

THE HIGH COURT

FAMILY LAW

[2012 No. 46 M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989 AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

S.Q.

APPLICANT

AND

T.Q.

RESPONDENT

JUDGMENT of Mr. Justice Keane delivered on the 5th June 2014

Introduction

1. What is the scope, and what are the limits, of the power of the High Court to order one of the spouses in matrimonial proceedings to provide information or documentation to the other spouse (and to the court) concerning the financial circumstances of a company in which the former holds a majority shareholding? That is the fundamental question raised by the present application.

Background

2. The application arises in the context of judicial separation proceedings between the parties. They were married in 2002. There were three children of the marriage but, sadly, one child passed away a number of years ago. The wife is entirely financially dependent on her husband.

3. In addition to a decree of judicial separation, the wife seeks various ancillary orders that attract the provisions of s. 16 of the Family Law Act 1995 ("the 1995 Act"), whereby the court must endeavour to ensure that proper provision is made for each spouse and any dependent family member having regard to all the circumstances of the case. Under s. 16(2)(a) of the 1995 Act, in considering the orders necessary to effect proper provision, the court is required to have regard to, amongst other matters, the "property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future."

4. The husband has a controlling interest in a particular group of companies. He was director and chief executive of the parent company when the present litigation commenced by Special Summons issued on the 15th November 2012. He has since averred that, while he remains a director, he ceased to be chief executive on the 31st December 2013, shortly before the issue of the present motion on the 14th February 2014. The group of companies employs over 500 people and operates a distribution network across the globe. The parent company is a privately owned one, registered in the State.

5. The husband holds more than 90% of the shares in the parent company. Two other directors own the remainder. The husband's affidavit of means, sworn on the 14th of March 2013, values his shareholding at US\$5,000,000.

6. Subsequent to swearing that affidavit, the husband obtained a report from a firm of chartered accountants on the value of his shareholding in the company. That report is dated the 14th June 2013. It values the husband's shareholding at between €7,663,839 and €9,196,793 as at the 31st May 2013. In light of the arguments that have been advanced on behalf of the husband and which are addressed below, it is pertinent to note that the said valuation report appends the accountants' letter of engagement, dated the 31st May 2013. While that letter notes that the relevant report is required for the purpose of legal proceedings between the husband and the wife, it does not acknowledge any distinction between the husband thus acting in his purely personal capacity and the husband acting in his role as an officer of the company. Indeed, the letter of engagement is not addressed to the husband at all but to another director of the company at the company's premises. The letter records that the accountants concerned would be relying, *inter alia*, on such information and explanations from the company's directors as those accountants deemed necessary to carry out that valuation. The valuation report refers to discussions that the accountants had with the husband and with another identified director of the company for the purpose of its preparation. Nothing in the report suggests or reflects any expressed concern on the part of the company or on the part of the husband that, in providing information and explanations for the purpose of the preparation of a valuation of the company to be used by the husband in his personal capacity in these proceedings, the directors (including the husband) risked breaching their fiduciary duty to the company or that they were thereby improperly disregarding the fact that the company has a legal personality quite separate from that of the husband.

7. The wife avers that, when the parties' former family home was sold some years ago, the husband paid over the substantial proceeds of sale to the company as a loan. The parties then moved into a family home that was owned by the company and in respect of which the husband paid rent to the company. More recently, the wife has moved into another property in the jurisdiction that has been purchased in the joint names of the parties and the husband has borrowed a substantial sum from the company to purchase a home in the location abroad where he now lives and works. While these transactions, insofar as they have been properly accounted for, do not support the wife's assertion that the husband has intermingled his own monies with those of the company, they do suggest that an examination of them, and of any similar transactions, may be necessary to properly assess the property and financial resources of the husband.

8. The wife sought detailed particulars and disclosure from the husband to assist the forensic accountants retained on her behalf both in valuing the husband's shareholding in the company and in examining the financial transactions between the husband and the company. The husband has provided a certain amount of disclosure to the wife in this regard, but she asserts that the disclosure so

far made is not adequate for those purposes.

9. At the culmination of a course of correspondence between the parties' solicitors, the wife's solicitors wrote on the 10th February 2014, enclosing a list of the remaining information and documentation required by the forensic accountants engaged on the wife's behalf. That information and documentation comprises the following:

- (a) A copy of the detailed trading profit and loss account, breakdown of administrative expenses, for the group consolidated accounts for the years 2011 and 2012;
- (b) Full management accounts for the year ended December 2013. The husband has already provided the wife with a balance sheet for the nine months to September 2013. The wife wishes, in addition, to be furnished with balance sheets up to and including December 2013, to include an analysis of the group's working capital position and its net debt;
- (c) A debt schedule of current debt, to detail capital and interest repayments, interest rates and term lengths, a copy of letter of loan/debt facility sanction, a copy of the purchase contract of a premises recently acquired by the company, showing delayed purchase payment terms, and a copy of the application sent seeking the financial assistance to fund the new premises;
- (d) A copy of the group's financial forecasts/budgets, including the split of earnings before interest, tax, depreciation and amortisation ("EBITDA") for the next three years, including 2014;
- (e) Details concerning a new manufacturing facility acquired in 2012;
- (f) A breakdown of turnover for 2013 as between patented products and non-patented products, and a confirmation of the patents held;
- (g) A breakdown of the intangible assets, as to goodwill acquired, patents or other as of December 2013;
- (h) Details concerning the enterprise value, acquisition price, and the EBITDA, of a company recently acquired by the company, as well as details concerning the funding of the acquisition;
- (i) The nominal ledger for all directors' loans accounts with the company to show the balances due, the amounts repaid by the company or advanced by the husband in the period from January 2010 to present. The wife suggests that information previously given by the husband concerning directors' loans was incomplete; and
- (j) A breakdown of the total sums paid to directors – as between total pension contributions, total paid to non-executive and executive directors in 2011, 2012, and 2013.

