THE HIGH COURT

FAMILY LAW

[2007 No. 48 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

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

BETWEEN

A.Y.

APPLICANT

AND

B.Y.

RESPONDENT

JUDGMENT of Mr Justice Binchy delivered on the 12th day of March, 2018

1. On 14th January, 2011, the parties entered into written terms of settlement of these proceedings (the "terms of settlement"). This was following upon the commencement of the trial of the proceedings which by that time had been at hearing for three days on 11th, 12th and 13th January, 2011. The terms of settlement were detailed and comprehensive, and were set out in a document running to some thirteen pages. They were made an order of this Court on 17th January, 2011 (the "Order").

2. On 19th September, 2014, the applicant issued a motion seeking reliefs in the following terms:-

> "(i) an order pursuant to O. 44, r. 1 of the Rules of the Superior Courts, 1986 (As Amended) directing that the respondent be brought before this Honourable Court at a time and date to be specified to answer his contempt of court arising from his wilful failure to comply with the terms of the Order of this Honourable Court (Mr. Justice Abbott) dated 17th January, 2011.
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> (ii) An order committing the respondent to prison arising from his failure to comply with the terms of the Order of this Honourable Court (Mr Justice Abbott) dated 17th January, 2011.
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> (iii) An order directing the respondent to make further and better disclosure, on oath, concerning any security entered into by him during the period in which this Honourable Court was seized of the proceedings and, in particular, a purported security dated 22nd October, 2010 between the Bank A, the respondent and his brother.
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> (iv) An order determining whether or not the respondent has occasioned an information deficit in respect of his financial disclosure to this Honourable Court in respect of the within proceedings and the order of 17th January, 2011.
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> (v) An order directing the respondent to disclose to this Honourable Court and the applicant any sums or amounts due and owing to his creditors that he had discharged in part or in full since 17th January, 2011, the identity of such creditors and the dates upon which such was made.
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> (vi) If necessary and further to the orders sought herein, an order pursuant to para. 34 of the Order of this Honourable Court dated 17th January, 2011 re-entering the proceedings and providing pursuant to s. 22 of the Act of 1996, for such variation of the terms of the said order or such other orders as will make proper provision for the applicant.
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> (vii) The directions of this Honourable Court as to the nature and extent of the matters arising herein that may be disclosed to NAMA or NALM Ltd and whether or not any of the aforesaid parties ought to be joined as notice parties herein and to such extent and in respect of such matters as may be deemed necessary.
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> (viii) Further or other relief;
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> (ix) Costs."

3. This judgment is concerned with the motion described above (the "applicant's motion") and also with a motion subsequently issued on behalf of the respondent (the "respondent's motion") on 10th April, 2015. Before dealing with those motions any further, it is useful to set out some background information concerning the parties, and their relationship. The parties were married on 12th February, 1986. The applicant, who at the time the hearing of these motions commenced, was in her 72nd year, had previously been married and there are three children of that marriage, T., aged 50, U., and V.. I was not informed as to the ages of U. and V. but they are mature adults.

4. The parties themselves have two children, D1. is twenty years of age and D2. will shortly be seventeen years of age. The Court has heard evidence and concerns expressed in the course of the hearing herein, relating to D1. and D2., which it is neither necessary nor appropriate to set out in detail, as to the legal status of and inheritance rights of D1. and D2..

5. The respondent has been a very successful businessman, with extensive interests both in the State and in two other jurisdictions. His main business activities outside Ireland have been in a country which I will refer to as X.. In the other jurisdiction outside Ireland, which I will refer to as H., he owns, together with his brother, valuable lands (the "H." lands). According to a memorandum from Bank A exhibited in the proceedings and dated 14th December, 2009, the respondent had submitted a statement of affairs to that bank indicating that he had assets of €128 million at that time, but that this was down from €240 million in 2007. While I cannot be certain from this document, it is very likely that this is a reference to the net worth of the respondent and not simply a reference to his assets without any regard to his liabilities.

6. At the commencement of the hearing of these motions the respondent was aged 64 years. He remarried in 2016, and has a child from that relationship who will be eleven years of age this year. Both of the parties live in Ireland. While I will be dealing in more detail with the assets of the parties, suffice to say for now that the applicant resides in a substantial period residence, surrounded by substantial grounds some twelve and a half acres of which have significant development potential and are zoned for residential development. There are also four high quality modern residences within the grounds of the family home which yield the applicant a rental income. I will refer to this entire property as the "Family Home", but where the context requires it, I may refer to individual parts of that property, such as the development lands, by which I mean the lands within the Family Home that are zoned for development. The Family Home is subject to a security originally given to Bank A, but which was taken over by NAMA. The loan related to the security is of the order of €5.9 million, having reduced from €6.9 million at the time of the settlement of these proceedings in 2011. The respondent lives with his wife and their child in rented accommodation.

7. The applicant's motion was grounded upon her affidavit of 19th September, 2014. In general terms the applicant complains firstly, that the respondent had not, as of the date of the affidavit, honoured specific financial obligations undertaken by him to the applicant in the terms of settlement and, secondly, that the respondent caused a serious and material non disclosure of relevant financial information in the course of the proceedings leading up to terms of settlement and the making of the Order. The non-disclosure alleged concerns a facility letter dated 28th October, 2010 issued by Bank A to the respondent's brother and about which the applicant says she knew nothing at the time that she entered into the terms of settlement. There was some confusion about this letter, because NAMA initially informed the applicant that a facility had issued to the respondent on 22nd October, 2010, which does not appear to have been the case. In any case, the applicant says that she only became aware of this facility letter when it was referred to in a letter sent to the applicant by NALM dated 8th September, 2014. The applicant's concern is that NAMA/NALM are relying upon this facility letter to support an argument that the mortgage granted by the applicant and the respondent to that bank over the Family Home secures not just liabilities of the applicant and the respondent relating to the Family Home, but also all other liabilities of the respondent to that bank that were acquired by NAMA. The applicant asserts that the failure by the respondent to disclose this letter before the completion of the terms of settlement amounts to a serious and material non-disclosure of relevant financial information, and she asserts that "accordingly, a pertinent information deficit may arise in the making of the Order and terms settlement of 17th January, 2011."

The terms of Settlement

8. I set out below a summary of the key provisions of the terms of settlement, as well as the specific complaints of the applicant as regards non compliance by the respondent with the same. The paragraph numbers referred to the corresponding paragraph numbers in the terms of settlement:-

> (1) A decree of divorce pursuant to the provisions of s. 5(1) of the Family Law (Divorce) Act, 1996;
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> (2) An order pursuant to the provisions of s. 13(1)(a)(i) of the Family Law (Divorce) Act, 1996 directing the respondent to pay to the applicant the sum of €12,916 per month for her ongoing maintenance and support. The respondent has complied with this obligation to date.
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> (3) An order pursuant to the provisions of s. 13(1)(a)(ii) of the Family Law (Divorce) Act, 1996 directing the respondent to pay to the applicant the sum of €5,000 per month for the support of the dependant children, D1. and D2., the said sum to be apportioned equally between them. The respondent has complied with this obligation to date.
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> (4) In addition to the maintenance payable under paras. 2 and 3 above, the respondent agrees to be responsible for the discharge of the school fees and expenses of the dependant children…in addition, he shall maintain private health insurance for the applicant and the dependant children….and….to be responsible for the medical, dental and orthodontic expenses of the children not covered by private health insurance. The respondent has complied with this obligation to date.
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> (5) An order pursuant to the provisions of s. 13(2) of the Family Law (Divorce) Act, 1996, directing the respondent to pay to the applicant the sum of €250,000 no later than the 1st May, 2011. The respondent complied with this obligation.
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> (6) An order pursuant to the provisions of s. 13(2) of the Family Law (Divorce) Act, 1996, directing the respondent to pay to the applicant the sum of €750,000 no later than 1st August, 2012. The respondent did not comply with this obligation.
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> (7) In the event that the payments as set out in paras. 6 and 7 hereof are not paid by him in the manner and at the time specified therein, the same shall constitute a debt of the respondent payable to the applicant which shall attract interest at the rate of Courts Act interest then applying.

9. Paragraph 9 item 12 of the terms of settlement deal with custody and access arrangements and are not germaine to the motions before the Court.

> 13. An order pursuant to the provisions of s. 15(1)(a)(i) of the Family Law (Divorce) Act, 1996 granting the applicant the right to reside in the Family Home of the parties known as [Family Home] ….and surrounding lands as more particularly set out in folios …..to the exclusion of the respondent.
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> 14. An order under s. 15(1)(b) of the Family Law (Divorce) Act, 1996 and under s. 36 of the Family Law Act, 1995 declaring the applicant to be the sole legal and beneficial owner (as against the respondent) in the Family Home of the parties known as ….. and surrounding lands ….
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> 15. The applicant agrees not to voluntarily dispose of [the Family Home] and its eight acre cartilage prior to D2. attaining 21 years of age.
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> 16. The applicant agrees that in the event of a disposal by her of [the Family Home] or any part of the surrounding lands …..she will pay to D1. and D2. 15% of the net proceeds of sale after deduction of any charges, expenses and/or taxes….
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> 17. An order pursuant to s. 13(2) of the Family Law (Divorce) Act, 1996 directing the respondent to pay the capital sum of €2,000,000 against the mortgages secured to Bank A on [the Family Home] and surrounding lands….the same shall be discharged on or by 1st February, 2014. The applicant complains that there the respondent did not meet this obligation.
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> 18. An order pursuant to s. 13(2) of the Family Law (Divorce) Act, 1996 directing the respondent to discharge in full the entire balance then remaining in respect of those mortgages on or by the 1st February, 2018. The parties agree and

declare that the current indebtedness secured by the mortgages aforesaid is in the approximate amount of €6.9 million.

19. Pending the full discharge of the mortgages by the respondent in the manner aforesaid, the applicant agrees to service the mortgages both as to capital and interest in respect of mortgages with Bank A bearing account numbers ….. and ….. and as to interest only in respect of mortgages with that bank bearing account numbers ….. [four accounts are mentioned]. The applicant will service the mortgages on that basis from her own resources (including rental income from the residential properties [adjacent to the Family Home] and from the maintenance payable to her under this agreement by the respondent. The parties agree that alteration of repayments in respect of the said mortgages from interest to interest and capital, or vice versa, shall constitute a change of circumstances such that either party may apply to court for a variation of periodic payment.

20. In the event that the lump sums or either of them payable by the respondent to the applicant under this agreement are not paid on or by the dates specified herein, the requirement under para. 16 for the applicant to pay to D1. and D2. 15% each of the net proceeds of any disposal of [the Family Home] or its surrounding lands shall lapse in its entirety.

21. In the event that the payments in respect of the mortgages as set out in paras. 17 and 18 hereof are not paid by him in the manner and in the time specified therein, the same shall constitute a debt of the respondent payable to the applicant which shall attract interest at the rate of Courts Act interest then applying.

22. In the event that the respondent is deceased prior to the 1st of February, 2018, and in the event that some or all of the lump sums payable by the respondent to the applicant, whether by way of direct payment or under paras. 6 and 7 or in discharge of the mortgage of [the Family Home] under paras. 17 and 18 hereof remain fully or partially unpaid, then the liability to fully discharge those sums and any interest outstanding thereon shall be a debt of the respondent's estate to be satisfied from the estate.

23. …

24. The applicant warrants that she has made full financial disclosure of her circumstances to the respondent and his advisers….

25. The respondent warrants that he has made full material financial disclosure of his circumstances to the applicant and her advisers…..

26. /27. The parties agree, subject to compliance with specified provisions in the terms of settlement, that neither shall be entitled, on the death of the other, to make an application to court for provision out of the estate of the other.

28. The applicant agrees that D1. and D2. will be entitled to not less than 20% each of her net estate upon her death, subject to the applicant being entitled to make an appropriate adjustment to take account of any benefit that may already have accrued to them pursuant to clause 16 above.

29. A declaration pursuant to the provisions of s. 15(1)(b) of the Family Law (Divorce) Act, 1996 and s.36 of the Family Law Act, 1995 that aside from the provisions of this agreement, the applicant shall be entitled to retain for herself, without further claim by the respondent, the entirety of her assets, both legal and beneficial, as more particularly described and set out in the first schedule to her affidavit of means of the 7th day of January, 2011.

30. This is a mirror image of 29 dealing with the assets of the respondent as more particularly referred to in his affidavit of means of 12th December, 2010.

31. ….

32. Each party should bear their own costs.

33. Liberty to apply.

34. In the event of an inability of the parties or either of them to perform this agreement and to abide by the orders of this Honourable Court due to circumstances beyond their control and which are not reasonably foreseeable as of the date of the execution of this agreement, the parties or either of them shall be at a liberty to re-enter the proceedings for a variation of the terms of this agreement, whether pursuant to s. 22 of the Family Law (Divorce) Act, 1996 or otherwise.

