that s. 20(2)(i) of the Act requires the Court to have regard to the conduct of each spouse only "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". In the present case it appears that the appellant's objection is directed not to the level of financial provision that has been made for the respondent in the High Court, but rather to the nature of the order directing the payment out of the Trust funds to the respondent and the winding up of the Trust. That being so, it is difficult to see how any alleged conduct of the respondent bears on that question, and what any finding of misconduct would have led to in concrete terms.

117. Leaving that point to one side for the moment, the facts relating to the Rutherfords costs issue have been set out in some detail above, and it is unnecessary to repeat them in any detail here. In essence, the appellant states that in the judicial separation hearing in 2010 the respondent testified as to having agreed a figure of around €12,000 for the work in question, yet at the review of taxation in the High Court she resiled from this evidence, submitting that at no time did she understand that a concluded agreement for such an amount had been entered into with Rutherfords.

118. In his written submissions the appellant argued that the respondent's evidence in the Court below was that she understood she had an agreement with Rutherfords for around €12,000 from the time she accepted their offer in June, 2008. In her written submissions, however, the respondent stated that while there was some slight confusion on the point, it would appear that she did not in fact respond to the Rutherfords letter to accept the offer made. She also stated that it was common case that Mr. Alexander confirmed in his evidence at the taxation that he did not in fact hear back from the respondent, and this would tend to contradict any submission by the appellant that a concluded agreement was entered into.

119. It is important to note that the trial judge did not make any finding that the respondent had made untrue or misleading submissions during the High Court review as to the absence of a concluded agreement with Rutherfords. Faherty J. stated at para. 231 of her judgment as follows:

> "[The appellant] submits that [the respondent's] evidence to this Court was that she had in fact sent a letter to Rutherfords accepting the terms of their 17th June, 2008 letter. I have already observed however that while the respondent testified that she believed she had sent a letter to Rutherfords, ultimately, she was not sure. She also testified that she accepted Mr. Alexander's evidence at the

taxation process that the proposal he had made in the June, 2008 letter was overtaken by the agreement reached between Mr. Rutherfords and Mr. Simms when the latter left Rutherfords to set up DSS."

120. The trial judge went on to find, at para. 233 of her judgment, that the case being made by the appellant in relation to this issue under the guise of "conduct" constituted a concerted attempt by him to re-open issues which, as she had earlier set out, had already been conclusively determined against him in the taxation process, findings which had been upheld by the High Court and on appeal by the Court of Appeal. The Taxing Master it may be recalled, had allowed the sum of €30,150 (inclusive of VAT) for the work in question. In doing so he rejected a submission by the appellant's legal costs accountant that the respondent's evidence in 2010 was that she had agreed costs at €12,705 with Rutherfords, and that this should be the maximum that should be awarded at taxation for the work in question. The Taxing Master stated that he was informed that the file was transferred on the basis that the value transferred with it, and he was prepared to accept that this was the case and that the respondent's recollection was "inaccurate". As noted by the trial judge, these findings were subsequently upheld on review by the High Court, and on subsequent appeal by the Court of Appeal.

121. It was common case between the parties that only conduct which is "gross and obvious" is material for the purposes of s.20(2)(i) of the Act, as per Irvine J. in *Q.R.* In this case the trial judge rejected the appellant's submission that the respondent's actions in and around the Rutherfords issue met the threshold of gross and obvious conduct, and, in my opinion, she was correct in making this finding.

122. In my opinion the evidence fell well short of establishing that the respondent set out to or did mislead the High Court and/or the Court of Appeal as to the alleged agreement on costs with Rutherfords. While her submissions on this issue could be

viewed as inconsistent with or as contradicting her earlier evidence to the High Court in 2010, and also as inconsistent with and/or as contradicting aspects of her evidence to the Court below in these proceedings, that does not mean that the trial judge was obliged to find that those submissions were incorrect, let alone false or misleading. It is important to note that there was other evidence which supported the respondent's submissions as to the absence of any concluded agreement with Rutherfords, such as the evidence of Mr. Alexander that he never heard back directly from the respondent in response to his letter of the 17th June, 2008. It was the overall evidence which led to the Taxing Master's ruling on this issue, which was subsequently upheld by the High Court and on appeal by the Court of Appeal. In the circumstances, I would reject this first ground of appeal.