The applicant through her legal representatives suggests that all of these items of information are relevant to producing a valuation of the company and to assessing the husband's assets and liabilities in light of his dealings with the company

10. The basis upon which the husband has refused to provide the further documentation sought is that he is, in the words of a letter sent from his solicitors to the wife's solicitors on the 18th November 2013, "neither prepared nor in a position to provide information pertaining to the Company, its operation, its management or accounts."

The present application

11. Section 38(7) of the 1995 Act requires each of the spouses concerned to give to the other spouse such particulars of his or her property and income as may reasonably be required for the purposes of proceedings of this kind. Section 38(8) empowers a court to direct a person, who has failed or refused to comply with sub-s. (7), to do so. The wife seeks such a direction in this case in relation to the outstanding documentation and information that she has identified concerning the company.

12. Order 70A, rule 6 of the Rules of the Superior Courts, as amended ("the RSC"), deals with the obligation imposed on each of the parties in proceedings under the 1995 Act in which financial relief is sought to file and serve an affidavit of means. Where a party fails to properly vouch the matters set out in his or her affidavit of means, Order 70A, rule 6(4) empowers the court to grant an order for discovery or to make such order as it deems appropriate or necessary, "including an order that such party shall not be entitled to pursue or defend as appropriate such claim for any ancillary relief under the Act save as permitted by the Court and upon such terms as the Court may determine are appropriate or the Court may adjourn the proceedings for a specified period of time to enable compliance with any such previous request or order of the Court." The wife seeks an Order under that rule on the basis that the provision by the husband of the information and documentation that the wife now seeks is necessary to properly vouch his affidavit of means and, in particular, the averment in it that the company in which he holds a majority shareholding has a value of \$5,000,000.

The role of the court

13. In the case of *W v W* [2008] IEHC 452, Abbot J. (at para 7.11) identified an obligation upon the court, of its own motion, to enquire into the adequacy and propriety of provision to be made in a judicial separation - as well as in a divorce - proceeding. In the view of Abbot J., that obligation derives from the provisions of Article 41 of the Constitution and mandates an approach similar to that adopted by the English courts under the equivalent statutory framework in that jurisdiction.

14. In *Prest v Petrodel* [2013] 2 AC 415, the United Kingdom Supreme Court (per Baroness Hale of Richmond JSC) expressed the position in the following terms (at page 504):-

"There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated, but also for all the other reasons explored in cases such as *McFarlane v McFarlane* [2006] 2 AC 618. This means that the court's role is an inquisitorial one. It also means that the parties have a duty, not only to one another but also to the court, to make full and frank disclosure of all the material facts which are relevant to the exercise of the court's powers, including of course their resources: see *Livesy (formerly Jenkins) v Jenkins* [1985] AC 424. If they do not do so, the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are."

15. I accept the foregoing as an appropriate description of the jurisdiction that this Court must exercise in proceedings in which the obligation arises to make proper provision under s. 16 of the 1995 Act.

The husband's objection

16. The husband contends that the wife is not entitled to an Order directing him to provide her with the documentation or information that she now seeks. In doing so, he relies on two grounds. First, he argues that the disclosure of the material concerned is neither necessary nor relevant for the purpose of valuing his shareholding in the company. Second, he asserts that the material concerned is not within his possession or power, such that it would be wrong in law to order him to disclose it. In advancing that second ground, the husband relies on two propositions of law. The first is that the Court should have regard to the separate legal personality of the company. The second is that the obligation on a party to make discovery of documentation is confined, *inter alia*, to documentation within that party's possession or power.

Relevance and necessity

17. These proceedings require consideration by the Court of orders necessary to effect proper provision for the parties and their dependent children. In that context, the Court is required to have regard to, amongst other matters, the "property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future."

18. It is common case that among the property and financial resources of the husband is his overwhelming majority shareholding in the company. The husband has vouched the value of that shareholding by providing an accountants' valuation report. That report appends the letter of engagement of those accountants. That letter of engagement is addressed not to the husband but to the company. The letter expressly records that, as a term of their engagement, those accountants propose to rely on such information and explanations from the company's directors as they (the accountants) deem necessary to carry out that valuation.

19. The wife has retained a firm of accountants to assist her in establishing the property and financial resources of the husband. They have produced what they describe as an "incomplete valuation" of the company, and by extension of the husband's shareholding in it. They value the husband's shareholding at between €12 million and €13 million on that "incomplete" basis. They have requested the provision of the information and documentation the subject of the present application in order to provide a more reliable valuation of that shareholding and to properly assess the significance of the substantial transactions between the husband and the company as part of an overall assessment of the husband's property and financial resources.