35. The within agreement is accepted by the parties in full and final settlement of all matters arising upon the breakdown of their marriage to one another…..

10. The applicant's key financial concerns at the time of the issue of her motion were that she had not received the payment referred to in para. 7 of the terms of settlement in the sum of €750,000 and that at the time of the swearing of her grounding affidavit, she was owed an additional €129,665.95 by way of interest on this payment. In addition, the respondent had not made the payment referred to in para. 17 of the terms of settlement being the payment of €2 million in reduction of the mortgage over the Family Home and adjacent lands. It is not in dispute that these payments were not made by the respondent. In simple terms, the respondent pleads that he does not have the money to do so – I deal with this in greater detail below.

11. In her grounding affidavit, the applicant explains that the Family Home is her home where she lives with her partner and the children of the marriage to the respondent, D1. and D2., and who, at the date of swearing of the applicant's grounding affidavit (19th September, 2014) were aged sixteen and thirteen respectively. The applicant avers that:-

> "it is clear that the said premises has been mutually agreed as intended to form part of my children's inheritance and that these obligations agreed to by the respondent were to secure that provision. Pursuant to the order of this Court and the terms of settlement, the respondent agreed to clear the entire mortgage by 2018".

12. The applicant goes on to explain that in the terms of settlement, the respondent "agreed and acknowledged that I am the sole and beneficial owner of the [Family Home] and the surrounding lands, the respondent having previously transferred to me the entirety of his legal and beneficial interest in the said premises in or about 2003 in consideration of monies advanced by me to him at that time".

13. She continues to explain how at the date of the terms of settlement there was a mortgage over the Family Home securing a loan in the approximate sum of €6.8 million relating directly to the purchase of the property and the development of the four houses referred to above on the lands. Those borrowings were not related to other business interests of either party.

14. The applicant then goes on to explain that the loan and related mortgage over the Family Home was subsequently acquired by NAMA and that she has had correspondence with NAMA/NALM in regard to the same. However, to her surprise, NAMA/NALM then subsequently asserted that it/they is/are entitled to rely on the security over the Family Home not just in relation to sums advanced (by Bank A originally) specifically in relation to that property, but also in relation to other liabilities of the respondent in relation to loans originally advanced to him by Bank A. The applicant strenuously denied this claim of NAMA/NALM and was supported in this regard by the respondent. The Court was informed on the opening day of the hearing of these motions that proceedings had been issued by the applicant in relation to this claim of NAMA/NALM, and that those proceedings are ongoing.

15. In the course of correspondence with NAMA/NALM, the applicant was informed that NAMA/NALM was relying upon a facility letter of 22nd October, 2010 issued by Bank A to the respondent and his brother. It subsequently transpired that this was inaccurate, and that that bank had issued a facility letter to the respondent's brother only and that was on 26th October 2010. In any case, the applicant said that that was the first that she had ever heard of such a facility letter. She then avers:-

> *"I say that, if the said facility is genuine, the respondent failed to disclose it to this Honourable Court or your deponent prior to the commencement of the hearing of this case on 11th January, 2011, some two and a half months later. In this regard, I say and believe that I have been advised by my solicitor and counsel that any such non-disclosure, if arising, amounts to a serious and material non-disclosure of relevant financial information and, accordingly, a pertinent information deficit may arise in the making of the order and terms of 17th January, 2011. I have, therefore, sought in the notice of motion herein that the respondent be compelled to disclose such matters on oath."*

16. Finally, in her grounding affidavit, the applicant also complains that the respondent has, since conclusion of the terms of settlement, behaved in a cavalier manner towards her, ignoring her ownership and exclusive right of residence in the Family Home. She says that the respondent does not respect the court order, or her entitlement to insist and rely upon the same. In particular, she says that the respondent has made no effort to meet the payments that are overdue for payment under the terms of settlement nor does he show any concern to assure her when and how those payments will be made. She concludes by averring that the behaviour of the applicant as regards his non-compliance with the terms of settlement and the court order made pursuant to the same, disclose a *prima facie* wilful contempt on the part of the respondent for his obligations under the court order.

17. During the course of the hearing, the applicant acknowledged, as did one of her financial advisers, Mr Desmond Peelo, of Peelo and partners, that prior to the 2011 settlement, the facility letter of October, 2010 had in fact been made available to Mr Peelo, so that it had been disclosed to the applicant. Moreover, the respondent gave evidence to the effect that he had also handed a copy of this letter directly to the applicant, although she had no specific recall that he did so. In any case, the only document upon which the applicant relies in her grounding affidavit as constituting a material non disclosure on the part of the respondent, was in fact disclosed by the respondent to the applicant prior to the conclusion of the settlement between the parties.

Respondent's replying Affidavit

18. The respondent delivered a replying affidavit dated 24th October, 2014. At the outset, he avers, or perhaps more accurately submits, that the effect of the applicant's motion is to re-enter the proceedings pursuant to para. 34 of the terms of settlement, for the purposes set out in that paragraph. The respondent then goes on to deal with the allegations made by the applicant that he ignores the court order in the context of the manner in which he relates to the applicant and when he visits the Family Home. He avers that since their separation, the parties have had amicable relations and that when calling to the Family Home for the purpose of maintaining contact with the parties' daughters, he also has conversations with the applicant about other matters and, in particular, financial matters. He says that he kept the "applicant continually informed about the financial extremes both in the company and the property business". He goes on to say that the applicant is fully aware of the efforts of the respondent to procure refinancing of two properties in particular to which he refers.

19. The respondent says that he has always been willing to honour the terms of settlement, and had he been able to fulfil his obligations he would have done so. He avers that the applicant was always aware of the Bank A letter of October, 2010, or at least was always aware of it in substance. He further avers that he provided the applicant with a copy of a statement of affairs that he gave to NAMA in May, 2013, without being requested to do so, and he exhibits the same.

20. He then goes on to explain why he has been unable to comply with the terms of settlement and he avers that "there have been a number of factors which have led to my financial demise and in particular there have been a number of devastating occurrences between January 2011 and now." These are as follows:-

> (1) The respondent and his brother had a substantial indebtedness to Bank B, of the order of €22 million, in connection with the development of a service centre (hereinafter the "service centre"). Prior to the liquidation of Bank B, they had succeeded in concluding a "standstill agreement" with Bank B which would have deferred the liability for repayment of the loan and to allow the borrowings to be discharged out of the principal trading entity of the respondent and his brother, a company which I shall refer to as "Z.", over a period of time. However, following the liquidation of Bank B in February 2013, the respondent's loan in relation to this development was sold to Investor A which demanded immediate repayment of the loan of €22 million as well as the repayment of a further €9.8 million owing in connection with other business ventures.
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> (2) A very significant business venture in which the respondent was involved in X. collapsed owing to a decision of the government of X not to proceed with a particular project, the "project". This project had been undertaken by a special purpose vehicle, the "SPV", owned by the respondent and his brother, which had invested very significant funds in the project. The cancellation of the project caused the SPV to lose not only the value of its investment, but also the opportunity to reap the potential rewards of that project, which were very significant, and upon which the respondent had placed some considerable reliance when entering into the terms of settlement.
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> (3) Z. lost one of its most significant assets (the "Z." asset) in an accident in X.. This caused it to suffer a very significant loss in revenues. While the Z. asset was insured, Bank B exercised its entitlement to appoint a receiver over the insurance proceeds of the asset of 15 million (currency of country X.). The accident also exposed Z. to the possibility a very significant environmental claim, which could yet materialise.
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> (4) Z. had agreed to purchase certain assets from the government of country Y., using funding to be provided by Bank B.

In the event Bank B was unable to provide the finance for the purchase of these assets, but was then unable to do so, exposing Z. to a risk of litigation. However, Z. managed to borrow the money elsewhere to pay the amount due and to purchase the assets.

(5) However, in 2013 there were further cutbacks implemented by the government of X. which had a dramatic impact upon the business of Z., reducing its income opportunity by half, while its cost base could not be reduced.

(6) The service centre referred to above lost very heavily following upon its opening, leaving the respondent and his brother exposed to a loan in connection with that development in the sum of €22 million and a further €2 million in respect of equipment leasing.

(7) NAMA demanded that the respondent and his brother sell all their property and pay back over €30 million in loans owing to NAMA.

The Respondent's Motion

21. The respondent's motion issued on 10th April, 2015. In this motion the respondent seeks *inter alia* the following reliefs:-

(1) If necessary, an order re-entering the proceedings;

(2) An order pursuant to s. 22 of the Family Law (Divorce) Act, 1996 for such variation of the terms of the order of this court dated 17th January, 2011 as will make a proper provision for the respondent;

(3) In particular an order for an immediate variation downwards of the maintenance payable to the applicant and the dependant children pursuant to paras. 2, 3, 4 and 5 of the order of this court dated 17th January, 2011.

22. This motion was grounded on a supplemental affidavit of the respondent dated 9th April, 2015. In this affidavit he avers that at the time of the swearing of his affidavit of 24th October, 2014, he could not set out his position in full because he was awaiting relevant information and documentation from NAMA in relation to data protection requests from Bank A. Having received the documentation requested, the respondent avers that "there is no contradiction between what this deponent believed to be the situation at the time of the divorce proceedings and the facts outlined in the said documents." He then goes on to refer to a letter of the solicitors for the applicant dated 23rd January, 2015 which, referring to the documentation concerned states:-

"As advised, the information contained therein would appear to give rise to significant and material issues of financial non disclosure on the part of the respondent in the context of the above divorce proceedings and settlement."

The respondent deprecates this allegation in the strongest possible terms. He then proceeds to aver that his financial circumstances are dire and continuing to deteriorate. He commissioned BDO Corporate Finance to prepare a report in relation to his financial situation, which he exhibits. This report however is principally directed at the business of Z., and the possible sale of that business in the light of its very vulnerable financial situation. The respondent avers that he had deferred issuing this motion until he, his brother and their management team had an opportunity to rescue the position of Z.. He then goes on to aver:-

"I have complied with the divorce terms as best I can and for as long as I can but cannot do so any further. I say in short my situation is as follows: all of my salary from Z. has been diverted to the applicant. I have been surviving at the discretion of my brother, [ ], who is paying outgoings on my behalf, including rent on the home which I rent and in which I reside, together with drawing down director's loans owed to me, from Z., which are now depleted in full. I fully understand the need to put before this Honourable Court an updated affidavit as to means for the purposes of the notice of motion. I have instructed the issued [sic] on my behalf."

Respondent's Proposals

23. During the course of the hearing of these motions, the respondent put forward the following proposals to the Court by way of variation to the Order:-

(i) that the maintenance payable by the respondent to the applicant pursuant to the Order, for the sole benefit of the applicant, should immediately be reduced by two thirds;

(ii) that the Family Home be put in a trust to be held as to one half thereof for the joint children of the parties and one half thereof for either the applicant or her children;

(iii) that upon the applicant herself, or with assistance, developing the development lands, that the maintenance payable to the applicant by the respondent for her own benefit be terminated in its entirety;

(iv) that all lump sums payable by the respondent to the applicant be discharged.

Respondent's Affidavit of Means

24. The respondent swore an affidavit of means on 14th May, 2015. He swore a further affidavit of means on 12th April, 2017. The latter indicates that the respondent has an exposure to total borrowings of almost €58 million (the vast majority of which is shared with his brother, and some of which is shared with the applicant) and that he has assets of €12.43 million. He claims his outgoings come to some €30,458 per month (this includes the monthly maintenance payable to the applicant in the sum of €17,916 and rent in the sum of €4,750). There is obviously a great deal more detail in the respondent's affidavit of means, which I will set out and address as appropriate later in this judgment.

25. As to his assets, the respondent deposes that he jointly owns five properties, which all together have a value of €12.434 million. These properties are:-

(i) The H. lands, which are located outside the jurisdiction. The applicant has a 50% interest in this property. His brother owns the other 50%. He currently values his interest in this property at €3 million. NAMA currently has security over this

property, but that security is likely to be replaced pursuant to an investment agreement (the "investment agreement") which the respondent and his brother entered into with an investor (the "Investor B") during the hearing of these proceedings. I summarise the main features of the investment agreement at paras. 36 and following below.

(ii) A property comprising 56 acres, also jointly owned by the applicant and his brother, which he values at €5.46 million. This valuation is based upon a value placed on the property for the purpose of the investment agreement. The property is currently secured to NAMA, but, pursuant to the investment agreement, the liabilities to NAMA will be discharged and the property will be transferred into a new company in which the respondent and his brother will each have an 8.5% shareholding.

(iii) A 33% shareholding in a property adjacent to Property No. (ii) which he values at €0.76 million. The property is currently secured to NAMA, but, pursuant to the investment agreement, the liabilities to NAMA will be discharged and the property will be transferred into a new company in which the respondent and his brother will each have an 8.5% shareholding.

