THE HIGH COURT

FAMILY LAW

[Record No. 2016/21 CAF.]

BETWEEN

T. M.

APPLICANT

AND

N. M.

RESPONDENT

JUDGMENT of Mr Justice Binchy delivered on the 13th day of December, 2017

1. This is an appeal from a decision of the Circuit Court (his honour Judge O'Callaghan) made on 20th April, 2016 (the "Order"). The appeal is brought by N.M. against the entirety of the Order.

Background

2. The parties were married to each other on 30th July, 1994. They have throughout their marriage resided in a small, though not remote, village in rural Ireland. There are three children of the marriage: the eldest a boy born in September of 1993, the next a girl, born in March of 2003 and the youngest a boy born in December of 2004.

3. Relations were good between the parties until in or about 2009 when the respondent discovered the appellant was in a relationship with a third party who was from the same locality. The relationship between the parties continued for a period but broke down entirely in or about February, 2013 when the appellant left the family home.

4. It is clear from the evidence that the parties were throughout their marriage and remain hard working individuals. Initially they rented accommodation, but in or around 1997 they acquired a site from the respondent's mother, at a price IR£2,000, which the respondent said was a significant discount on the market value of the site. They then applied for a mortgage, aided by some IR£7,500.00 provided by the respondent, which she had received by way of the proceeds of a personal injuries claim. They then built the family home on this site.

5. The appellant is an electrician who established his own business. The respondent gave evidence that she helped him to start up by providing him with IR£2,000.00 to purchase a van. At some point, upon the advice of accountants, it was decided that the appellant's business should be incorporated and a company was formed for this purpose (the "Electrical Company"). Both parties became equal shareholders, as well as being the only directors of, the Electrical Company. The Electrical Company is no longer trading, and the appellant once again trades as a sole trader.

6. In 2002, the appellant, together with his brother, J.M. formed a construction company (the "Construction Company"). The two brothers have an equal shareholding in the Construction Company, although it is no longer a trading company. However, it does own a property, a dwellinghouse from which it receives a rental income.

7. The respondent had studied nursing in the United Kingdom. Initially however the respondent worked in the family business, but she started nursing in 1998 when the eldest of the children started school. Prior to starting work as a nurse the respondent did a course in Trinity College, Dublin. In the early years of their relationship, the parties received help from each of the parties' parents.

8. The respondent said in her evidence, and this was not disputed by the appellant, that from the outset they agreed that they would each work hard and that they would save as much as much money as possible. They put money into prize bonds for the future education of their children, as well as accumulating other savings. They bought and developed a number of properties. At the time the relationship broke down those properties comprised the following:-

(1) The family home and apartments and site adjacent thereto (all of which together I will hereafter refer to as "Property no. 1") which may be broken down into three parts:-

(i) The first is the dwellinghouse itself, a five bedroom dormer bungalow comprising circa 2,400 sq. feet, the agreed value of which is €140,000.00.

(ii) Adjacent to the family are two, two bedroom, apartments constructed by the appellant. These were constructed more than seven years ago, without planning permission, although one of them was a garage conversion. It is agreed that if planning permission can be obtained this will increase the value of Property no. 1 by €20,000.00 per apartment.

(iii) There is also a site adjacent to the family home the agreed value of which is €30,000.00.

Property no. 1 is jointly owned by the parties, and is subject to a mortgage in favour of Permanent TSB securing liabilities of the order of €112,000.00.

(2) A dwellinghouse in the same vicinity as the family home, the agreed value of which is €200,000.00 ("Property no. 2"). This is a five bedroom dwellinghouse comprising circa 3,200sq feet. This property is free from security, because it was mainly funded from the parties' savings, with the balance coming from funds borrowed by the parties and secured over the family home described at Property no. 1 above. The house was built by the appellant himself over a period of three years and was substantially completed by 2009, although it still had to be decorated and a kitchen installed. The appellant moved into this dwellinghouse in or about the end of July, 2013. There is attached to the dwellinghouse a large shed, the planning status of which is somewhat uncertain as there is no specific planning permission for the same, although there had previously been a poultry shed on the site. This property is also held in the joint names of the parties.