20. On behalf of the husband it appears to be suggested that the tests of relevance and necessity should be applied by reference to the documentation and information deemed relevant and necessary to the valuation of the husband's shareholding by the husband's accountants. It is further suggested that the preparation of a "draft" or "incomplete" valuation of the husband's shareholding by the wife's accountants establishes that the wife has been provided with all documentation necessary for valuation purposes. Alternatively, it is argued that the wife's accountants can obtain all of the information or explanations relevant and necessary to a valuation of the husband's shareholding in the company, in particular details of the company's EBITDA, by consulting the audited accounts of the company. I do not accept those contentions. There may well be disagreement between the parties' respective accountants about what information and documentation is properly relevant or strictly necessary for the purpose of a proper valuation of the husband's shareholding. But in circumstances where the husband's accountants have sought - and, evidently, obtained without difficulty - from the company all such information and explanations as they deemed necessary for that purpose, it would be unfair to the wife and would hamper the Court in its own assessment of the husband's property and financial resources if the information deemed reasonably necessary by the wife's accountants for the same purpose was ruled irrelevant or unnecessary to disclose.

21. It seems to me both fair and just, and an aid to the discharge by the Court of its quasi-inquisitorial role in these proceedings, to order disclosure of the information and documentation now sought. However, that leaves over the question of against whom such an order can or should be made.

The separate legal personality of the company

22. In opposing the wife's application, the husband places great reliance on the separate legal personality of the company. In particular, he submits that the leading judgment of Lord Sumption JSC in *Prest* represents a persuasive restatement of the law in that regard, which should be adopted in this jurisdiction.

23. Of course, the force of this submission derives entirely from the proposition that, in order to grant the relief that the wife seeks in the present application, the Court is required "to pierce the corporate veil" in a broadly similar manner to that in which the English High Court did so in *Prest*.

24. The appeal in *Prest* arose out of divorce proceedings in England in which a wife sought ancillary relief. At paragraph 3 of his judgment (page 374 of the report), Lord Sumption JSC describes the wide powers to grant such relief that have been conferred on the courts in that jurisdiction, including powers very similar to those available to this Court: (a) to order a spouse to make a periodical or lump sum payment to the other spouse, under section 8 of the 1995 Act; and (b) to order a spouse to transfer property to which he or she is entitled in possession or reversion to the other spouse, under section 9 of the 1995 Act. Lord Sumption JSC continues that, in considering the exercise of those powers, an English court must have regard to matters including the "income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future." That is, of course, one of the matters to which this Court must have regard under s. 16(2)(a) of the 1995 Act.

25. Lord Sumption JSC then states (at paragraph 4, page 474 of the report):-

"The proper exercise of these powers calls for a considerable measure of candour by the parties in disclosing their financial affairs, and extensive procedural powers are available to the court to compel disclosure if necessary."

26. It is submitted on behalf of the husband in this case that the information sought by the wife is not within his gift. Yet, there is no suggestion on the evidence before me that it was not entirely within the husband's gift to secure from the company all of the information and documentation required by the accountants that were retained on his behalf to value his shareholding in the company for the purpose of these proceedings.

27. The specific issue that arose in *Prest* was not the nature and scope of the powers of the court to order disclosure by a spouse in matrimonial proceedings; it was whether the terms of a particular provision - s. 24 of the UK Matrimonial Causes Act 1973 - confer upon a court an implicit power to pierce the corporate veil where property is held by a company in which a spouse holds a majority shareholding. The UK Supreme Court held that they do not. The legislative provision at issue in *Prest* is identical, in material part, to s. 9(1)(a) of the 1995 Act, whereby, as available ancillary relief on granting a decree of judicial separation, a court may order the transfer by one spouse to another, or to a dependent or other person, of specified property "*being property to which the first-mentioned spouse is entitled either in possession or reversion.*" The application of that provision is not in issue here.

28. A broader issue that arose in *Prest* concerned what Lord Sumption JSC identified as a practice that had been in existence for some years in the Family Division of the English High Court whereby the assets of companies substantially owned by one party to the marriage were treated as available for distribution under s. 24 of the UK Matrimonial Causes Act, provided that the remaining assets of the company were considered sufficient to satisfy its creditors. In reprobating any such practice, Lord Sumption JSC pointed out (at para. 40, page 490 of the report):-

"[A] transfer of this kind will ordinarily be unnecessary for the purpose of achieving a fair distribution of the assets of the marriage. Where assets belong to a company owned by one party to the marriage, the proper claims of the other can ordinarily be satisfied by directing the transfer of the shares."

29. Whether the practice at issue in *Prest* has ever been adopted by the High Court in this jurisdiction in considering the application of s. 9 of the 1995 Act, I do not know. It is clear that the question does not arise for consideration in the context of the present application, where what is at stake is rather the level of disclosure necessary to permit a proper valuation of the husband's shareholding in the company and to permit an appraisal of the financial resources available to him through his personal dealings with the company. In that regard, there is a passage from the judgment of Lord Sumption JSC that is directly pertinent to the issue at hand. Having rejected the proposition that any different principle applied in the Family Division concerning the doctrine of separate legal personality, the judgment continues (at para. 38, page 489 of the report):-

"This analysis is not affected by section 25(2)(a) of the Matrimonial Causes Act 1973. Section 25(2)(a) requires the court when exercising the powers under section 24, to have regard to the "income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future". The breadth and inclusiveness of this definition of the relevant resources of the parties to the marriage means that the relevant spouse's ownership and control of a company and practical ability to extract money or money's worth from it are unquestionably relevant to the court's assessment of what his resources really are. That may affect the amount of any lump sum or periodical order payment orders, or the decision what transfers to order of other property which unquestionably belongs to the relevant spouse. But it does not follow from the fact that one spouse's worth may be boosted by his access to the company's assets that those assets are specifically transferable to the other under section 24(1)(a)."