(iv) A 37.5% interest in 62 acres of lands, also adjacent to Properties (ii) and (iii) above, which he values at €4.534 million, and which valuation is again calculated on the basis of the investment agreement referred to above. The property is currently secured to NAMA, but, pursuant to the investment agreement, the liabilities to NAMA will be discharged and the property will be transferred into a new company in which the respondent and his brother will each have an 8.5% shareholding.

(v) A farm (the "farm") which the applicant jointly owns with his brother, valued at €0.2 million. This property is currently the subject of security taken by NAMA. Although it is not entirely clear, and was not the subject of any evidence, it appears from the short form of the investment agreement handed in to the court during these proceedings (entitled "binding term sheet") that this property will be secured to Investor B, subject to the terms of the investment agreement..

26. As to his shareholdings in various companies, there are five companies identified by the respondent and he attributes a nil valuation to each one, including the Z group, which it may be said is the respondent's core business.

27. In his affidavit of means he refers to a legal interest in a 50% of shareholding in a company which owns a holiday property in an EU member state (the "Holiday Property"). The other 50% shareholding in this company belongs to the applicant. The respondent avers that he holds his shareholding in this company upon trust for the children of the parties, and accordingly he ascribes a nil value to this shareholding.

Applicant's Affidavit of Means

28. The applicant swore an affidavit of means on 5th April, 2017. She describes her assets as being:-

(1) The Family Home. She does not place a value on this or any of the other properties she owns because at the time of swearing her affidavit up to date valuations were awaited. However, she says that the Family Home was at the time subject to loans totalling €5,962,811, for which the respondent has a joint responsibility;

(2) The four houses developed by the parties within the grounds of the Family Home, and from which the applicant receives a rental income;

(3) A 50% shareholding in a company in an EU member state, the sole asset of which is the Holiday Property, valued at €1.2 million;

(4) A house and mews in Dublin all of which are let and providing the applicant with a rental income, but which are subject to a loan in the sole name of the applicant in the sum of €1,758,812;

(5) Bank accounts having balances as of the date of swearing of the affidavit totalling €50,274;

(6) Jewellery valued at €59,100.

29. The applicant avers that she receives a gross rental income from the properties referred to above in the sum of €372,864 which, after deduction of expenses, yields a net rental income of €219,843 subject to tax. She also refers to the income received from the respondent pursuant to the terms of settlement and calculates her gross income per month at €36,316 and her net income per month at €29,316. However, she says that her total monthly expenditure is €34,984.

30. In addition to the loans already referred to above, the applicant says that there is a loan due to Bank A with a current balance of €697,597 (for which she is jointly liable with the respondent) in respect a further holiday property which was sold in 2010, and there is also a loan over the commercial property in Dublin city centre with a current balance of €1,758,812. She also has other debts comprising a debt relating to an investment described as investment BSD estimated at approximately €70,000, credit card loans (at the time of swearing her affidavit) coming to a little over €14,000 and a debt owing to a third party in respect of a loan in the sum of €60,000.

31. In addition to the foregoing, the applicant avers that she owes fees arising out of the 2011 divorce proceedings and these proceedings of the order of €500,000. She avers that she owes her accountants €50,500, has tax arrears for 2016 and 2017 of €150,000 and that she owes a property consultant €50,000. She also claims to have a contingent liability in respect of a guarantee given for her daughter amounting to €70,000 and that there were pending orthodontic expenses for the parties' daughter, D2, in the sum of €5,000. She also holds deposits in respect of rented properties, which will probably have to be returned, in the sum of €42,100.

Applicant's further motion

32. During the course of the hearing the applicant decided not to pursue the reliefs sought in her motion in respect of the attachment and committal of the respondent, and instead elected to apply to the court for judgment in a monetary amount reflecting the payments due to have been made by the respondent up to the date on which that decision was taken and notified to the solicitors for the respondent, i.e. 7th July, 2017. Thereafter, the applicant caused to issue a motion dated 12th July, 2017 seeking the following reliefs:-

"(1) An order permitting short service of the notice of motion and any necessary abridgment of time;

(2) Such amendment to the notice of motion dated 19th September, 2014 as may be required to allow the applicant to seek judgment as follows;

(3) An order for judgment as against the respondent, B.Y., in the sum three million five hundred thousand euro (€3,500,000.00) being:

a. The sum of seven hundred and fifty thousand euro (€750,000.00) and interest accrued thereon at the rate of the Courts Act interest from 1st August, 2012 to 30th April, 2017 in the further sum of two hundred and seventy thousand euro (€270,000.00).

b. The sum of two million euro (€2,000,0000.00) and interest accrued thereto at the rate of Courts Act interest from 1st February, 2014 to 30th April, 2017 in the further sum of four hundred and eighty thousand (€480,000.00).

(4) Interest on the sum specified at para. 3 above or part thereof from judgment to the date of payment.

In the letter of 7th July, 2017, it is stated that the primary purpose of the applicant's motion is to require the respondent to comply with his financial and related obligations arising from the terms of settlement.

33. This motion was grounded upon the affidavit of the applicant dated 12th July, 2017. In this affidavit she simply deposes as to the amount due to her, together with interest thereon, pursuant to the terms of settlement. She avers that the computation of interest was the subject of evidence given by an accountant, Mr Paul Wyse, called on behalf of the applicant to give evidence in the proceedings, and was not disputed. She exhibits a computation sheet of the interest claimed. By letter of 14th July, 2017, the solicitors for the respondent agreed to the amendments of the motion as proposed by the applicant, but without prejudice to their right to make arguments as to the appropriateness of such amendment and as to the cost consequences of same. They also said that this agreement was subject to an amendment being agreed to the respondent's motion to include reference to the "discharge and/or suspension of the terms of settlement".

Payments to NAMA

34. It is common case that the respondent and his brother made significant payments to NAMA in reduction of their liabilities to NAMA following upon the execution by the parties of the terms of settlement. These payments were funded through a combination of the sale of assets by the respondent and his brother, and also from funds made available through the principal business of the respondent and his brother, i.e. by Z. While the exact amount of these payments was not agreed, it is agreed that they came to a total of between €7.2 million and €7,990,409. The applicant, in the course of the proceedings, sought to explore whether or these payments were indicative of the respondent preferring one creditor (NAMA) over another (the applicant).

The Resondent's Proposal to Bank A

35. Subsequent to the issue of the applicant's first motion, and because of the enlarged claim of NAMA/NALM over the Family Home (i.e. to the extent that NAMA/NALM claims that business debts of the respondent are also secured over the Family Home) the respondent made a Data Protection request of NAMA/NALM. This Data Protection Act request resulted in the delivery of documents to the respondent, which he shared with the applicant. These documents included a proposal made by the respondent to the Bank A (prior to the respondent's loans being taken over by NAMA/NALM) dated 12th May, 2010. In this proposal, the respondent gave detailed particulars of his assets and liabilities, and his net worth was stated to be €18,421,000. However, for the purpose of these proceedings, the respondent had sworn an affidavit of means on 21st April, 2010 indicating a negative net worth of €13,546,242. The difference between these two positions is €31,967,242. Although this disparity only came to light following the issue of the applicant's motion, unsurprisingly it was very much centre stage at the hearing of these motions. Included in the assets of the respondent was a loan due to him by a company called "M." in the sum of €6.5 million to which no reference at all had been made by the respondent in any of the affidavits of means sworn by him in these proceedings.

Investor B and the Investment

36. Before considering the evidence, it is appropriate at this juncture to provide more detail about the investment agreement. At the outset of the hearing of these motions, the Court was informed that the respondent and his brother had reached heads of agreement with Investor B as set out in a document entitled "binding term sheet", which was handed in to Court, and which is the same document that I have referred to earlier as the "investment agreement". Negotiations with Investor B were ongoing during these proceedings, although the binding term sheet/investment agreement is stated to be legally binding; however, that document also states that it was the intention of the parties to enter into more detailed definitive agreements in due course. The negotiations with Investor B came to fruition in or about September, 2017. I was not informed as to the exact date, but it is not material.

37. The effect of the investment agreement, when implemented, will be to enable the respondent and his brother to discharge fully the amount owing by them to NAMA in the sum of €31,000,000. These funds will be provided by Investor B. This does not include the amount owing by the respondent and the applicant jointly in connection with the Family Home. In exchange for the investment of Investor B (the "Investment"), the applicant and his brother agreed to divest themselves of most of their most significant assets, which are to be transferred to a company in which each of the applicant and his brother will initially be allocated an 8.5% share. Since there are likely to be obligations to invest in the new company to enable it develop the lands to be transferred to it, there is every possibility that the shareholding of the respondent and his brother in this new company will be diluted in the future, unless they can raise funds to contribute pro rata to such investment.

38. The investment agreement contemplates that if the assets transferred are developed and thereafter sold, and the sale price realises a return for Investor B of not less than the amount of the Investment, together with any additional development costs, then the respondent and his brother will be entitled to retain for their own benefit another significant asset, the H. lands, which are to be secured to the Investor in the meantime, and they will have no obligation to reimburse the Investor any of the monies invested by it in the project. They will also participate in any profits from the venture, in whatever percentages they then hold shares in the new company.

39. However, if there is a shortfall to Investor B arising out of any sums invested by it, then the respondent and his brother remain liable to indemnify Investor B against that shortfall, up to the amount of the €31 million. The value of the respondent's interest in the lands in H. is significant. His own expert values it at €3 million, while the applicant's expert values it at €5.2 million. While it is somewhat unclear from the terms of the investment agreement, it appears to contemplate that the farm will be released from security in respect of debts due to NAMA, but that it will then be secured again in favour of the Investor, by way of additional security in respect of any possible liability of the respondent and his brother to the Investor. The timetable under the terms of the investment

agreement for all of this to play out is 24 months from the date of completion as defined in the agreement, which is a moveable date but it seems very likely that much will be known within a period of two to three years.

40. Finally, the parties are agreed that the discharge of the liabilities of the respondent and his brother of their liabilities to NAMA will resolve any claim of NAMA/NALM over the Family Home in respect of these liabilities, though not in respect of the amount owing by the applicant and the respondent to NAMA.

The Evidence

Evidence of the Applicant

41. The applicant was first called in evidence. Her evidence was entirely consistent with each of her affidavits referred to above. Importantly, she acknowledged that the Bank A facility letter of October, 2010, had been made available to her, or at least to her advisors prior to entering into the terms of settlement. In the course of her evidence, she expressed some frustration about what she clearly considers to be interference by the respondent with her efforts to live her own life. She does not protest about this to the respondent, in order to avoid confrontation, but she denies providing hospitality to the applicant any more than it is civil to provide when he is visiting their children.

42. The applicant expressed some upset that the respondent had exchanged text messages with their children suggesting that she might leave the Family Home to one of the children of her first marriage. Their daughter, D1., was very upset by this and the applicant stressed that the Family Home is not just the home of the applicant but also that of her daughters. In response to concerns of the respondent that the applicant might in some way seek to prefer the children of her first marriage, and in particular that she might disadvantage D2., on the basis that her legal obligations to D2. by reason of not her not being adopted, may be less than those owed to D1., the applicant stressed that she loved all her children equally and she would never contemplate favouring any one child over and above the others. She acknowledged that the respondent has concerns that she would not "do the right thing" but said that these concerns are unfounded.

43. The applicant expressed some concern about her future from the point of view that she has no pension provisions. She is, therefore, dependent upon her assets, and, at least for the time being, upon the maintenance received from the respondent, not just to meet her current outgoings but to plan for her future. She said that she needs the current levels of maintenance from the respondent until the NAMA issue has been resolved. She said, however, if that issue is dealt with satisfactorily, she will be able to sell the development lands which would have a very positive effect on her finances. At that point, she acknowledged that she could possibly manage on reduced levels of maintenance because she would no longer have to make mortgage repayments in respect of the Family Home, but she had not given serious consideration to this possibility just yet. She confirmed her income and outgoings as per her affidavit of means. In cross-examination, it was put to her that if the mortgage over the Family Home was eliminated, her outgoings would be reduced to €18,836 per month, as against a rental income (before tax) of €18,320 per month. Assuming she lost as much as half of her rental income in tax, that would leave her with €9,000 per month. And if the income that she received from the respondent in respect of maintenance of the children is added (€5,000 per month) that would mean that she would be receiving €14,000 per month having paid all taxes. It was then suggested to the applicant that whatever maintenance is paid by the respondent should be reduced to cover the difference between the €14,000 income per month and her expenditure of €18,320 per month.

44. In reply, the applicant said that in the event that the "cloud is lifted over" the Family Home, it would allow her the possibility to contemplate a reduction in maintenance, but in the meantime she could not survive financially without the maintenance payments received from the respondent. She also referred to the difficulty of maintaining the Family Home and the cost of maintenance of the same. It was put to her that she might contemplate selling the Family Home and she did not object to this in principle but referred to the provision in the terms of settlement that she would not dispose of the same until D2. had reached the age of 21.