The Second Ground

123. The appellant's second ground of appeal is that the trial judge erred in finding that the respondent was a "financially minded" person, having regard to a number of matters. Firstly, he submits that the trial judge made an error in stating that the legal costs accountants, Anthony E. McMahon, had been retained by the respondent for the taxation of costs, whereas in fact they were retained by her solicitors, DSS. The trial judge accepted this argument in her subsequent Ruling dated the 13th November, 2020, and amended the reference in para. 66 of her judgment accordingly. The appellant argues that, despite this error, the trial judge "declined to revisit any of the findings in her judgment that derived from this accepted error". The appellant does not, however, spell out which findings he says derived from this error, which I would view as a minor technical error in the context of the very unusual taxation process in this case, and it is difficult to see what findings are being referred to. In any event, the trial judge herself

confirmed that the amendment to para. 66 of her judgment did not in any way impinge on the findings which the Court had made, in particular the Court's finding that proper provision in this case required the dissolution of the B.X. Trust. As set out in her judgment, Faherty J. did not accept the various arguments put forward by the appellant that the actions of the respondent *vis-a-vis* the taxation process impinged on her ability to manage her financial affairs, irrespective of who had retained the legal costs accountants in question.

124. Secondly, the appellant argues that the trial judge failed entirely to consider the significance of the respondent's evidence that she was advised by Mr. Simms that she had to be represented at the review of taxation proceedings, in the light of the evidence of Mr. Flynn that the respondent did not have to be represented at those proceedings, as she had not been an active party to the taxation process before the Taxing Master. The appellant also points to the further uncontroverted evidence of Mr. Flynn that the respondent's written submissions to the review of taxation were against her own financial interests. It is clear, however, from the High Court judgment that Faherty J. did consider this evidence, in conjunction with other relevant evidence. The trial judge noted that the respondent had been awarded the costs of the review of taxation before both the High Court and the Court of Appeal, and that her right to participate in the review was upheld by both Courts. In her ruling, the trial judge confirmed that the Court did not accept the appellant's contention that the involvement of the respondent in the review of the taxation process was evidence of an alleged lack of financial mindedness. In my opinion, the trial judge was correct to so find, given that any client is *prima facie* entitled to participate in a solicitor/own client taxation of costs, and given that, on the unusual facts of this case, the respondent's right to participate in the review

of taxation was upheld by both the High Court and the Court of Appeal, and both Courts duly awarded her the costs arising from her participation.

125. Thirdly, the appellant points to the trial judge's comments as to how the respondent would deal with her legal costs in these proceedings and submits that this anticipated approach of the respondent was clearly in direct conflict with the trial judge's finding that the respondent is a financially minded person. The trial judge did not consider the respondent's approach to these costs as one of the headings under which she considered the issue of the respondent's financial mindedness, perhaps one might guess because the respondent's potential approach to same involved elements of speculation. The trial judge did, however, state that it appeared to her a near certainty that when the respondent was furnished with a Bill of Costs in these proceedings, she would not seek to tax them on a solicitor/own client basis, and the trial judge felt it unlikely that the respondent would even question them.

126. It is important to note that taxation of solicitor/own client costs is relatively uncommon, and only a small proportion of such bills are referred to taxation. Many clients will trust their solicitors in these matters, though many others will negotiate their bills. The fact that the respondent neither sought to negotiate nor to refer her earlier bills to taxation is not necessarily an indication of poor financial acumen, but may be simply an indication of the trust she reposed in her solicitor.

127. As set out above, the written submissions on behalf of the respondent suggest that matters panned out somewhat differently, and that after the High Court order and the release of the funds from the B.X. Trust the respondent entered into an agreement with her legal advisers in relation to the costs of the divorce proceedings, securing a reduction on her fees. Leaving that to one side, taken on their own the trial judge's comments do appear to indicate that she regarded the respondent's likely approach on

this issue as displaying some potential lack of financial mindedness. However, notwithstanding same, it is clear that it was the overall evidence under a number of different headings that led to the trial judge's conclusion that, "in all the circumstances", she could find no basis for the appellant's contention that the respondent was not a financially minded person. She relied in particular on the fact that the respondent was able to procure much better returns from her first lump sum investment than the return which the B.X. Trust yielded, while noting that the latter's performance was related to its rigid investment structure.

128. It is of course insufficient for the appellant, or any appellant, to merely highlight one aspect of the evidence or the trial judge's comments, and then to say that this evidence or comment is in conflict with or inconsistent with a particular finding made by the trial judge. It is necessary to go further and establish that the evidence or comment had a causative effect on the correctness of the finding in question, *i.e.* that the finding must be viewed as incorrect in the light of that conflict or inconsistency. In my opinion the appellant has failed to establish any such causative effect here, as there was ample other evidence to justify the trial judge's finding as to the respondent's financial mindedness.