30. As this application is solely concerned with the assessment of the husband's worth and not with the suggested transfer of any of the company's assets to the wife, I do not consider it necessary to consider either the restatement of the law in *Prest* on the exceptions to the doctrine of the separate legal personality of the company; or the extent to which that restatement differs from the summary of those exceptions set out in Keane, *Company Law* (4th ed., 2007 at p. 145) and cited with approval by Laffoy J. in *Fyffes plc. v DCC plc* [2009] 2 IR 417 (at p. 488); or, should there exist a material difference between them, which of those formulations is to be preferred. For the avoidance of doubt, I do not consider it appropriate or necessary to consider whether the separate legal personality of the company can or should be disregarded for the purposes of the present application. That is to say, I accept that it would be wrong in law to make any order directed to the company (which is not a party to the proceedings or to the present application), or to make any order that treats the property of the company as, in effect, that of the husband.

Possession or power

31. The husband has averred in bald terms that the documents and information sought on behalf of the wife are not within his possession, power or procurement, as is required for an order of discovery to be made in respect of any such document under Order 31, Rule 12 of the Rules of the Superior Courts. He further avers that the previous disclosure by him of certain information or documentation concerning the company that is not otherwise publicly available confirms his willingness to provide information where he is in a position to do so. Those assertions form the basis for the submission advanced on the husband's behalf that, as the documentation and information sought is not within his power, control or procurement, he should not be made subject to an order with which *prima facie* he cannot comply, and that the appropriate course for the wife to embark on in pursuing the material concerned is an application for non-party discovery against the company.

32. However, neither the husband's terse averments just described nor the *inter partes* correspondence written on his behalf do anything to explain how the husband was able to procure the engagement by the company of a firm of accountants to assist the husband in valuing his shareholding in the company for the purpose of these proceedings on terms whereby the company agreed in advance to provide such information and explanations as those accountants deemed necessary in order to carry out that valuation. Nor do they explain how the husband was able to reconcile the concern he now professes – *i.e.* that the disclosure to his wife through him of any such information or explanations might breach the fiduciary duty he owes to the company as its director – with the fact that a firm of accountants was engaged by the company to assist him in his personal capacity in these proceedings on the terms just described, or with the fact that he has already made certain private information concerning the company's affairs available to the wife's solicitors for the purpose of these proceedings. I find it especially noteworthy that there is no evidence whatsoever before the Court concerning any request by, or on behalf of, the husband to the company for the information and explanations sought on behalf of the wife.

33. In advancing this limb of his argument, the husband relies on a series of cases culminating in the decision of the Supreme Court in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited* [2013] IESC 3. The question that arose in that case was, in the words of Clarke J. (*nem. diss.*), "[t]o what extent can an Irish court require disclosure through the discovery process of documents which are held by a connected company, which is not a party to the Irish proceedings concerned?"

34. In answering that question, Clarke J. surveyed the existing jurisprudence both here and in other common law jurisdictions. The leading case remains that of *Johnston v. Church of Scientology* [2001] 1 I.R. 682. It involved an application for discovery of documents in the possession of a branch of the Church of Scientology incorporated in England for use in an action against the branch of that church incorporated here. It had been held in the High Court (*per* Geoghegan J.) that there was strong *prima facie* evidence that the English branch held the documentation at issue as agent for the Irish branch and he had ordered the latter to discover it for that reason. The Supreme Court allowed an appeal against that order on the basis that the plaintiff had failed to establish a relationship of agency between the two entities in respect of the creation or custody of the relevant documents.

35. Denham J. (Murphy and Murray JJ. concurring) identified the applicable rule in the following terms (at page 701 of the report):-

"A party is only obliged to disclose documents in his possession, custody or power. To this rule there may be rare exceptions. However, these rare exceptions are examples of the judge, in his or her discretion in the circumstances of a particular case, making a determination on the facts. Such exceptions may be seen in the cases of *Northern Bank Finance Ltd. v. Charlton* (Unreported, High Court, Finlay P., 26th May, 1977) and *Yates v. Ciba Geigy Agro Ltd.* (Unreported, High Court, Barron J., 29th April 1986). However, the facts of neither are on all fours with the facts of this case and may be

distinguished.”

36. Denham J. went on to describe the decision in each of those two cases in the following way (at pp. 701-2 of the report):-

“The decision of Finlay P. in *Northern Bank Finance Ltd. v. Charlton* (Unreported, High Court, Finlay P., 26th May, 1977) may be seen as a practical solution to a special problem rather than a novel interpretation of the relevant rules. What the learned President said at p. 19 of the transcript of the judgment was as follows:-

“I am therefore satisfied that within the meaning of the principle applicable to an affidavit of discovery I must at this stage at least decide *prima facie* that these documents are within the procurement of the plaintiff and that there is not any reason to believe that if the plaintiff in pursuance of the obligations of the directors of J.G. Mooney & Company properly have to them as their nominees requested the handing over even though it might be on a returnable basis of these documents that that request would be refused. If it is a further application may have to be made to me and different considerations might apply depending upon the grounds for that refusal.”