(3) A third dwellinghouse in the same county as property numbers 1 and 2, purchased with a combination of a loan and savings. This was an investment property, purchased expressly with the view to letting. The current estimated value of it is €30,000.00, but it is subject to a mortgage of €145,000.00. This property is in the sole name of the appellant and is currently let and yields a rent of €550.00 per month.

(4) A one bedroom apartment (the "Apartment") in the sole name of the appellant. This was purchased by the appellant during 2013 unknown to the respondent. This is located in Northern Ireland, in a small rural town about thirty miles approximately from the village in which the parties reside. According to the appellant, it is not let, and has not been let, for some time. He said that when it was let, it yielded an income of about STG£50 per week.

(5) The investment property owned by the Construction Company, referred to above. Of course this is not an asset belonging to the parties themselves and is only of any value to the parties through the appellant's shareholding in the Construction Company. The appellant has a 50% shareholding in this company, the other 50% shareholding of which belongs to his brother, J.M.. The estimated value of this property is €65,000.00. As mentioned above, the Construction Company is no longer trading, and the net value of the appellant's shareholding in the same is estimated to be of the order of €9,326, which takes account of the value of this property.

9. Insofar as the above properties are concerned, the Order provided as follows:-

"(1) The appellant was directed to transfer to the respondent his interest in Property numbers 1 and 2 above, but subject to the mortgage over Property no. 1. That would not of course relieve the appellant of his liability to the financial institution concerned as regards the mortgage, but I think it was clearly intended by the learned Circuit Judge that the respondent would have to assume responsibility for the mortgage.

(2) An order declaring that the appellant is entitled to the sole legal and beneficial ownership of Properties numbers 3 and 4, which are registered in his sole name, and each of which are subject to the liabilities described above."

10. In addition to the orders relating to the properties described above, the Circuit Judge made the following further orders:-

"(1) An order granting custody of the two minor children to the respondent, with specified access arrangements for the appellant. These access arrangements are the subject of some disagreement to which I will return.

(2) An order that the appellant pay the respondent €460.00 per month for the maintenance of each of the two minor children.

(3) An order extinguishing the mutual succession entitlements of the parties in the estate of the other – the court was informed that the appellant was not pursuing an appeal in respect of this order.

(4) An order requiring the appellant to pay to the respondent the sum of €20,000.00 within six months from the date of the order of the Circuit Court.

(5) An order transferring to the respondent the entire balance in bank account No. 27305939 held in Bank of Ireland. At the date of the making of the order in the Circuit Court there was €32,201.47 standing to the credit of this account. That balance was subsequently withdrawn and is currently held in the account of the respondent's solicitors pending the order of this Court in the appeal.

(6) An order transferring all remaining prize bonds whether held in the joint names of the parties or in the sole name of the appellant, to the respondent. According to the affidavits of means sworn by the parties prior to the Circuit Court trial, these have a value of the order of €18,000."

11. In her evidence on this appeal, the respondent stated that she was satisfied with the terms of the Order. In the course of the hearing, the appellant made two open proposals for the resolution of the appeal, and at this juncture it is only the latter that is relevant. It is in the following terms:-

(1) that ownership of Property no. 1 should be transferred to the respondent, subject to the mortgage secured over that property;

(2) that ownership of Property no. 2 above be transferred to the appellant;

(3) that the appellant pays the respondent €50,000.00;

(4) that there be an adjustment in relation to access to the youngest child so that every alternate weekend that child would spend from 6pm on Saturday to 6pm on Sunday with the appellant;

(5) that the balance of the Order would be affirmed save that the appellant would increase the amount of maintenance payable in respect of each minor child by €100.00 per month, specifically for the purpose of establishing an education fund for the children. This would be over and above the amount of €460.00 per month in respect of maintenance for the children, as provided for in the Order.