45. She said she would not contemplate an arrangement whereby ownership of the Family Home would be divided to the intent that she would own one half and the other half would be held in trust for D1. and D2.. She said that she would ensure that D1. and D2. get their fair share of her estate in due course and she never had any agreement or indeed, any discussion to the effect that, if the respondent discharged the debt due in respect of the Family Home that it would be divided on this basis.

46. In relation to the Holiday Property, she agreed that, although there had never been a trust in relation to this property, it had been agreed that in due course this property would be applied for the benefit of both her own children by her first marriage (as to one half share) and the children of the parties D1. and D2., as to the other half share. Accordingly, she had no objection to the respondent placing his interest in the French Property into a trust on behalf of D1. and D2., but she was not agreeable to her share being placed into such a trust. This property is encumbered, and the respondent agreed to assume responsibility for the mortgage repayments. The amount of the loan due in respect of the Holiday Property is unclear, as it was not referred to either in the affidavits of means of the parties or in their oral testimony.

47. The applicant was questioned in cross-examination about a statement in a letter from her solicitors to the solicitors for the respondent dated 5th August, 2016, which it is stated:-

> "To be clear at the time our client was induced by your client to settle the divorce proceedings in 2011, he was aware of the facility letter dated 22nd October, 2010 and she was not. Your client failed to disclose this important fact to our client and to her advisors and to the court. If our client had known of a facility letter which purports to hold/pledge [the Family Home] as security against the wider liabilities of the respondent and his brother P. she would have insisted that this matter was attended to her satisfaction before entering in the settlement."

48. As I have already mentioned, the applicant acknowledged that a copy of the Bank A loan facility letter of October, 2010, had in fact been made available to her advisors prior to entering into the terms of settlement. But she said that if she had known that perhaps the respondent's financial position was stronger than she believed at the time, she might not have agreed to the settlement. At the same time, she acknowledged that she freely entered into the settlement. The applicant said that what she wants now is for the respondent to honour the terms of settlement. She acknowledged that the respondent had from time to time, in discussion with her described some of the difficulties that he had encountered since the terms of settlement and that he had said to her that he did not have any money.

49. As regards the possibility of developing and selling the development lands adjacent to the Family Home, she confirmed that she had had discussions with a planning team engaged by the respondent, but that she wished to engage her own planning team and to make her own decisions as to how best maximise the potential of these lands. For the time being, however, she felt that nothing could be done for as long as NAMA was claiming an interest in the Family Home that related to any liabilities other than just the loan

relating to the same. There is also a difficulty with access to the development lands, which has to be resolved.

Evidence of the Respondent
50. The respondent confirmed that at the time of entering into the terms of settlement, he read the agreement, fully understood it and always intended to comply with the same. More than that, he was optimistic that he would be able to comply with the terms of settlement. He explained that he would have been able to do so, had the project been successful. Had that project been successful, over a period of three or four years, he would have eliminated his indebtedness and had sufficient funds to discharge his obligations to the applicant. He explained in considerable detail the "devastating" events that in effect conspired to prevent his ability to comply with the terms of settlement (those referred to at para. 20 above).

51. He explained that when dealing with these proceedings originally, he did not claim any interest in the Family Home (as he would have been entitled to do at that time because he did not remarry until 2016) because he was concerned that if he succeeded in contending for an interest in the Family Home, NAMA might have attempted to recover the value of that interest and apply it towards his indebtedness. He stressed (time and again) that he was very exercised at the time about keeping the Family Home safe from his creditors and particularly so that it would available in due course as an asset to pass on to his children. In that context, he asserted that he agreed with the applicant at the time that he would not pursue any claim as against the Family Home provided that the applicant agreed to hold 50% of her interest in the property upon trust for their children, D1. and D2.. He said the applicant reneged on this promise. He added that this agreement went back as far as 2003, when he originally transferred the property to the applicant. He was asked why he had not put any of this on affidavit, to which he replied that he thought his oral testimony in this regard would be sufficient.

52. He also claimed that the applicant had reneged on her promise to continue with the adoption process for D2.. This, he said, left D2. in a legal limbo. At first he said that the applicant had abandoned that process in 2007, when his son by his current wife was born. However, he said he was not aware that the applicant would not continue this process until she told him so in 2011. He said that he has begged the applicant to regularise the position. He denied that the adoption process came to an end because of a legal impasse involving the natural mother. He agreed, however, that all of these matters were known to him in 2011 at the time that he entered into the terms of settlement, and that they were not referred to in the terms of settlement.

53. In relation to the affidavit of means that he completed in April, 2010, he said that he believed that he completed it himself, having been given a template. He confirmed that he fully understood that he was obliged to be as accurate and comprehensive as possible in completing the affidavit. He acknowledged that that affidavit included all of his debts and liabilities, but did not include the amount due to him by way of loan from a business partner company, M.. He could not explain this omission even though the amount due to him by M. was referred to in the proposal made to Bank A just a few weeks later and he confirmed that when he was preparing his affidavit of means for these proceedings, he would also have been working on the proposal to Bank A.

54. He clarified, however, that the proposal to Bank A was inaccurate insofar as it indicated that M. owed him (the respondent) €6.5 million – the correct amount was in fact €4.5m, the difference of €2 million related to monies owing by M. to his brother alone. He explained that the amount due to him by M. had been written off in 2013, because by that time the project had been cancelled and there was no longer any prospect of recovering these monies from M.. This is because the monies that he and his brother had lent to M., had been lent onwards by M. to the SPV for the project. So, too, were the monies lent to M. by Bank B, the liability of M. to repay which the respondent and his brother had guaranteed to Bank B. He was asked what efforts he made to recover the amount due from M. and he said none, because there was no point. He said that everybody involved in M. had invested money in the project and had lost their investment. In summary, the financial viability of M. was directly linked to the project; when it failed, so too did M., and it could not repay the loan due to the respondent.

55. He said that he was not, and never had been a shareholder in M.. He was asked why, therefore, did he give a guarantee of M.'s liabilities to Bank B, in the amount of €21.3m? He said that he and his brother did so because Bank B had expressed a preference that funds being lent for use in the project should be lent to an entity without other indebtedness. M. met this requirement, but the Bank insisted that the respondent and his brother underwrite the loan to M.. He explained that the funds advanced by Bank B were lent onwards by M. to the SPV, the special purpose entity undertaking the project. The applicant and his brother, had originally owned 80% of the SPV but had eventually acquired the other 20%. The shareholders of M. had also advanced monies to the SPV, through M.. The respondent said that they had suffered a loss of the order of €6 million by reason of the cancellation of the project.

56. It was put to the respondent that it was strange that he should provide a guarantee for such substantial sum of money to a company in which he had no shareholding or interest and his reply to this was that had he not done so, Bank B would have appointed a receiver to Z., and caused the collapse of the project, with the loss of all the monies invested up to that point in time, as well as the loss of opportunity from the project. The respondent was unwilling to divulge the names of the shareholders of M. with whom he had worked for more than 30 years and to whom he had promised that under no circumstances would he reveal their identities. The persons concerned were senior security personnel in another country. He said that the applicant was aware of the identity of some of these personnel and had met several of them. Upon being pursued on the issue, he identified some of them by reference to their initials and identified one by name.

57. He explained that in the course of providing funding to the SPV, some assets were secured by the SPV in favour of M. as security for the loans advanced by M. to the SPV. He also said that significant assets belonging to Z. were secured in favour of M., on behalf of SPV, in exchange for the loan advanced by M to the SPV, and also in order to protect those assets from creditors of Z.. Also, M. itself provided security over certain assets to Bank B. The latter has some relevance because counsel for the applicant made the point that, assuming that the funds advanced by Investor B clear the indebtedness due by M. to NAMA (it is understood the Bank B loan was eventually taken over by NAMA), those assets may be available for the creditors of M., including the respondent. This follows from an answer given by the respondent to his own counsel, as to the impact of the Investment upon his overall indebtedness. He was asked: "Just to confirm, …..the position of the [Investment] is that it would replace your borrowings with Bank B, Bank A, whatever, that all went into NAMA and NAMA would be taken out of the equation as the lender, the [Investor] would be the lender. Is that correct?" The respondent confirmed that this is correct.

58. The respondent confirmed that at the time he entered the terms of settlement, he was optimistic that he could comply with his obligations pursuant to the same. This optimism was based on the project. He acknowledged that there were already some problems with that project at the time, but nothing that he felt could not be overcome.

59. Sometime towards the end of 2009, Bank A began to put some pressure on the respondent and his brother, both to reduce their borrowings – with a view to avoiding their debts being taken over by NAMA, and also to provide additional security for the same. The objective was to reduce borrowings to a level below €20 million and they disposed of assets in order to achieve this objective. Notwithstanding that they did so, however, their debts were subsequently taken over by NAMA. In the meantime, however, they had

been required by Bank A to restructure their loan facilities which necessitated the applicant preparing a statement of affairs for the Bank. This was provided in the proposal to the Bank of April, 2010. In preparing this document, Bank A required the respondent and his brother to "put the best foot forward". However, he acknowledged that the statement of affairs was "gilding the lily". More than that, he acknowledged that the document was not truthful in its content, but he said that Bank A insisted that it be put forward as it was.

60. It was put to the respondent in cross-examination that he did not disclose the Bank A proposal document and accompanying statement of means at all in these proceedings, and in particular that he did not disclose the loan due to him by M.. He said that he did not know about or recall this documentation until it was received back from the bank in response to the Data Protection request in January, 2015. However, he said that he had given information to his own accountants, which openly disclosed the existence of a debt due by M. to the respondent, when dealing with queries raised by the applicant's accountants in the course of the preparation of the original trial in 2011.

61. The accountant dealing with the matter at the time on behalf of the respondent, a Ms McShane gave evidence and confirmed that this was so. She confirmed that through oversight, she had not passed this information on to the accountants acting on behalf of the applicant. She explained that most probably this happened because she had taken the view that the debt owing by M. would never be repaid having regard to the very significantly larger sum owing by M. to Bank B, which in turn was underwritten by the guarantee provided by the respondent and his brother to that Bank. The respondent said that far from gaining any advantage from the non disclosure of the loan due to him by M., the failure, on the part of his accountant, to disclose the loan due to him and the much greater amount due by the respondent and his brother to Bank B was a disservice to him, insofar as it would have shown his net worth to be even less than that disclosed at the time.

62. The respondent said that he gave the applicant, in person, a copy of the facility letter that issued from Bank A in October, 2010. He said that Bank A, in providing this restructuring facility, forced his brother to provide his home as security for €4.5 million. At that time, his brother's home was almost debt free and this was the source of some considerable annoyance to his brother, not least because the Family Home was kept out of this additional security because it is in the name of the applicant.

63. The respondent was questioned at some length about the value of his assets as set out in the proposal to Bank A. The value of many of these assets is now somewhat academic in view of the fact that they have been the subject of the agreement with Investor A and so there is no need to summarise his evidence in this regard, save insofar as it relates to the value attributed to Z. and the SPV. At the time, a value of €750,000 was attributed to his 50% shareholding in Z. and €12 million was attributed to the value of the SPV, though in regard to the latter, it is not clear if it refers just to the shareholding of the respondent, or to the total value of that company. In any case, the respondent says that the valuation was totally unrealistic and was a valuation of those entities that the bank insisted upon at the time.

64. As far as the service centre is concerned, the respondent and his brother between them owed €21 million to Bank B which is reflected in the statement of affairs given to Bank A. On the other hand, in the same statement of affairs, a value of €12,100,000 is attributed to that asset. The respondent gave evidence that he and his brother entered into an agreement with Investor A to which I have referred above in relation to this project. There is a balance due on this loan now of €17 million, but Investor A have agreed to write off this balance provided that they receive two payments, by October 2018, one of €3 million and one of $3 million. The respondent said that these are the next most significant liabilities that he and his brother must next address, and, as matters stand, he does not know how these payments will be funded.

65. The respondent said that when it became apparent that the project was cancelled and after the other devastating events, he came to the conclusion that it would be necessary to maximise the value of the development lands adjacent to the Family Home. He said he had already previously invested a significant sum of money in having those lands rezoned. He said he put a planning team in place with a view to obtaining planning permission to develop the lands zoned for development, but after a period of about nine months engagement, the applicant cancelled these arrangements because she insisted that he pay all the expenses associated with the planning application. He said he was unwilling to do this unless the applicant put a trust in place for the benefit of D1. and D2., which he claimed he and the applicant had previously agreed. The respondent says that at the time he estimated the value of the Family Home and adjacent lands to be at the order of €20m, and he estimates that that could have increased to as much as €30 million now.