129. It is important to note that the expression "financially minded" is not some statutory concept, but was simply an observation made by a previous High Court judge which appears to have been intended to convey that the respondent might not manage her assets optimally, if she had control of them. It cannot be regarded as a finding that the respondent lacked capacity to manage her affairs, such as might warrant her admission to wardship. In the present case the trial judge heard considerable evidence from the respondent and also from third parties, including from Mr. C. and Mr. A., as set out at para. 72 above. Both of these witnesses gave evidence which led to the trial

judge's conclusion that the respondent was well capable of managing her assets (with appropriate advice), and there is no basis for overturning that finding.

130. In the course of his oral submissions the appellant made an additional argument related to this ground of appeal. He argued that the principle of *res judicata* arose on foot of the High Court's finding in the judicial separation judgment back in 2010 that the respondent was not a financially minded person. He cited the case of *Right to Know CLG v. An Taoiseach* [2021] IEHC 233, where Simons J. referred to the form of *res judicata* known as issue estoppel, whereby a party will generally be precluded from relitigating an issue of fact or law which has previously been determined against them in earlier proceedings. The determination of that issue must have been necessary to the outcome of the earlier proceedings, *i.e.* the finding on the issue must have been fundamental rather than merely collateral or incidental. The appellant argued that the High Court finding was fundamental to the B.X. Trust being set up. He also cited authorities on the principle of precedent and Courts of co-ordinate jurisdiction, in questioning the departure by the trial judge from the previous determination made by the High Court.

131. In my opinion the appellant's submissions regarding *res judicata* and precedent are misconceived. The issue before the High Court in 2010 was what was proper provision for the respondent as of 2010, and within that overall issue he made an observation as to his view of the respondent's financial mindedness as of that time. In my view, such an observation was not such as to be capable of giving rise to a res judicata or issue estoppel. Furthermore, and in any event, the issue before Faherty J. in 2020 was a different issue, *i.e.* what was proper provision for the respondent as of 2020? This included consideration of her capacity for financial management, but as of 2020

and not as of 2010. I agree with the following comments of the trial judge (at para. 113):

> "To my mind, the appellant's reliance on a view expressed…almost ten years ago is misguided. The view arrived at…was against the backdrop of a particular factual matrix and cannot be the decisive factor some ten years hence in considering whether the B.X. Trust should be unwound. What this Court must have most regard to are events subsequent to the parties separation and the relevant financial considerations."

The Third Ground

132. The appellant's third ground of appeal is that the trial judge erred in law in finding that, in the event of the B.X. Trust being wound up, the appellant does not have a reasonable concern as to a contingent liability arising from a potential claim by the respondent for further proper provision at any time in the future. The trial judge acknowledged that the appellant had this concern, but was satisfied that his apprehension was misconceived in the light of the decision in *W.A.* As stated above, in that case the High Court was dealing on appeal with divorce proceedings over eleven years after the parties executed a separation agreement, which divided their property and assets approximately equally between them. In the intervening years the applicant husband's financial situation became very strong, whereas the respondent wife's situation worsened. The High Court refused the respondent certain ancillary orders, including a property adjustment order, a pension adjustment order and a financial compensation order. In his judgment in *W.A.*, Hardiman J. stated that certainty and finality were desirable objectives, which were particularly attainable where the parties' resources were substantial, and this must colour the manner in which the Courts had

regard to the terms of the separation agreement which sought to achieve such finality. He recorded his view that any difficulties which the wife now experienced were wholly of her own making, and that the husband had contributed to them in no way whatsoever. Equally, the wife had contributed to the husband's present state of prosperity in no way whatsoever.

133. In his submissions the appellant acknowledged the outcome in *W.A.*, but argued that the trial judge had failed to note that although the respondent was unsuccessful in securing certain ancillary orders from the applicant, a periodic maintenance order in her favour in the sum of €150 per week was made by the Circuit Court. He submits that should the respondent fully dissipate the B.X. Trust funds through mismanagement, then she could make a claim for periodic maintenance under s.13 of the Act.

134. The trial judge held that even allowing for the legal impossibility of making provision for a "clean break" (hence the appellant's concern that the respondent may return in the future to seek further provision, and hence his insistence on the retention of the B.X. Trust to forestall such a possibility), she found that the appellant's case for the retention of the B.X. Trust had not been made out and, for all the reasons already set out by her, she was satisfied that proper provision in this case required the dissolution of the B.X. Trust. In my opinion the trial judge had ample credible evidence to justify her finding that proper provision in this case required the dissolution of the B.X. Trust. I accept the respondent's submission that the theoretical possibility that the respondent could at some future stage seek further maintenance from the appellant as a result of financial mismanagement cannot justify the reconstitution of the Trust structure, in circumstances where the evidence in the Court below established that the respondent had adopted a prudent approach in the investments she herself had made with the monies over which she had control, and where I agree with the High Court's

rejection of the appellant's arguments that the respondent is not a financially minded person.