It will be appreciated that the learned President was dealing with a particular document which he believed – having regard to the relationship between the plaintiff company and the company in whose possession it was – could be obtained for the asking. But he made no concluded finding to that effect and, in the terms quoted, effectively reserved the right to the [party from whom discovery was sought] to return to the court to explain whether the document was forthcoming.

It may therefore have been an exception in practice rather than an exception in principle. Certainly the facts are readily distinguishable from the present case. Non-party discovery will resolve any such problems in the future where it relates to documents within the jurisdiction.”

37. I interject here to note that the company in this case was prepared to act as the husband’s agent in retaining the services of a firm of accountants to value the husband’s shareholding for the purpose of the present proceedings. I note further that those accountants offered their services on the express basis that the company agreed in advance to provide such information and explanations as those accountants deemed necessary in order to carry out that valuation – *i.e.* that any information or explanations they required from the company could be obtained from it for the asking. There is no evidence before this Court of any request having been conveyed to the company by the husband for such information and explanations as the wife’s accountants have deemed necessary to carry out an equivalent valuation, still less is there any evidence that any such request has been refused by the company. Nevertheless, it is equally important to note that the decision in *Johnston* envisages an application for non-party discovery as the appropriate step in such circumstances.

38. Denham J. continued (at p. 702):-

“In *Yates v. Ciba Geigy Agro Ltd.* (Unreported, High Court, Barron J., 29th April, 1986), Barron J. referred to *Northern Bank Finance Ltd. v. Charlton* (Unreported, High Court, Finlay P., 26th May, 1977) and at p.3 of the reported judgment stated:-

“In the present case, there is no reason to suppose that a request for such documents by the defendant would be refused. Indeed, counsel for the defendant has admitted they will be made available to him for the purposes of the trial and that they have already been made available for the purposes of the preparation of the defendant’s defence. *Prima facie* such documents must be regarded as being available to the defendant if they are requested.”

Thus this too may be regarded as a practical solution to a particular set of circumstances rather than an exception in principle.”

39. Again, I pause to note that, in this case, the husband has already obtained the benefit of a valuation of his shareholding in the company, procured by the company on his behalf from a firm of accountants that had made available to it by the company all information and explanations that that firm deemed necessary for that purpose.

40. That stated, the decision in *Johnston* confirms that the applicable legal principles are those set out by O’Flaherty J. in *Bula Ltd. v. Tara Mines Ltd.* [1994] 1 I.R. 487 and *Quinlivan v. Conroy* [1999] 1 I.R. 271. The general rule is that documents which are in the possession, custody or power of a party may be discovered; and a document is in the power of a party where that party has an enforceable legal right to obtain the document. And in *Thema International Fund plc*, the Supreme Court found that the amendment of Order 31, r. 12(1) of the Superior Court Rules in 2009, most notably by the substitution of the words “possession, power or procurement” for “possession or power” in that rule, has not materially altered the position in that regard.

41. Returning to the judgment of Clarke J. in *Thema International Fund plc v. HSBC Institutional Trust Services (Ireland) Limited*, having observed that the decisions in *Northern Bank Finance Ltd. v. Charlton* and *Yates v. Ciba Geigy Agro Ltd.* had been distinguished by Denham J. in *Johnston v. Church of Scientology* as “rare exceptions” to the general rule, the Supreme Court went on to distinguish the facts of those two cases from the facts at issue in the appeal before it, which were as follows. The plaintiff operated an investment fund in respect of which the defendant provided custodial services as part of the HSBC group of companies. The fund was significantly dissipated due to the depredations of a company associated with Bernard Madoff who was prosecuted and convicted in the United States of America for running what is reputed to have been the largest “ponzi scheme” in world history. The plaintiff alleged various failings on the part of the defendant in carrying out its obligations as custodian of the fund, giving rise to a claim in damages. In the context of those proceedings, the plaintiff sought discovery of relevant documentation held by any entity in the HSBC group worldwide. In the High Court, Charleton J. granted discovery of certain categories of documents held by HSBC entities in New York and Hong Kong on the ground that there was no reason to believe that the defendant could not procure those documents on request from those entities, against which Order the defendant appealed.

42. Clarke J. stated (at para. 5.6.):

“It does not need to be emphasised that, at least so far as the existing jurisprudence is concerned, the only two cases in which the court has gone beyond requiring discovery of documents in respect of which a legal entitlement existed in the party required to make discovery were cases where a single or small number of specified documents, known to exist, were directed to be disclosed in circumstances where the court was satisfied that there was no reason to believe that any difficulty would be incurred in securing the documents concerned. There is a very significant difference indeed between those circumstances and what was ordered in this case being that a connected company, not directly within the jurisdiction of the Irish courts, would be required itself to search through its own documents for the purposes of making

documents available to [the defendant] so that in turn, those documents could be included in [the defendant's] discovery."