66. The respondent said that since January, 2011, his entire salary has been paid to the applicant in order to meet the maintenance obligations that he agreed to in the terms of settlement. However, in order to be able to do this he has had to borrow money from his brother for his own upkeep and living expenses. At the time, he told his brother that this would last for about two years but it has gone on for five years and his brother now wants to stop the payments. The respondent says that the payments are being made from his brother's directors account in Z. which is in credit. The respondent confirmed that the business of Z. has improved again in the last year, and that the business is profitable even though it is carrying debt. He agreed that his salary has not been increased during the period since the terms of settlement, even though the business of Z. has improved.

67. The respondent confirmed that, following upon the terms of settlement, substantial payments were made to NAMA amounting to €7,244,795. Some of these payments were made from the proceeds of the sale of assets solely owned by his brother, some of the payments were made from the proceeds of sale of assets owned jointly by the respondent and his brother and the remainder were paid on behalf of both the respondent and his brother by Z.. The respondent confirmed that Z. was under no obligation to pay NAMA, and when asked why Z. could not have paid , on his behalf, what is due to the applicant under the terms of settlement (instead of making payments to NAMA or by reducing the payments made to NAMA), he said that if he and his brother had not cooperated with NAMA, they would have been put into receivership. Also, since both the applicant and his brother were jointly liable to NAMA, his brother wanted to make payments to NAMA in reduction of their liabilities.

68. The respondent said that, while he was expecting the applicant to re-enter these proceedings by reason of his failure to make the payments due to her, and while he went so far as to arrange to meet a summons server, it came as a great shock to him to realise that the applicant had issued a motion for his attachment and committal by reason of non-disclosure. He said that if anything he had "over disclosed" to the applicant. His brother too was very upset, having been required to give security over his house to Bank A, while the Family Home remained out of reach of creditors.

69. In relation to the Holiday Property, the respondent said that it was always his understanding with the applicant that this property would be held as to his one half share for the benefit of D1. and D2., and as to the applicant's one half share for the benefit of her adult children. He wants to stand over this arrangement. The respondent said that he believed that he had completed a transfer of his shares in this entity in favour of D. and D2.. In his latest affidavit of means, the respondent says that he holds the shares in this company in trust for and for the benefit of D1. and D2.. Consistent with this, during the course of the hearing the applicant produced

a copy of a declaration of trust of the shares in favour of D1. and D2., dated 2nd September, 2011.

70. The respondent said that he is quite simply unable to meet the terms of the settlement now. While things could improve in the future, that cannot be assured and if it does happen it is some years away. He says that he is not looking for anything from the applicant and acknowledges that he is prevented by law from doing so, in any event. By way of resolution to these proceedings, the respondent proposes that he should be relieved form all lumps sum payments which he agreed to make to the applicant in the terms of settlement. He proposes that maintenance to the applicant should be reduced by two thirds immediately; that the development lands should be developed and sold as soon as possible, and all debts pertaining to the Family Home paid. This will , in the opinion of the respondent, generate a surplus of between €20 million and €30 million. From that point onwards, he should be relived of any further maintenance obligations to the respondent. He will, however, continue to meet the maintenance payments and other expenses due in respect of D1. and D2., with the assistance of his brother.

71. The respondent expressed concern that the applicant would not treat fairly with D1. and D2., and in particular expressed concern that it was her intention to benefit one of her own children with the Family Home. At the same time, however, he acknowledged that the applicant has a very good relationship with D1. and D2.. He said that it has always been understood as between the applicant and the respondent that once the issue of indebtedness to NAMA was resolved, the Family Home would in due course be placed in a trust for the benefit of D1. and D2. as to 50%, and the applicant as to 50%. He said that the applicant is now reneging on that commitment.

72. The respondent acknowledged that in the future, there is a possibility that one of his significant assets overseas, the H. lands, could become free of the security given to Investor B, and thereafter become available to the respondent and his brother at their full value. This, however, is speculative; it is also possible and he and his brother could end up owing Investor A a significant sum of money, with the H. lands being applied in reduction of the debt, pursuant to the agreement reached with Investor A.

73. As matters stand, the respondent informed the Court that he did not know how he and his brother would fund the payments that are due to Investor B in October of this year. Those payments are the next big liabilities that the respondent and his brother are facing. Aside from that the respondent said that there is the possibility of an environmental suit in X. arising out of the clean up from the accident involving the Z. asset as well as a potential net liability of €2.5 million in respect of a project involving a marine development. The respondent and his brother originally owed €3.2 million to Bank B arising out of this project, but this has been reduced to €2.5 million.

74. No vouching documentation or other evidence was produced or led at all in relation to any of these matters by or on behalf of the respondent. The only evidence placed before the Court in relation to these matters and in relation to the "devastating events" post the Order was the oral evidence of the respondent himself, and to a lesser extent that of his brother who also gave evidence.

The Expert Evidence and the Assets of the Parties

75. Seven affidavits of means were exchanged between the parties between 8th February, 2010 and 12th April, 2017, three on behalf of the applicant and four on behalf of the respondent. The applicant instructed Mr Paul Wyse of Smith and Williamson, Chartered Accountants, to prepare a report on the affidavit of means of the respondent of 12th April, 2017, which report was put into evidence. Mr Wyse was instructed just two and a half weeks prior to the commencement of the hearing.

76. The respondent instructed a Mr Tim O'Keeffe of Copsey Murray, Chartered Accountants, who prepared a report addressing the current assets and liabilities of the respondent, and who gave evidence in regard to the same. Mr O'Keeffe said that his firm had a working relationship with the respondent going back to 2012, although as the evidence went on, it appeared that it may have gone back further, to 2010, because he had some familiarity with the proposal made to Bank A by the respondent in May 2010, although neither he nor his firm prepared that proposal.

77. Helpfully, Mr Wyse and Mr O'Keeffe agreed upon a schedule of differences of their respective conclusions in relation to the net worth of the parties. On Mr Wyse's conclusion, the respondent had a negative worth of €7,402,000, with additional possible contingent liabilities of €8,409,000. In the opinion of Mr O'Keeffe, the respondent has a negative net worth of €10,427,000 with contingent liabilities of €8,409,000. However, it is important to note that these figures assume, in relation to the liabilities of the respondent which he shares with his brother, one half of the liability for debts for which he is legally jointly and severally responsible. If the full exposure of these debts were to be attributed to the respondent, they would increase very substantially, up to an amount in excess of €40 million. In the view of Mr Wyse, the financial standing of the respondent is not very different now to his financial standing at the time he entered into the terms of settlement with the applicant.

78. Mr Wyse compared the affidavit of means of the respondent of 12th April, 2017, with his affidavit of means of 12th December, 2010, sworn just weeks prior to the conclusion of the terms of settlement. He noted that on 12th December, 2010, the respondent averred that he had a negative net worth of €13,000,546, which increased to €45,000,689 in his affidavit of 12th April, 2017. Mr Wyse said that the difference between the two positions is explained by reason of the difference in position adopted by the respondent as regards his liability for debts in the two affidavits. In his affidavit of means of December, 2010, the respondent attributed to himself only such portion of the debts as he might be obliged to bear if all parties to the debt concerned discharged their responsibilities; in the affidavit of April, 2017, the respondent attributed to himself one hundred percent responsibility in respect of all debts. According to Mr Wyse, when the figures are adjusted so that the loans are treated with on the same basis, there is not much difference between the respondent's financial position in 2010 and 2017.

79. Mr Wyse has valued the interest of the respondent in the H. lands at €5,221,000. However, Mr O'Keeffe has valued the same interest at €3 million, on the basis that the interest of the respondent is held through a company in which he has only a minority interest. Mr Wyse, however, makes the point that the value of interests in property holding companies are usually only realised on a disposal of the asset, and therefore the question of discounting the value of a shareholding on the basis that it is a minority shareholding only does not arise. As against that, he agreed that he was not aware of any agreement between the parties to the company owning these lands as to when the lands may be sold, or any provision whereby any of the parties could unilaterally bring about a sale of the lands; so to that extent the value of the respondent's interest in these lands appears to be locked in until such time as there is an agreement amongst the majority of the shareholders in the holding company to dispose of the same. In any case, for the time being, the H. lands are secured to the Investor.

Assets and Liabilities of the Applicant

80. The accountants of the parties also prepared a schedule of differences of the assets and liabilities of the applicant. Her liabilities, which include the loan secured originally to Bank A and now to NAMA, over the Family Home, amount to an agreed sum of €8,733,000. Of that, €5,963,000 relates to the loan secured over the Family Home, for which the respondent is jointly liable.

81. The value of the offices owned by the applicant are agreed at €2,625,000. Her 50% share in the French Property is agreed at €0.6 million. The main area of difference between the parties as regards the value of the applicant's assets is around the value of the Family Home and adjacent lands. The applicant maintains that the Family Home, excluding the adjacent houses and the development lands, has a value of €5m, whereas the respondent maintains is has a value of €5,500,000. The four houses around the Family Home from which the applicant derives an income are valued by the applicant in the sum of €4,175,000, and by the respondent in the sum of €3,950,000, a difference of €225,000.

82. The biggest single area of disagreement as regards the value of the applicant's assets was in relation to the value of the lands within the Family Home that are zoned for development (the "development lands"). The applicant, at the beginning of this hearing, had placed a value of €6,100,000, on the value of the development lands. The respondent had placed a value of €11,500,000 on the same lands, a difference of €5,400,000. Before the hearing concluded, the parties had reached a measure of agreement in regard to the value of these lands. In this regard, the applicant agreed that the value of the development lands is €7,250,000, taking full account of the development potential of the lands. The respondent is prepared to accept that the current value of the development lands is €7,250,000, but that that value may increase in the event of a successful planning application for the development of the lands.

83. On the basis of her own figures, therefore, the applicant has a net worth of €11,626,000, although it may fairly be pointed out that no account is taken in these figures of capital gains tax that would be payable in the event of the sale of the development lands. Somewhat ironically, given that the respondent has valued the four houses around the Family Home, at €225,000 less than the value placed on those houses by the applicant, the respondent's estimate of the net worth of the applicant is €11,401,000. But that is subject to the caveat that the respondent considers that the development lands may have a higher value in €7,250,000 in the event of successful planning application.

Applicat's application to amend her motion

84. The respondent opposes the application of the applicant to amend the reliefs sought in her notice of motion. Counsel for the respondent submitted that on the authority of *Thwaite v. Thwaite* [1981] 3 WLR 96, the terms of settlement take their validity from the Order once they had been made an order of the court, rather than from any contractual status. This is undoubtedly correct, but is that a reason to refuse the applicant the reliefs sought by her in her motion of 12th July, 2017?

85. It must be remembered that there were, in effect, two limbs to the applicant's original motion of 19th September, 2014. The first limb involved an application to have the respondent attached and committed arising out of his failure to comply with the Order. That failure related specifically to the non-payment by the respondent of €750,000 to the applicant and €2000,000 to Bank A (in reduction of the loan secured over the Family Home) pursuant to paras. 6 and 17 of the terms of settlement. The second limb of the applicant's motion of 19th September, 2014, related to allegations of material non-disclosure on the part of the respondent in these proceedings in the lead up to and at the time of completion of the terms of settlement.

86. The applicant has effectively abandoned any reliefs claimed under the second limb of her motion, but as to the first limb of her motion, instead of seeking the attachment and committal of the respondent, she seeks judgment against him for the amounts already due under the terms of settlement and, importantly, the Order. This is entirely consistent with *Thwaite v. Thwaite*.

87. The applicant relies upon O. 28, r. 1 of the Rules of the Superior Courts in support of her application to amend her motion. This Order states:-

> "The Court may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

88. Counsel for the applicant expressed concern that the amendment sought is required because the Order in its current form is not an adjudication of a debt, but rather a direction by the Court to the respondent to make certain payments to the applicant. Therefore, in order to be certain that she has an order of the court that is capable of being enforced as a debt, the applicant requires judgment in the sums directed to be paid by the respondent to the applicant pursuant to the Order.

89. As against that, counsel for the respondent submits that the purpose of O. 28 is to permit a party to correct a defect or error on the face of the pleadings, and there is no error or defect in this instance. The applicant is simply engaging in a "change of tack" and there is no basis upon which the court should permit the applicant to do so.

90. I do not agree with the submissions of the respondent in this regard. The Order directs payment of specified sums by the respondent to the applicant. There are only two ways in which this part of the Order may be enforced: either by applying to have the respondent committed on account of his failure to comply with the Order, or alternatively by taking up the judgment and enforcing it in whatever way is appropriate or possible. The applicant is quite entitled to chose whichever remedy she pleases and the respondent is in no way prejudiced if she decides to abandon her application for the committal of the respondent and instead to pursue enforcement of the Order in other ways.