The Fourth Ground

135. The appellant's fourth ground of appeal is that the additional payment by the respondent of €260,000 to her solicitors in 2011 was a breach of an undertaking given by her solicitor on her behalf to the High Court in 2011, and was a breach of the order of the High Court dated the 22nd July, 2011, and that these breaches are matters of the utmost gravity to which the High Court should have attached weight in assessing whether the respondent was financially minded, and whether a costs order against the appellant was just in all the circumstances.

136. As regards the alleged breach of an undertaking given by the respondent's solicitor on her behalf, in his oral submissions the appellant referred to the transcript of the hearing before the High Court on the 22nd July, 2011, where he suggested to the judge that the taxation of the respondent's costs need not hold up any payment of a lump sum to her "as long as there is an undertaking from the [respondent] that she will not discharge any of her legal costs from these funds until the Taxing Master had declared…what is actually owing". While the High Court judge then asked counsel for the respondent "do I have that undertaking?", it appears that no formal undertaking was ever in fact given by her on behalf of the respondent, and the order of the High Court does not record the giving of any such undertaking.

137. As regards the alleged breach of the High Court order, the order recited that "the Court doth direct that the sum of €200,000 can be paid to [the] legal advisers for the appellant on account without prejudice to the rights of either of the parties *vis-a-vis* the taxation". The trial judge decided on this issue as follows:

> "143. To my mind, the salient issue in this aspect of the case is the respondent's testimony that she wished to settle her costs and where she was advised by her solicitors that in paying the €260,000 she would not be in breach of [the High Court] order. In this regard she was reasonably entitled to rely on her solicitor's advice such that no question of her being in breach of the order can arise. She has not taken issue with that advice before this Court.
>
> 144. The payment of the €260,000 was not some reckless action on her part. She made the payment upon the request of her solicitor and on the advice that she would not be in breach of [the High Court] order in paying it, and on the understanding that she would be reimbursed if she overpaid. While to my mind, it was unfortunate that she was asked to pay €260,000 at that time, I accept that she did so only after being requested by her solicitors and in circumstances where she was advised that in paying the sum, she would not be in breach of [the High Court] order. Accordingly, I do not accept that the payment of the monies is a question of her financial mindedness, especially in circumstances where she understood that she would be reimbursed if she had overpaid.
>
> 145. It is now also the case that the respondent's costs ultimately taxed in October, 2012 at €462,809.68, a sum which roughly equates with the total fees paid by her to that point in time. In all the circumstances, I find that the fact that the respondent chose to act on the advice of her solicitor in December, 2011 is not a factor which the Court should weigh in assessing whether the B.X. Trust should be dismantled."

138. In my opinion it is again somewhat difficult to see the exact relevance of these alleged breaches, and how any such breach (if established) bears on the question of the form or structure (as opposed to any issue of quantum) by which proper provision

should be made for the respondent. In any event, in my opinion it was reasonably open to the trial judge to come to the above conclusions, having regard to the evidence before her and in particular to her finding that the respondent was advised by her solicitor that in paying the additional sum, she would not be in breach of the High Court order. It is important to note that this order was a very unusual form of order, as a client is normally entitled to pay his or her solicitor, or any other service provider, whatever fees he or she thinks fit, at whatever time is thought appropriate by the client. Against that backdrop the trial judge was entitled to accept the averments made by Ms. Downes regarding this payment, including her statement that the interpretation which her office took in relation to the meaning and effect of the order was made in good faith. In the circumstances, I would also reject this ground of appeal.

Conclusion

139. In my view the appellant has not advanced any ground in this appeal which should persuade this Court to set aside any of the findings or orders made by the trial judge. Accordingly, I would dismiss the appeal and affirm the decision of the learned trial judge.

140. With regard to costs, as the appellant has been entirely unsuccessful in this appeal, my provisional view is that the respondent is entitled to her costs of the appeal. The same result would follow if the Court were to apply the traditional approach whereby "costs follow the event", and I see no circumstances present that would justify making any alternative order as to costs. If either party wishes to contend for an alternative order, they have liberty to apply to the Office of the Court of Appeal within fourteen days of delivery of this judgment for a brief supplemental hearing on the issue of costs. If such hearing is requested and results in an order in the above proposed

terms, the requesting party may be liable for the additional costs of such a further hearing. In default of receipt of such application, an order in the above proposed terms will be made.

141. As this judgment is being delivered electronically, I note that each of Collins J. and Binchy J. have indicated their agreement with it and with the orders I propose.