43. Having observed that the scope of the discovery sought in that case went beyond anything that had previously been required of a party to litigation within the State, Clarke J. went on to consider the position in other common law jurisdictions. The decision of the House of Lords in the English case of *Lonrho Ltd v. Shell Petroleum Co Ltd*. [1980] 1 WLR 627, has been widely cited throughout the common law world, and deals with the nature and scope of the concept of "possession, custody or power" as it is employed in the rule of court that governs the process of discovery in that jurisdiction. In particular, Clarke J. cited Lord Diplock's definition of the term "power" when used in that context as meaning:-

"...a presently enforceable legal right to obtain from whoever actually holds the document inspection of it without the need to obtain the consent of anyone else. Provided that the right is presently enforceable, the fact that for physical reasons it may not be possible for the purpose entitled to it to obtain immediate inspection would not prevent the document from being within his power; but in the absence of a presently enforceable right there is, in my view, nothing in [the applicable English rule] to compel a party to a cause or matter to take steps that will enable him to acquire one in future."

44. Clarke J. next looked at the position in New Zealand and, specifically, the ex tempore decision of the High Court there in *Howard Trading Auckland Ltd v Nissan New Zealand Ltd* ([2010] NZHC 401, 16 March 2010). In that jurisdiction, the test for discoverability is "control", defined under r. 1.3(1) of the New Zealand High Court Rules, as amended, scheduled to the Judicature Act 1908, as:

"(a) possession of the document; or

(b) a right to possess the document; or

(c) a right otherwise than under these rules, to inspect or copy the document."

45. In *Howard Trading Auckland Ltd*, documents were sought from the defendant company, which were said to be in the possession of its parent company in Japan. The defendant had sought those documents from its parents in anticipation of a discovery request, but the parent had declined to provide them. Venning J. cited the House of Lords decision in *Lonrho Ltd v Shell Petroleum Ltd*, and in particular, the following passage from the judgment of Lord Diplock in which he addressed the issue of whether documents held by a subsidiary of the defendant were in the "power" of its parent, insofar as the latter could seek, and might be expected to obtain, the consent of the former to let it take copies of those documents (at p. 636 of the report):

"It may well be that such consent could be obtained; but Shell and B.P. are not required by Order 24 to seek it, any more than a natural person is obliged to ask a close relative or anyone else who is a stranger to the suit to provide him with copies of the documents in the ownership and possession of that other person, however likely he might be to comply voluntarily with the request if it were made."

46. Venning J. contrasted the approach in *Lonrho Petroleum Ltd* with that of the New Zealand High Court in the intellectual property case of *Inverness Medical Switzerland GMBH v MDS Diagnostics Ltd* ([2007] NZHC 1547, 21 December 2007), in which Potter J. stated:

"...in a commercial case where there is a relationship pursuant to which the defendant may reasonably be expected to gain access to relevant documents, then the defendant should take all reasonable steps to obtain that documentation and to make discovery. Fairness and openness in the discovery process demands as much."

47. As Clarke J. points out in *Thema International Fund plc*, Venning J. declined to follow two decisions of the Federal Court of Australia, also in intellectual property cases. The first of those was that of the Federal Court of Australia in *Sabre Corporation Pty Ltd. v. Russ Calvin's Hair Care Company and Others* [1993] FCA 557. The decision of Lockhart J. in that case represents the *fons et origo* of a form of order in that jurisdiction ("a *Sabre* Order") whereby a party is required "to make such requests and do such things as may reasonably be necessary" to obtain documents from a non-party, where the court is satisfied that the documents are in the possession, control or power of an identified non-party and that there is a real likelihood that the party to the proceedings against whom the order is made would be given access to the documents by the [non-party] upon request. However, as Venning J. pointed out in *Howard Trading Auckland Ltd* and as Clarke J. noted in *Thema International Fund plc*, that power is exercised in Australia against the background of the underlying enforcement power provided under s. 23 of the Federal Court of Australia Act 1976, whereby:

"The Court has power, in relation to matters in which it has jurisdiction, to make orders of such kinds, including interlocutory orders, and to issue, or direct the issue of, writs of such kinds, as the Court thinks appropriate."

Moreover, and perhaps by reference to the significance or effect of that underlying statutory power, the existence of the jurisdiction to make the order at issue in *Sabre* was expressly conceded by the respondent to the application in that case.

48. The second Australian decision that Venning J. declined to follow was that in *Gambro Pty Ltd v Fresenius Medical Care Australia Pty Ltd* [2002] FCA 581. In granting an Order of the *Sabre* type in that case, Tamberlin J. noted the applicant's reliance on the observations of Hoffman L.J. in *Unilever plc v Chefaro Proprietaries Ltd* [1994] FSR 135 (at 143) that, in principle, discovery of research and development documents should be available against a multinational corporation on a group basis. However, as Venning J. points out, the Court of Appeal in *Unilever* went on to conclude that there was no jurisdiction for the order for further and better discovery sought in that case.

49. In considering the case before him, Venning J. placed some emphasis on the condition precedent to the grant of a *Sabre* Order that the court must be satisfied that there would be a real likelihood of the request being complied with were such a request made. On the facts of that case, Nissan New Zealand had already made a request of Nissan Japan that it provide Nissan New Zealand with documents in Nissan Japan's possession relevant to the matters at issue in the litigation. Nissan Japan had declined that request and, in correspondence from its general counsel, had given as its reason that it was not a party to the litigation and was not obliged to divulge documentation either to Nissan New Zealand or the plaintiffs. In that context, Venning J. stated:

"This Court will not make futile orders. Unless the Court can be satisfied there is a real likelihood the request will be complied with, the Court will not make an order. To do so would effectively be to set the respondent up to fail. It would be neither fair nor reasonable, under the threat of a sanction such as an unless order or a striking out or stay of the

respondent's defence for non compliance, that a party in the position of the applicant could effectively obtain an order requiring discovery from an overseas non-party when there is no express jurisdiction in the rules to do so."