91. That said, the question arises as to whether or not it is necessary for the applicant to have any further order of the court having regard to the terms of the Order, which are very clear. Counsel for the applicant addressed this in his submissions and expressed concern that there is authority for the proposition that arrears of maintenance are not due as a debt in the ordinary way, and do not constitute a final judgment. He referred to the decision of Abbott J. in *F.(N) v. F.(E)* [2007] IEHC 317 in which Abbott J. found that accumulated arrears of maintenance in the sum of €59,000 were "…in strictly legal terms… not due as a debt…". He also referred to the 4th Ed. of *Shatter's Family Law* in which the author states at para. 14.111 that a "maintenance order is not a final judgment". It is submitted that in this context, there is no distinction to be made between a periodical payments order and a lump sum order.

92. I have to say that I have difficulty with the proposition that an order by a court directing a party to pay a liquidated sum to another is in any way different to the granting of a judgment, save only insofar as the former, if not complied with, may give rise to an application for attachment and committal, as occurred in this case. To require a party to come back to court in order to obtain a judgment in an amount already ordered by a court to be paid by one party to another seems to me to heap an unnecessary layer of process upon the party in whose favour the order has been made, together with the attendant expense. What is the point of the court making the order in the first place, if the beneficiary of the order has to come back to the court to ask it to make the same order again? Unless and until such time as the order is set aside or varied by the Court, in my view, a court order directing a party to pay a sum of money to another is no different to a judgment in the same amount and is capable of being enforced through the same procedures as a judgment. Provided that the order is clear, unambiguous and unconditional, a beneficiary of such an order should be able to take up the order, when perfected and enforce it through the court processes in the usual way, whether that be by way of

applying for an instalment order, referring the order to the sheriff for execution or through the registration of a judgment mortgage on any property of the debtor and thereafter obtaining a well charging order and forcing a sale of property of the debtor to satisfy the order. In engaging in any such enforcement processes, however, the applicant for the relief claimed should ensure to redact any provisions of the order that do not relate to the payment of the amount due, so as to protect the in camera nature of the proceedings.

93. Having thus decided, the applicant will be entitled to enforce the Order insofar as it relates to amounts to be paid to the respondent, unless the Order is varied pursuant to the application of the respondent. However, there is a slight complication in this insofar as para. 17 of the Order directs a payment to be made to Bank A, and not to the respondent, in reduction of the loan secured over the Family Home. Whether or not there is a need to resolve that complication, however, depends upon whether or not I am persuaded to accede the respondent's motion to vary the Order.

Principles Applicable on Applications to Vary under s. 22

94. I was referred to a range of authorities, substantially the same authorities, by each of the parties in relation to the interpretation and application of s. 22. These include: the decision of Abbott J. in *A.K. v. J.K.* (2009) 1 I.R. the decision of Dunne J. in *O'C(C) v. O'C(D)* [2009] IEHC 248, the decision of Abbott J. in *N.F. v. E.F.* [2011] 2 I.R. 100 and the decision of the Supreme Court in *D. v. D.* [2015] IESC 16. From these decisions, the following principles as regards the interpretation and application of s. 22 may be discerned:-

> 1. Where a change of circumstances occurs between the date of a court order and the execution of that order such as to make it impossible for a party to comply with the same or to make it inequitable to require that party to comply with the same, the courts may alter the obligation or relieve the party under that obligation altogether from compliance with the same. So for example, where there has been a dramatic and unforeseen drop in property values such as to undermine the fabric of a judgment or settlement or render the judgment or settlement incapable of performance, such as occurred in *D. v. D.*, the court may intervene;
>
> 2. When applying s. 22, the court should, so far as possible, maintain the original intent, balance, and symmetry of the original order, while at the same time adopting whatever changes and adjustments in provision as are necessary to ensure fairness and justice – per Abbott J. in *A.K. v. J.K.* Similarly, in *D. v. D.*, the Supreme Court agreed to permit the introduction of new evidence regarding a significant drop in land values, so that account of those values could be taken in the application to vary, but at the same time stated that the principles applied by the High Court in that case in the division of the assets could still be applied.
>
> 3. In considering whether or not to make an order under s. 22, the court must have regard, systematically, to the factors set out in s. 20(2)(a) to (l) of the Act of 1996. It is not enough for the trial judge to simply to refer to those factors in a general way. (The Supreme Court in *T.v.T.* [2002] 3 I.R. 334).
>
> 4. When invoking s. 22, an applicant must invoke new events and not simply what Dunne J. described in *O'C. v. O'C.* as "… the continuation of an existing trend."

95. The applicant also submitted that misconduct on the part of an applicant is a matter that should be taken into account when considering an application under s. 22. The applicant referred to the recent decision of the Court of Appeal in Q.R. v. S.T. [2016] IECA 421. In that case Irvine J. stated:-

> "It is very clear from the authorities that in certain circumstances it would be unjust for a court, when determining proper provision under s. 16(2)(i), to fail to reflect the financial misconduct of one of the parties. This makes particular sense if that conduct led to the depletion or diminution of the assets available for consideration …
>
> … Likewise efforts on the part of a spouse to hide money or dispose of assets to frustrate the court's ability to make proper provision are but a few examples of the types of conduct it might be unjust to ignore. However, as the section clearly provides, the decision to take conduct into account ultimately depends on all of the circumstances of the case. …".

96. The applicant makes this submission in the context of what the applicant claims is the inadequacy of information provided by the respondent as regards: M. generally; the loan due by M. to the respondent in particular; the write down of that loan by the respondent; the apparent writing off of the liabilities of the respondent to Bank B/NAMA in connection with his guarantee of the liabilities of M. (consequent upon the agreement with Investor B) and the possibility that there may be assets within M. which could be realised to repay the loan due to the respondent. The general thrust of the applicant's argument is that there has been an insufficiency of candour on the part of the respondent in the disclosure of his assets, which, at a minimum, creates an uncertainty as to his true worth. On the authority of *Q.R. v S.T.*, that is misconduct which the court should take into account in considering the respondent's motion.

97. As against that, the respondent submits that the decision of Irvine J. makes it clear that there must be an intent on the part of the spouse against whom wrongdoing is alleged to impair the ability of the court to make proper provision for the other party, and the financial misconduct alleged must affect the capacity of the spouse to make proper provision for the other spouse. Counsel for the respondent cited the following passage from the decision of Irvine J in *Q.R.v S.T.*:-

> "This helpful passage from the decision of Ryan J. [in *K.C. v T. C.* (Unreported, Court of Appeal, 12th February, 2016)] would suggest that when determining the manner and amount of the provision to be made for the parties it would be unjust to rely upon litigation misconduct, unless, having considered carefully all of the evidence which might favour a finding of mistake or innocence, the court was convinced that the party concerned had deliberately told lies, had sought to mislead the court and/or had still not made full disclosure."

Respondent's Application to vary Order

98. Counsel for the applicant submits that the application to vary the Order should be rejected on six grounds which may be summarised as follows:-

> (i) There has been a lack of candour on the part of the respondent as regards the disclosure of his assets.
>
> (ii) This lack of candour has given rise to uncertainties as regards the respondent's net worth and financial standing, and

the Court should not engage in any guess work to try and resolve those uncertainties which arise from the respondent's own conduct.

(iii) Since the Order, the respondent has preferred other creditors over the applicant to the tune of some €7,244,795, and possibly more. The respondent made no effort to engage with these other creditors to the benefit of the applicant by, for example, pointing out that he had responsibilities to the applicant under the Order and seeking agreement from them to make payments to the applicant. In particular, it may have been open to the respondent to submit to NAMA that at least some of the payments made to it should have been credited not as against the liabilities of the respondent and his brother, but as against the joint liabilities of the respondent and the applicant in respect of the loan secured over the Family Home.

(iv) There has been no material change in the financial circumstances of the respondent since the date of the Order, such as to warrant an order under s. 22.

(v) The "devastating events" relied upon by the respondent were either not devastating at all, but merely part of the ebb and flow of ordinary business and/or were anticipated by the respondent at the time settlement was concluded. In this regard, the applicant places particular reliance upon the admission of the respondent that he entered into the terms of settlement more in hope than in confidence and that he was aware of problems with the project at the time settlement was concluded.

(vi) There was no corroborative evidence of any kind put forward by the respondent in relation to any of the events relied upon him to support the application to vary the Order.

99. In reply to these arguments, the respondent submits as follows:-

(i) There was no information deficit on the part of the respondent and no lack of candour in relation to the provision of information. The only ground relied upon by the applicant in this regard was an allegation that the respondent had not provided the applicant with the Bank A facility letter of October 2010, which allegation the applicant was obliged to withdraw. In relation to the complaint that the respondent did not disclose the loan due to him by M., this was not the fault of the applicant, but arose due to an oversight on the part of his accountant, to whom he had provided the relevant information.

(ii) Insofar as there was any information deficit, it was unintentional and was not material. The applicant put the matter no further than to say that she might have considered the terms of settlement differently.

(iii) As regards the proposal to Bank A, the evidence of the respondent was that the content was directed by Bank A and that the figures were intended to put the best possible gloss on the circumstances of the respondent (and his brother) at the time. Moreover, the proposal form itself is ambiguous in a number of respects in relation to the ownership and value of a number of assets, and it overstated the financial circumstances of the respondent.

(iv) As regards payments to third parties, it was the evidence of the respondent supported by the evidence of his accountant, Mr O'Keeffe, and to an extent by Mr Peelo and Mr Wyse, that if the respondent and his brother had not complied with the demands of NAMA, then NAMA would have appointed a receiver over the assets secured. Moreover, a significant proportion of the payments to NAMA was funded through the sale of assets owned exclusively by the respondent's brother.

100. In their submissions, counsel for the respondent did not address the point made on behalf of the applicant that his circumstances today are not very much different from his circumstances in January, 2011. However, it is submitted that the respondent entered into the terms of settlement believing that he could comply and that he was optimistic he could overcome any obstacles. He did so on the basis that the project was still subsisting and was poised to yield a dividend. He believed that the service centre would become profitable and he had a standstill agreement as regards his liabilities to Bank B. The rug was pulled from under that project when his debts were transferred to Investor B and it demanded repayment of the loan relating to the service centre in particular, but also other loans. Then there was the loss of the Z. asset in an accident, and the cut backs by the government of X. which impacted significantly upon the business of Z.. It is submitted that there no evidence put forward to suggest that these occurrences, individually or taken together, did not have the devastating consequences claimed by the respondent. These were all events that occurred subsequent to January 2011. They have had the effect of altering, fundamentally, the basis upon which the respondent entered into the terms of settlement. It is further submitted that the applicant was aware, at least in a general way, of the respondent's circumstances and expectations at the time of settlement.

Conclusions on application to vary the Order

101. I should first deal with the submission made on behalf of the applicant as regards the lack of candour of the respondent, and specifically insofar as this submission is advanced in relation to M.. It is submitted on behalf of the applicant that there has been a material lack of candour on the part of the respondent, which the Court should take into account in considering the application to vary the Order. Firstly, I think it is clear from the evidence of Ms McShane (to which I referred at para. 61 above) that the respondent did provide her with information regarding the loan due by M. to the respondent and his brother (even if the loan amount did not exactly correspond to the amount referred to in the Bank A proposal) and that Ms McShane overlooked to pass this information on to the applicant's advisors. Furthermore, it is clear from the documentation placed before the court by Ms McShane that a copy of the guarantee given by the respondent and his brother to Bank B in respect of the liabilities of M. to that bank was made available for inspection and that Messrs Peelo reviewed the same. Moreover, the replies from the respondent to his accountant at the time indicate that documentation concerning the loan advanced by the respondent to M. was available for inspection, and this was relayed by the respondent's accountant to Mr Peelo. A copy of the loan statement was attached with the reply.

102. Although the commercial rationale for the respondent giving a guarantee of the liabilities of M. is still somewhat unclear, an explanation was given by accountants acting on behalf of the respondent in a reply to queries raised by the applicant's accountants, which explanation was repeated by the respondent himself in his evidence. Undoubtedly there are still gaps as regards the information concerning M.. For example it would have been particularly useful if the accounts of M. could have been made available, but the respondent indicated that these could not be made available because he is a not a shareholder or director of that entity. The respondent expressly refused to reveal the identity of the shareholders of that company on the grounds that he always promised them that he would never do so. While on the one hand this is not satisfactory, on the other hand it is difficult to see how the mere identification of the shareholders of M. would of itself lend much assistance to these proceedings.

103. Overall my conclusion on this aspect of the matter is that the problem with M. arises not so much from a failure on the part of the respondent to give information, but rather that it is difficult to understand the commercial rationale behind the relationship between the respondent and M.. But the fundamental information appears to have been provided and verified i.e. a guarantee was given by the respondent and his brother to Bank B as regards the liabilities of M. (which according to Peelo and Partners is actually unlimited and not capped at all, even at the amount of €21.3 million as the respondent indicated) and there is a loan owing by M. to the respondent and his brother in the sum of €13 million, of which €4.5 million is owing to the respondent. What has not been proven, however, or vouched in any way is how much is owing by M. to Bank B. Nor has the Court been given any information as to the value of assets secured by M. to Bank B which could become available to repay the loan due by M. to the respondent and his brother, notwithstanding that, according to the respondent, this loan was written off in 2013.