12. Counsel for the appellant submitted that under the terms of the Order, if left unaltered, the respondent would receive assets having a value of between €377,000.00 and €420,000.00 whereas the appellant would receive at most assets having a net value of €12,500.00, but could possibly end up in a situation where, depending on the view the Court takes as to treatment of the mortgage attaching to the family home, he could find himself in a situation with an overall excess of liabilities over assets. Counsel for the appellant submitted that the open proposal put forward by the appellant would result in an approximately equal division of the assets of the parties.

13. I mentioned above that from the outset of their marriage, the parties had a policy of saving. As part of that policy, they put some funds into prize bonds as an education fund for the children. At one point the parties had as much as €290,000 in prize bonds. According to the respondent, the site on which Property no. 2 was constructed was purchased for €80,000.00, in 2006, by encashing some of those prize bonds. Subsequently, more prize bonds were encashed, and the single largest encashment was for the purpose of opening a bank account in the joint names of the parties in a branch of the Bank of Ireland, in Northern Ireland (the "NI-BOI

Account"). At the time that it became apparent that the marriage had broken down irretrievably, in or about February 2013, the parties had STG£102,000.00 in the NI-BOI Account. By this time, the respondent said that the value of prize bonds held by the parties had reduced to about €16,000.00 to €18,000.00 .

The NI-BOI Account

14. In July 2013 the respondent decided to check the balance in the NI-BOI Account. She was told there was STG£0.42p left in the account. She discovered that the appellant had withdrawn the entire balance of the account, amounting to STG£€102,350 on 4th February, 2013, before he had left the family home. The respondent says that when she challenged the appellant about this he firstly told her that he gave a loan to a third party named D.L.; then he said that the money was his and that she would not be getting any of it, and told her to get a mortgage and do whatever works were required to finish the house at Property no. 2.

15. The appellant maintains that he used the proceeds of this account to carry out outstanding works to Property no. 2. The respondent does not believe this, and says that Property no. 2 was largely complete at the time that the relationship broke down, save for the installation of a kitchen and the completion of the staircase. In the view of the respondent, the property required comparatively little expenditure to bring it to the point where it was complete and habitable. I will come back to this expenditure in due course.

16. While the N.I.-BOI account itself made it clear that the appellant had purchased a draft for himself in the sum of STG£102,350 the respondent did not know what the appellant did with the money. It transpired that he first lodged it to another account which he had opened in his own name in Northern Ireland. However, in February of 2014 he purchased a draft in the sum of STG£90,000 (the euro equivalent at the time of €108,225) which the appellant to gave to his brother, J.M., who in turn lodged this sum, together with an additional €6000 to an account in the State in the sole name of J.M., in Bank of Ireland (the "J.M. account") in April 2014. J.M., who attended to give evidence under subpoena, arrived to Court without the statements relating to the J.M. account and I directed that he should obtain those statements during the course of the hearing. His evidence was interrupted to facilitate production of the same.

17. Questioned about the difference between the amount lodged and the amount of the bank draft given to him by the appellant, J.M. said that he assumed that the difference was accounted for by the lodgement of some of his own funds at the time. J.M. explained that the reason that these funds were lodged to his account, was that he wanted to make an investment for which he was required to demonstrate that he had access to €80,000, and the appellant agreed to make funds available to him to assist him in this regard. J.M. denied using this account solely for the appellant, but it may be observed that it appears from the statements that this account was stagnant for more than four years, during which there was a balance of €126.57, until 31st March, 2014, when €50 was withdrawn. Soon afterwards, lodgements of some substance were made to the account , starting with €10,000 on 14th April, 2014.

18. There was a further lodgement to the J.M. account in the sum of €14,650.00 on 22nd May, 2014 and J.M. was unable to identify the source of that lodgement.