50. Venning J. continued:

"The difficulty that can arise with such orders is apparent from the subsequent decision in *Gambro Pty Ltd v Fresenius Medical Care Pty Ltd* [[2002] FCA 1359]. After making the order requiring the respondent in that case to "take all reasonable steps available [to] it to obtain documents or copies" a request was made from the overseas principal for relevant documents for discovery. The request was denied. The Court took the view that in the circumstances all reasonable steps had not been taken but, despite that, declined to order a stay. In the course of that subsequent decision the Federal Court confirmed that it was not the law in Australia that documents in the possession of an overseas parent company can be said to be within the "control" of the subsidiary and further accepted that on the present state of the law in Australia it was not open to the Court to pierce the corporate veil or treat the Australian subsidiary as part of an overall entity in order to compel discovery of overseas documents from the subsidiary. The Federal Court was then left in the position of, having made an order, finding as a matter of fact the order had not been complied with, it had no effective sanction to impose. That again in my judgment is a further reason not to make the form of order sought."

51. Having considered the foregoing jurisprudence, Clarke J. concluded:

"5.18

...[T]here are strong reasons, most notably those cogently set out in Howard, for the traditional position adopted in the jurisprudence of common law countries. What is to happen if a party is ordered to make discovery of documents which it neither possesses nor has the power to require possession of, in the event that the party does not, in fact, make discovery? Is that party's claim or defence to be struck out? Does the court have to enter into a detailed inquiry as to the efforts made and the bona fides of the position adopted by the connected company? What is the court to do if not fully satisfied about the attempts made?

5.19 The position adopted in most of the common law jurisprudence to which reference has been made and also adopted under the former rule in this jurisdiction under *Johnston v Church of Scientology* has, in my view, the considerable merit of certainty. A party either has documents in its possession or has the legal entitlement to require possession. In those circumstances the document must be discovered. In all other circumstances, the document does not have to be discovered."

Alternative steps available

52. Having set aside the Order for further and better discovery that was the subject of the appeal in *Thema International Fund plc*, the Supreme Court made a number of additional observations about the practical implications of the legal principles identified in its judgment.

53. First, Clarke J. noted the availability of non-party discovery as an interlocutory relief in respect of any non-party amenable to the jurisdiction of the Irish Courts, stating (at para. 7.1.):

"While, strictly speaking, a party would be entitled to require its opponent to bring an application for third party discovery in the event that its opponent wished to obtain disclosure of relevant documents held by a related (although non-party) company, it seems to me that a party who imposed on its opponent such a cumbersome procedure, without there being some good reason, could well find that the court would be unsympathetic to applying the usual costs regime which applies in respect of true third party discovery involving only entities that have no connection with the parties."

54. Second, Clarke J. considered the implications for a party that resists an application for the disclosure of material it might be expected to be able to procure, in reliance on a claim of lack of legal right (at para 7.3):

"It would, in my view, be an abuse of process for a party to decline to make discovery of documents held by another company within the same group on the basis of not having a power to obtain the documents concerned and then seek, without having given prior disclosure of the relevant documents, to place reliance on those documents at the trial. It follows that where a party intends to place reliance on documents in respect of which it does not have a legal entitlement but which it hopes to be able to secure, there is an obligation on that party to make all appropriate enquiries as to the availability of such documentation in advance of swearing its affidavit of discovery so that any documents which are, in fact, going to be relied on are included in the affidavit of discovery even though such documentation may not, originally, have been in the possession power or procurement of the party concerned."

55. Clarke J. continued:

"7.4. Third, it should be noted that such a practice could itself lead to potential abuse. A party might be selective as to those of the documents held by related companies which it sought and obtained and, thus, was obliged to discover. It does not seem to me that that difficulty can be remedied at the discovery stage. A party is only obliged to discover documents within its possession, power or procurement including, for the reasons just analysed, such documents as it may be able to secure from related companies and on which it wishes to place reliance. However it seems to me that it will always be open to a trial judge to take whatever steps are appropriate, in all the circumstances, to deal with a situation where the trial judge feels that a selective view of the documentary record is being placed before the court by virtue of the fact that a party has chosen to secure some but not all of a relevant set of documents from associated corporate entities. In such circumstances, it would be open to the trial judge, in an appropriate case and in the light of all relevant facts, either to decline to admit in evidence a selective part of the relevant documentary record or, while admitting such documents in evidence, to draw any appropriate inference from the absence of the remainder of the same set of documents. It would of course be necessary, in considering what, if any, course of action to adopt, for the trial judge to pay appropriate regard to any explanation tendered for the selective nature of the documents produced.

7.5 Finally, and in like vein, it is also open to a trial judge to draw any inference which may be appropriate in all the circumstances from any unexplained failure to make documents, which it is established are likely to exist and of significant relevance to the case, available for consideration at the trial. Parent companies and related companies are, of course,

entitled to stand on their rights and not make documents available to connected companies involved in litigation in this jurisdiction. However, if they do so without good cause, they may well place the related company which is involved in litigation in Ireland in a difficult position if, as a consequence, the trial judge is of the view that there were pieces of the jigsaw missing and no legitimate explanation as to why that may be so. The trial judge will, of course, have to decide the case on whatever evidence is ultimately presented. However, if that evidence is incomplete and if the trial judge views any explanation for its lack of completeness as being inadequate, then, in an appropriate case, adverse inferences may be drawn."