104. However, it seems to me to be highly unlikely that there is available to the respondent and his brother some hidden reserve in M.. The loan owing to the respondent by M. was disclosed to Bank A and it is not unreasonable to assume that either that bank, or subsequently NAMA, would have required the respondent and his brother to recover the amounts payable to them by M., and thereafter required payments of those funds to the bank or NAMA, if there was a reasonable prospect of securing repayment of the loan.

105. Moreover, it is hardly insignificant that the respondent's brother was required, in 2010, to provide additional security to Bank A in the form of a charge over his Family Home, which, from its address, may reasonably be assumed to be a very valuable and prestigious property. It hardly needs to be said that it is highly unlikely he would have done this if it could have been avoided. The evidence of both the respondent and his brother was that the latter was very upset about being required to provide this security. Since it is clear, on the evidence, that the financial affairs of the two brothers are very much intertwined it is reasonable to draw the inference that the financial circumstances of both were stretched to the limit at that point in time. Furthermore, it is only as a result of the introduction of funds by the Investor B, in the course of these proceedings, that the respondent's brother will be able to secure the release of his Family Home from that security.

106. For these reasons, I consider it highly unlikely that M. has any funds available to pay the loan due by it to the respondent and his brother. Insofar as the respondent has been reluctant to give certain information about M., I do not believe that that information is any way material to a proper consideration of the true state of the respondent's financial affairs, though it would have been helpful to have had more information provided to arrive at this conclusion more swiftly and with more certainty. However, I do not believe that the evidence of the respondent as regards M. has been so cavalier as to justify the rejection by the Court of other important evidence given by the respondent. Nor do I believe that the respondent has told lies or attempted to mislead the Court

107. I turn next to the submissions made on behalf of the applicant regarding the alleged preference of other creditors – specifically NAMA – by the respondent, over his obligations to the applicant. It is submitted than in considering the respondent's motion, the Court should take into account the payments made by the respondent and his brother to NAMA, after the making of the Order. In other words some of these monies could and should have been used to discharge some or all of the respondent's obligations to the applicant under the Order.

108. It can hardly be doubted but that NAMA was putting the respondent and his brother under very significant pressure to reduce their liabilities. The respondent's brother had to sell a number a number of his assets in order to meet the demands of NAMA, and he was clearly very anxious to reduce his exposure to NAMA, not least on account of the security he had been required to provide over his own home. It is not surprising therefore that the respondent's brother would not agree to payments from Z. to NAMA being credited against any liabilities to which he was not a party, or, more specifically, to be applied in reduction of the loan owing by the applicant and the respondent to NAMA relating to the Family Home. While the respondent could have made efforts to have some of the payments diverted to reducing his and the applicant's indebtedness to NAMA, rather than that of the respondent and his brother, I doubt very much if, in the circumstances, any efforts of this kind would have borne fruit.

109. The respondent was under pressure from two sources: NAMA and his brother to reduce their joint indebtedness to NAMA arriving out of their business activities. The furthest that Mr Wyse was able to put it was that he had seen NAMA take account of obligations of parties pursuant to matrimonial proceedings, and sometimes make concessions, but he did not venture to suggest that in this case NAMA would have agreed, if requested, to allocating payments received from Z., the respondent and his brother in reduction of the liabilities of the applicant and the respondent. I think it very unlikely it would have made any difference if the respondent had requested NAMA or his brother to agree to allocate any of the payments made to NAMA as suggested by the applicant. Moreover, it was the evidence of the respondent that had he and his brother not reduced their liabilities to NAMA as they did, the likelihood is that NAMA would have appointed a receiver over their assets, and thereafter taken steps to wind up the business of the respondent and his brother. While Z. may not have had any liabilities to NAMA, it is not difficult to see how the taking of enforcement action against the respondent and his brother by NAMA could ultimately have an impact on Z. also. In my view the allegations of an inappropriate preference by the respondent of his banking creditors over the applicant, are not made out.

110. I turn then to the application to vary itself. The jurisdiction to vary orders previously made in matrimonial matters is well established and is set out in s. 22 of the Act of 1996. It is has been the subject of considerable amount of judicial discussion and interpretation and I have already summarised above the key principles to be applied when considering applications of this kind. I am conscious of the requirement to address the factors set out in s. 20 of the Act of 1996, seriatim, and I have done so at the end of this judgment. The first question to be determined is whether or not there has been a change of circumstances, since January, 2011 such as to make it impossible for the respondent to discharge the lump sum provisions of the Order or to make it inequitable to require him to do so?

111. It is submitted on behalf of the applicant that the circumstances of the respondent are not very different to those obtaining in January, 2011, and, therefore, if he felt able to comply with the Order at that time, he should be able to do so now. However, that simply doesn't follow. A person may enter into a settlement in the reasonable expectation that certain events will occur or alternatively that surrounding circumstances – such as property values – will remain the same, or even improve. If external forces, through no fault of that person, conspire to render those expectations nugatory, then that person, again through no fault of his or her own, may be unable to comply with the terms of settlement.

112. In this case, the respondent claims that a number of events occurred, over which he had no control, and which he had no reason or expectation to believe would occur. As counsel for the applicant has pointed out, the court has only the evidence of the respondent himself in relation to these events, and he produced no vouching documentation nor called any witnesses in regard to same. Moreover, counsel for the applicant has submitted that having regard to what he submitted was the lack of candour on the part of the respondent in making disclosure and in particular in refusing to give information in relation to M., it would be inappropriate for the Court to make any order in favour of the respondent on foot of his application for variation of the Order.

113. There is no denying that the failure of the respondent to produce any corroborative evidence as to the occurrence and effect of the events relied upon him in support of his motion is unsatisfactory. Each of these events must have generated a certain amount of documentation. It should also have been possible to call some supporting testimony. But unsatisfactory and all as all of this may be, it falls to the Court now to decide whether or not the evidence put forward by the respondent in relation to these events should be accepted as being sufficient proof of their occurrence and effect.

114. Firstly, it should be observed that, while not produced in Court, some documentary evidence appears to have been produced to the applicant's solicitors and/or her accountants in relation to the settlement entered into between the respondent, his brother and Investor A. This is clear from the report of Mr Wyse. I accept the evidence of the respondent that the respondent and his brother will have to make payments of €3 million and $3 million to conclude the settlement with Investor A in October next, and to obtain the benefit of the write down agreed with Investor A, although the report of Mr Wyse refers only to the requirement to pay €3 million.

115. Secondly, in cross-examination, the applicant accepted that she had no reason not to believe the respondent in relation to the occurrence of these events. Now of course she had no more evidence to vouch these occurrences than I have available to me now, but the applicant knows the respondent better than anybody else involved in these proceedings and if she had reservations or felt that he was fabricating stories to avoid his liabilities to her, I would expect her to have said so.

116. Thirdly, uncorroborated evidence is not the same thing as no evidence at all; it may be frail for want of corroboration, but it is nonetheless evidence. Having had the benefit of observing the respondent in the witness box over a number of days, and also having had the benefit of evidence from his brother, on the balance of probabilities I think the events described by the respondent did indeed occur, and that they had the consequences which he described in his evidence.

117. It is my view also that these events are events which the respondent could not have anticipated. On the contrary, he expected that the project was finally going to start yielding a return in the years following the conclusion of the terms of settlement which would have enabled him to discharge his liabilities to the applicant as they arose. Indeed, he gave evidence that the timing of the payments provided for in the terms of settlement was structured as it was to reflect anticipated income from the project, resulting in the reduction of debt in Z. and the SPV and thereby further resulting in the availability of funds (to the respondent) by 2014 to make the payment referred to para. 17 of the terms of settlement.

118. Not only was the project cancelled, but the other events relied upon by the respondent, which occurred in close succession to each other either had the effect of depriving Z. of essential income, or alternatively caused it to suffer a significant loss.

119. I do not believe that the events relied upon by the respondent in support of this application could be regarded as part of a "continuing trend" of the kind that occurred and was referred to by Dunne J. in the case of *O'C v. O'C*. And while it might have been possible to foresee some of the financial difficulties encountered by the respondent, nobody could have foreseen the cascade of misfortune that occurred which, taken together, must surely constitute a change in circumstances sufficient to invoke the jurisdiction of s. 22.

120. The financial circumstances of the respondent are both uncertain and precarious. It may be that he will yet reap a dividend and quite possibly a good dividend, as a result of the Investment, not just arising from profits made from the obtaining of consents to enable the lands to which the Investment relates to be developed, but also, should that occur, from the release of the H. lands and possibly also the farm from security provided to the Investor. It is also possible that the respondent will receive a reasonable income from the activities of Z.

121. As against all of that, it must at least be equally plausible at this point in time to say that, not only will the respondent not reap the dividend as a result of the Investment, but he may yet be required to stump up funds to Investor B, and quite possibly very significant funds (up to the maximum of its investment of €31 million) to reimburse it any losses on the Investment. As far as Z. is concerned, while its finances have, according to the both the respondent and his brother, improved within the last year or two, it appears from the evidence of Mr Wyse that there is significant indebtedness within the Z. group of companies. While he found it hard to arrive at any conclusion as regards the overall financial strength of Z. (because of the absence of a consolidated balance sheet) the very fact that there is a significant indebtedness within the group must be a cause for concern.

122. Right now, it would appear that the only certainty that the respondent has as regards his finances is that there is a commitment to pay Investor B €3 million and $3 million in October of this year, and neither the respondent nor his brother at this point in time know where those funds will be found. If they fail to make those payments, the consequences are quite likely to be ruinous, resulting in the reinstatement of the debt due to Investor A of €17 million, and, according to the respondent, an additional liability to pay €3 million.

123. As against all of that, the financial circumstances of the applicant appear to be as certain as any market permits. She has net assets of €11,626,000, on her own case. This assumes a value for the development lands, with planning permission, of €7,250,000. That, it would appear, is likely to be the minimum value of those lands, although there will obviously be a cost associated with obtaining planning permission. There will also be capital gains tax to be deducted from the sale of the development lands. The loan attaching to the Family Home, for which both parties are jointly liable, currently stands at about €5.9 million, and the applicant has additional loans relating to her other properties of €1,759,000 and other loans totalling €1,011,000. So her total liabilities, as per the agreed schedule of differences, come to €8,733,000. Putting aside the costs of obtaining planning permission and capital gains tax, if she were to sell the development lands for the value that she has agreed in respect of those lands, and apply the proceeds of sale in reduction of both the loans to which she is a party with the respondent, and the loans she holds in her sole name, she would be left with an indebtedness of €1,483,000, as against assets of approximately €13,109,000 (having sold the development lands).

124. This would have the effect of reducing very substantially the monthly repayments that the applicant has been making in respect of loans which according to her statement of means of 5th April, 2017 amount, in round terms, to €21,000 per month. Taking a very simplistic view of things, if her indebtedness was reduced as described above (which amounts to a reduction in indebtedness of some 84%) and her repayments are reduced correspondingly, her repayments per month would be reduced to €3,360. This would reduce the monthly expenditure referred to in her affidavit of means of 5th April, 2017 to €17,344 per month, compared with a net income per month of €29,316. However, her net income per month includes payments currently being received from the respondent of €17,996 per month.

125. The applicant would also have available to her the option of clearing her indebtedness altogether, by selling some of her other assets. While that would obviously reduce her income, it seems certain to me that it is possible for the applicant, now that the shadow of NAMA/NALM has been removed, through proper management of her finances, to strike the right balance between retaining such assets as are sufficient to generate an income for her needs, and disposing of assets to reduce or eliminate debt.

126. It should be noted that at the time the Order was made, the applicant had sworn an affidavit of means dated 9th January, 2011 in which she averred that the value of the Family Home (which it must be remembered I have defined as including the development lands) was €6.9 million, and the value of her other properties (excluding the Holiday Property) was €1.5 million. In the intervening period, the value of the former has increased to €16,425,000, and the latter to €2,625,000.

127. While it goes without saying that a party who receives assets pursuant to terms of settlement or a court order in matrimonial proceedings is entitled to the full benefit of any subsequent increase in those assets, it is highly unlikely that anybody could have foreseen, in January 2011, that there would be such an increase in the value of the properties owned by the applicant.

128. In addition to the assets mentioned above, both applicant and respondent own a half share in the Holiday Property the net current value of which is estimated to be €1,200,000. The respondent has said that he considers his share of this property to be held upon trust for D1. and D2., and the applicant has no objection to that.