19. J.M. subsequently did not proceed with the intended investment, and he said that he returned the monies to the appellant when it became apparent he would not be proceeding. He claimed to have repaid the loan by payments of €40,000.00 on each of 24th July and 1st October, 2014, and this is verified by J.M.'s bank statements and also those of the appellant himself. As to the balance of €28,225.00, J.M. said he repaid it to the appellant, over time, in cash. The appellant confirmed this and further stated in his evidence that by the end of 2014 he was owed no money by J.M..

20. However, there were a series of additional lodgements to the J.M. account that come to a total of €36,140.00 and which correspond to cheques written by the appellant. The appellant said that he wrote these cheques in favour of J.M. in order to obtain cash from J.M. to discharge bills incurred in connection with the carrying out of works to Property no. 2. J.M. confirmed that this was the case – he said that he had cash available, and the appellant needed cash.

21. The appellant was asked why he did not simply withdraw the money himself or otherwise pay the suppliers directly, and there was no satisfactory answer to this question. He said simply that he encashed cheques through third parties regularly. The only certainty about the lodgements to this account is that lodgements totalling €181,115 were made between 14th April, 2014 and 3rd April, 2015 (when the account was reduced to zero) of which there is no doubt that the appellant was the source of €144,365.00. As to the balance, no explanation was given as to the source of the same and J.M. appeared uncertain. To be fair, one would not expect a busy businessman to be able to put his finger on the source of all lodgements in an active bank account at a moment's notice, under cross-examination. However, what is striking is that this account was, as I said above, clearly inactive for a number of years until the appellant advanced funds to J.M..

22. Between 28th March, 2015 and 3rd April, 2015 J.M. drew down from the J.M. account five separate amounts, in cash, each in the sum of €20,000.00, and on 3rd April, 2015, he also withdrew €1,205.64, in cash. When asked what he did with these funds, J.M. said that he lent those monies to a friend of his in order to assist him with the purchase of a bar in New York city. He said that his friend, who is a very good friend, is repaying him with interest. He said that this loan is not documented in any way.

23. It hardly needs to be said that such a transaction, implemented in this way, is highly unusual (to say the least) but when I put this to J.M., he disagreed, suggesting that cash transactions of this nature are a normal feature of his working life. Be that as it may, it is nonetheless surprising that J.M. would enter into such a transaction against a background where he and the appellant both mentioned in evidence that J.M. had previously lent a substantial sum of money to a third brother who had failed to repay J.M..

24. On 14th January 2015, Messrs James M. Donohue, Solicitors, who subsequently became, but were not at the time, the solicitors for the appellant in these proceedings, wrote to the respondent and the appellant and their respective firms of solicitors stating:-

> "We wish to confirm to you , [respondent] and [appellant] that JM of …… , received a loan of money in the form of a sterling draft in the sum of £102,480.00 in February 2013 from [appellant]. This loan has entirely been paid back to [appellant] over the course of the preceeding (sic) approximately 20 months. The last payment of €40,000 was on the 1st October, 2014"

J.M. confirmed that this letter was sent upon his instructions, and that he recalled attending the offices of the said solicitors and instructing them to write the same. He said that it was sent at the request of the respondent's solicitors. Before he had the statements from the J.M. account available, he confirmed that the amount received was as stated in this letter, although he said that he thought the money was repaid sooner, over eight or nine months. When he returned to Court with the J.M. account statements, he said he must have been mistaken as to the amount received, as there was no corresponding lodgement on the J.M. account. He said he must have been mixing up sterling with euro amounts, and that the amount he received from the appellant was €108,000. He

acknowledged having spoken with the appellant to clarify his recollection, between the time he first gave evidence and the time he resumed giving evidence, having obtained the statements for the account.

25. Just to add to the confusion, in a letter dated 3rd December, 2014, the solicitors then on the record for the appellant, in a clear reference to the amount the appellant received from the NI-BOI account, referred to it as being STG£102,000, and, on conversion, €112,500.