Conclusion

56. In these matrimonial proceedings, the evidence establishes that a company in which the husband owns a large majority shareholding has made available to the forensic accountants retained on behalf of the husband all such information and explanations as that firm of accountants deemed necessary to carry out the valuation of the husband's shareholding in the company for the purpose of these proceedings. The wife has sought from the husband certain documents and information deemed necessary for the same purpose by the forensic accountants retained on her behalf and to assess the significance of the husband's extensive financial transactions with the company. The husband has refused to provide the documentation and information sought on the ground that he is "neither prepared nor in a position to provide information pertaining to the [c]ompany, its operation, its management or its accounts."

57. The net issue presented is whether that refusal falls to be dealt with by the trial judge according to the additional observations of Clarke J. at paras. 7.1 to 7.6 of the judgment of the Supreme Court in *Thema International Fund plc*, insofar as those observations may be applicable to the issues or evidence at the trial of the present action, or as a rare exception to the general principles governing discovery; that is, as a special problem requiring a practical solution. The following factors appear to me to be relevant to the resolution of that issue.

58. The first factor concerns the particular nature of the underlying proceedings. They involve the determination of the appropriate ancillary relief in judicial separation proceedings where proper provision is in issue, which means that the Court has a quasi-inquisitorial role and an obligation to inquire into the relevant matters of its own motion if necessary. It also means that the parties have a specific duty, not only to one another but also to the court, to make full and frank disclosure of all the material facts which are relevant to the exercise of the court's powers, including the nature and extent of the resources available to them. Accordingly, in this case the obligations of the Court, and the duties of the parties, go significantly further than they would in respect of the question of discovery in adversarial litigation generally.

59. The second factor that must be considered is the specific factual matrix presented. I have already alluded several times in the course of this judgment to the husband's ability to secure the company's unqualified co-operation with the forensic accountants retained on his behalf to prepare a valuation of the company and, by extension, of his shareholding in it for the purpose of these proceedings. Accordingly, the husband has already had made available to him by the company – and will have available for the trial of these proceedings – all such documentation and information as his forensic accountants require. I have also pointed to the absence of any evidence that the husband has requested the company to provide an equivalent level of co-operation to the forensic accountants retained on behalf of his wife for the same purpose, much less that any such request has been refused. Accordingly, this Court is dealing with documentation and information that it is reasonable to believe – having regard to the relationship between the husband and the company – could be obtained for the asking (as in *Northern Bank Finance Ltd v Charlton*), or which must be regarded, *prima facie*, as being available to the defendant if requested (as in *Yates v Ciba Geigy Agro Ltd*).

60. It is true that the Supreme Court in *Johnston v Church of Scientology* identified non-party discovery as the appropriate procedure to obtain such material in litigation of the sort at issue in that case. But the trial court in that case did not have the quasi-inquisitorial role or specific statutory obligation that the trial court in this case does, nor did the parties in that case have the particular obligation of candour that the parties in this case do; that is, an obligation to make full and frank disclosure of all the material facts which are relevant to the exercise of the court's powers, including, of course, their resources.

61. The third factor, closely interlinked with the other two, relates to the nature of the relief that is actually sought in the present application. This is not strictly an application for discovery at all. It is primarily an application for an order pursuant to Section 38(8) of the 1995 Act, requiring the husband to give to the wife such particulars of his property and income as may be required for the purposes of the proceedings. It need hardly be re-emphasised that the conduct of these proceedings entails a consideration of the ancillary relief necessary to make proper provision not only for the parties, but also for the dependent members of the family concerned. The particulars at issue are those scheduled to the wife's notice of motion now before the Court. A further or alternative relief sought is an order pursuant to Order 70A, rule 6(4) of the Rules of the Superior Courts directing the husband to properly vouch his affidavit of means. One of the orders available to the Court under that rule is an Order adjourning the proceedings for a specified period of time to enable compliance with a previous request for vouching.

62. In the circumstances set out above, I have concluded that the decisions of the Supreme Court in *Johnston v Church of Scientology* and *Thema International Fund plc*, while clearly binding on this Court, are plainly distinguishable on the basis of the particular jurisdiction engaged in this case; the specific facts before the Court; and the *sui generis* nature of the relief sought in the present application.

63. The Court will order the husband to furnish to the wife the particulars of his property and income that are set out in the schedule to the wife's notice of motion. The Court will further order that the proceedings herein be adjourned for a specified period to enable compliance with the wife's request for the vouching of the husband's affidavit of means by the provision of the documentation and information set out in the schedule to the notice of motion. I will hear the parties on what period of adjournment is appropriate.

64. As Finlay P. noted in *Northern Bank Finance Ltd v Charlton*, should any request the husband may make to the company to assist him in complying with the order I propose be refused, then a further application may have to be made to the Court in the context of the appropriate case management of these family law proceedings. Then, in the words of Finlay P., "different considerations might apply depending on the grounds for that refusal." Ultimately, it may be necessary to resolve any issue that remains through one or other of the alternative courses of action identified by Clarke J. in *Thema International Fund plc*. But those matters, should they arise, are for another day.