The Respondent's trust proposal

129. The respondent has made a proposal that the Family Home should be placed into a trust for the benefit as to 50% thereof for the applicant, and the other 50% thereof for the children of the parties. Such a proposal cannot be countenanced for several reasons. Firstly, it would be highly unusual, if not unprecedented, to make such an order in matrimonial proceedings. The courts do not normally make capital provision for the children of a marriage. The children are usually provided for through the distribution of assets to their parents and, as to their ongoing maintenance, with specific orders for periodic payments in relation to the children. Other than by agreement of the parties, proceedings such as this are not an opportunity for succession planning to be made at the request of one party, but at the expense of the other. While the applicant did agree, at clause 28 of the terms of settlement, that D1. and D2. will be entitled to not less than 20% each of her net estate upon her death, there is a distinction to be drawn between a party to matrimonial proceedings agreeing to such an order as part of a settlement with the other party, and asking the court for such an order.

130. Secondly, while the respondent has argued that the creation of such a trust was at all times agreed by the applicant, the applicant has strenuously denied this. Moreover, the terms of settlement reflect no such intention, and if that was the intention of the parties, there is no reason at all why it could not have been reflected in the terms of settlement – it would not have exposed the Family Home to the grasp of creditors; on the contrary. Not only that, the contention that the parties had an agreement to place the Family Home in a trust is entirely at odds with clauses 16 and 28 of the terms of settlement. There would be no necessity for such provisions if it had been agreed that the Family Home was to be placed in a trust in which the children of the parties were to be beneficiaries of 50% of the Family Home. In contrast, the applicant has accepted the proposition put forward by the respondent, in relation to the Holiday Property, that it was agreed between them that in due course the applicant would be free to leave 50% of that property to her children, and the respondent would be free to leave his 50% share thereof to the children of the parties. I reject entirely the evidence of the respondent in relation to the agreement that he claims as regards the creation of such a trust. The evidence of the applicant in this regard is to be preferred.

131. Furthermore, it should be observed that one of the children of the parties is now, and the other is almost, an adult. Their needs are clearly very different to those of dependant young children. Their ongoing needs, to the conclusion of their education, and if necessary beyond, can be met from the income of the parties, and the respondent has indicated a willingness to continue funding the cost of their education, and, where necessary, their healthcare costs in accordance with the terms of the Order.

132. Finally, in the interests of completeness, I should say that I agree with the submissions made by counsel on behalf of the applicant that the creation of such a trust would give rise to unthinkable complications and leave parties in respect of whom a decree of divorce has been granted and who it may be assumed wish to live lives freely and independently of each other, joined at the hip indefinitely.

Decision on application to vary the Order

133. I return now to the application to vary the terms of settlement. I am satisfied that the respondent has no means to discharge his outstanding financial obligations to the applicant. As I have outlined above, his financial circumstances are precarious and uncertain. He has no pension provision and is almost 65 years of age. He has remarried and has ten year old child. In my view there is every risk that if the respondent is required to meet his outstanding financial obligations under the terms of settlement, he could be reduced to penury. As against that, I think it is clear from what I have outlined above that, owing to the very substantial increases in property values that have occurred since the Order, the position of the applicant is comfortable to the point of affluence. While it is true that the applicant does not have any specific pension provision either, even if the respondent is released from his lump sum obligations under the terms of settlement, and the applicant has to discharge all of their joint liabilities to NAMA, the applicant should have available to her far more resources than she could ever need for the remainder of her days. This is so notwithstanding that, like the respondent, the applicant does not have a specific pension provision. Her assets are her pension, and more. In my view she could, if required, also make proper provision for the needs of the children out of these resources

134. For all of these reasons, I believe that it is appropriate that I should make an order varying the Order that has the effect of vacating the obligation of the respondent to pay the applicant lump sum payments required of him pursuant to the terms of the Order, and specifically vacating the orders reflected in paras. 6, 17 and 18 of the terms of settlement. Additionally, I direct that, as between applicant and respondent, the liabilities to NAMA secured over the Family Home shall the responsibility of the applicant, but in any case shall be discharged by the applicant within two years. I will leave it to the applicant herself to decide how best to meet that obligation; suffice to say it is very clear she will have more than sufficient assets at her disposal to do so.

135. In making these orders I have had regard to the requirement to preserve, as closely as possible, the balance and symmetry of the terms of settlement. As at the date of the terms of settlement, the applicant would have envisaged receiving the Family Home, then valued at €6.9 million, free of charge by 1st February, 2018. She would also have received an additional payment (over and above that already paid by the respondent) of €750,000. Taking just those two items together and ignoring other assets, this would have given the applicant cash and assets having a value of €7,650,000. As it is, the effect of the orders that I am now making will result in the applicant receiving an asset now valued at €16,425,000 (this is a combination of a current valuation of the Family Home to which the applicant has agreed in the sum of €15,275,000, to which I have added the sum of €1,150,000 to reflect the now agreed minimum value of the development lands in the sum of €7,250,000), from which should be deducted (for comparison purposes) the amount due in respect of the loan over the Family Home in the sum of €5.9 million, leaving the applicant with an asset, free of charge or encumbrance, valued at €10,525,000, when the liabilities to NAMA have been discharged.

136. The applicant has also seen the value of her commercial premises grow by some €1.1 million since the making of the Order. It is clear, therefore, that the applicant will, even after the orders that I propose to make, be significantly better off than she would have been in January, 2011, after the making of the Order, because of the significant improvement in the property market in the meantime.

137. As regards maintenance, the terms of settlement provided that the respondent was to pay the applicant the sum of €12,916 per month for her ongoing maintenance and support (para. 2) and the sum of €5,000 per month for the support of the dependant children, D1. and D2., to be apportioned equally between them (para. 3). It was the evidence of the respondent that he has only been able to meet these payments through the support of his brother, because the respondent's entire salary from Z. has been required to meet his maintenance obligations under the Order. His brother has been meeting the respondent's living expense from his director's balance in Z.. His brother gave evidence to the effect that he anticipated that he would only have to give this assistance for a limited period after the Order, and certainly not as long as has transpired, and he wants to bring it to an end. While he is willing to continue the payment of maintenance in respect of the children, he is not willing to do it in respect of the maintenance payable to the applicant herself. The respondent has proposed that there should be an immediate reduction by two thirds of the maintenance payable to the applicant for her benefit.

138. The evidence of both the respondent and his brother was that the trading circumstances of Z. have improved over the last year or two. Unfortunately, no figures at all were available to give any indication as to that improvement, or as to the kind of salary that could be paid to the respondent. However, I think it is clear that, on the basis of their respective financial circumstances as I have found them to be, it would be unjust and indeed unnecessary, to require the respondent to continue paying maintenance for the applicant and the children of the parties at the same level as was provided for in the terms of settlement.

139. Dealing with the children first, the respondent has not proposed any reduction in the payment, which appears to be a very generous level of payment, in respect of their maintenance. It is desirable however that some end should be put on that obligation and accordingly I will order that para. no. 3 of the terms of settlement should be amended by the addition of the words:-

> "such payments to cease in respect of each child attaining the age of 24 years i.e. when D1. reaches the age of 24 years, the payment shall be reduced to €2,500 per month, and upon D2. reaching the age of 24 years, the obligation to make this payment shall cease altogether."

140. Similarly, the obligation to discharge medical and healthcare expenses in respect of the children as described in para. 4 of the terms of settlement should cease upon each child attaining the age of 24 years.

141. As to the maintenance obligations to the applicant as provided for in para. 2 of the terms of settlement, at the moment the applicant has a net deficit of income over expenditure. It is going to take her some time to reorganise her affairs and to arrange to obtain planning permission for the development lands and dispose of the same. Having regard to this, and the improved trading circumstances of Z., I will direct that this payment is to continue for a period of twelve months from the date of perfection of the order herein, but thereafter shall cease altogether.

142. The Holiday Property was not the subject of any order, and I do not propose to make any order in respect of the same now. It appears the parties are agreed as to the future treatment of this property. However, in the event that there should be, at any time in the future, disagreement in relation to the upkeep, management or sale of this property, I will give the parties liberty to apply, to the intent that if one party shall so require it the Court will order that that property shall be sold (or alternatively the company through which it is held be sold) and the proceeds of sale divided equally between the parties.

The Factors Set out in Section 20(2)(a)(ii)(I) of the Act of 1996

143. As I have mentioned above, it is a requirement for the Court to consider the factors set out in s. 20 *seriatim*, when considering, under s. 22, an application to vary orders previously made. In considering the orders that I consider appropriate in this matter, I have taken those factors into account as follows:-

> *(a) The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future.*
>
> I have set out in as much detail as I can particulars of the earning capacity, property and other financial resources now available or likely to be available in the foreseeable future, and reflected the same in the orders that I intend to make, as set out above. I consider those orders to be the fairest and most just allocation of the resources of the parties in all of the circumstances.
>
> *(b) The financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (whether in the case of the remarriage of the spouse or otherwise).*
>
> All of these factors have been set out above in as much detail as is available to the Court, and have been taken into account in my conclusions as set out above.
>
> *(c) The standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be.*
>
> Neither party advanced any case as to any particular standard of living enjoyed by the parties prior to the institution of proceedings.
>
> *(d) The age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another.*
>
> The parties were married on 12th February, 1986. It is not clear precisely when the marriage broke down but from the evidence and the pleadings it would appear that this was at latest 2006. The applicant is in her 72nd year, and the respondent is in his 65th year.
>
> *(e) Any physical or mental disability of either of the spouses.*
>
> None was indicated to the Court.
>
> *(f) The contributions which each of the spouses has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution made by each of them to the income, earning capacity, property and financial resources of the other spouse and any contribution made by either of them by looking after the home or caring for the family.*

The wealth of the family would appear to have originated from the businesses of the respondent. However, the most valuable asset of the family is beyond any doubt at the moment the Family Home which is in the sole name of the applicant. Although this was not explored in detail at the hearing, it appears that it was previously in the joint names of the parties and the applicant gave evidence that she purchased the interest of the respondent in the Family Home. No indication was given as to where she obtained the funds to do so. Neither party invited the Court to attribute any significance as to the respective contributions of the parties to the welfare of the family.

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

No case was made by either party under this heading.

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

No evidence was advanced under this heading.

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

The applicant did complain about the conduct of the respondent in two respects. Firstly, she clearly resented what she considered to be an ongoing intrusion by the respondent into her everyday life and in particular the manner in which he attempted to influence how the applicant should maximise the development potential of the development lands. For his part, the respondent countered that he had expended a lot of money in having the development lands zoned for development and that he was doing no more than putting a planning team in place to maximise the development of the lands in a timely manner. He had a somewhat patronising attitude to the applicant in relation to these matters. The orders that I am making as regards the Family Home affirm the absolute entitlement of the applicant to ownership thereof and give her complete control over the future development of the development lands.

The applicant also had complaints as regards communications between the respondent and the children of the parties. However, these complaints are not such as to require any orders.

It is also apparent from this judgment that the applicant also had complaints about the disclosure made by the respondent in the course of the proceedings, and I have already dealt with this in detail above.

(j) The accommodation needs of either of the spouses.

The accommodation needs of the applicant are more than adequately satisfied. The respondent is residing in rented accommodation, the rent for which is being provided for by his brother. This is one of the reasons that I have decided that it is appropriate to relieve the respondent of his lump sum obligations under the Order and to provide for the termination of maintenance payments by the respondent to the applicant in twelve months time.

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

This did not arise in these proceedings.

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

The applicant has not remarried, and she does not have a partner. The respondent has remarried and has a child aged ten years by his new spouse. Neither party asked the Court to take into account any rights that those parties may enjoy.

However, the respondent expressed concern that the applicant might prefer the children of her first marriage over and above the children of the parties, and in particular expressed concern regarding D2., whose legal situation is uncertain. He said that it had previously been agreed between the parties that the Family Home should be placed in a trust in which the children of the parties would enjoy a 50% beneficial ownership. This was denied by the applicant, and on the evidence I have preferred the evidence of the applicant in this regard.

The respondent has acknowledged that the applicant has a very good relationship with the children of the parties, but is obviously concerned that the applicant will not make fair provision for them in the future. For her part, the applicant has vehemently denied this and has said that she will not prefer any of her children over any other of her children in the management of her affairs in the future.

In considering this issue, I have taken account of the ages of D1 and D2.. D1. will be twenty-one this year and D2. will soon be seventeen years of age. The respondent has agreed to continue paying the applicant the sum of €5,000.00 per month for the support of the children, to discharge school fees and to maintain private health care for the children, and to pay for any uninsured medical and dental costs. The question of school fees, it is presumed, will soon become academic, but the children may require assistance with third level fees and I propose to amend the Order to require the respondent to discharge such fees as may be required to provide the children of the parties with a university education in Ireland. Thereafter, it is a matter for the parties to decide for themselves how they wish to benefit the children of the marriage whether on an *inter vivos* basis or by way of succession.