26. The respondent stated in evidence that when she discovered that the appellant had taken all the money in the NI-BOI account, she was in a state of shock. Her reaction was to draw down €20,000.00 from the Electrical Company bank account (up to the limit of its overdraft facility) and a further €4,000.00 from a joint account of the parties in Ulster Bank. In response to this, the respondent says that the appellant then took her car and logbook. In any case the respondent refunded the €24,000.00 to the bank accounts a week after she drew down those funds. At this time the respondent was working full-time as a nurse some distance from the family home, and before that she had been working as a nurse in Dublin, still further from the family home. The appellant had been paying for a child minder, but he now informed the respondent that he was no longer able to do so, following a very significant downturn in his business owing to the state of the economy. The respondent says that she had been making the mortgage repayments relating to Property no. 1, but she could no longer afford to make the repayments and she asked the appellant to pay half. He said he could not do so. The respondent, concerned that she would be unable to meet her outgoings, then, unilaterally, drew down the balance of a loan facility (amounting to €45,000) that had been provided by Permanent TSB to the parties, which had been intended to assist in the construction of Property no. 2. This loan facility was an extension of the existing mortgage facility over Property no. 1, and was also secured over that property. The respondent lodged these monies to her AIB account. In her evidence she said that she gave €15,000.00 of the monies drawn down to her mother, as payment for assisting with childcare. She said that her mother did this on week days between 7:30am and 9:30am and again between 3:00pm and 6:00pm, and also helped sometimes at the weekends. Her mother, C.R. confirmed this in her evidence.

27. The respondent also said that she gave a loan (out of the same monies) to their oldest son, C., to assist him with farming and to buy a car. She gave him this money over a period of about twelve months and in total the loan came to about €15,000.00. C. repaid the respondent about €10,000 of this loan. The respondent said that she also provided further assistance to C. by borrowing on his behalf €11,000 from the local Credit Union. C. was to repay this loan, but he defaulted, leaving the respondent liable for the same. She had to repay about two thirds of this to the Credit Union, which C. did not repay to the respondent. The appellant also claimed to have lent C. a sum of money, of the order of €4,500.

28. The respondent said that in March, 2012, the appellant gave his brother, J.M., a loan of €45,000.00. She said that was done by transferring prize bonds, and that in addition the appellant gave his brother €15,000.00 in cash. This was done to the knowledge and acquiescence of the respondent; however, J.M. subsequently repaid the €45,000 to the appellant, and according to the respondent not only did he not inform her of the repayment, but the appellant said that the appellant told her that his brother had not repaid the money.

London Property

29. The respondent claimed that she and the appellant lent a sum of money - €22,500.00 to assist the appellant's brother, P.M., to purchase a property in London (the "London Property"). The appellant confirmed that money had been advanced to assist with this purchase, but he said that it was a gift to P.M. and that others in the family made gifts of the same amount and that there was never any intention that they expected repayment from P.M. I am entirely satisfied from the evidence of the appellant and that of P.M., in whose name the property is registered, and also from the evidence of J.M., that it was never intended that this money would be returned by P.M. and that the appellant has no expectancy of repayment of any money from P.M. or any interest in the property in London.

Apartment in N.I.

30. The respondent only discovered that the appellant owned the Apartment following upon the breakdown of their relationship. She discovered this from bank statements of the appellant which disclosed a monthly management charge. The appellant has transferred title to this property to his brother J.M.. He said that he did this in order to give J.M. security for a loan in the sum of €5,000.00 that J.M. had advanced to him. He said he wanted to offer this security to J.M. because J.M. had been let down by another of their siblings as regards repayment of a significant loan. However, J.M. said that while he was willing to take the property into his name as security, he did not seek that security. He confirmed in his evidence that he claimed no interest over this property and he will transfer it back to the appellant, if required. He also said that he has not received rental income from the Apartment.

31. There is a dispute as to the value of this property. Resolution of this dispute was somewhat hampered by reason of the fact that the respondent's valuer could not gain access to the property to conduct a survey of the same. Somewhat surprisingly, the appellant says that he does not have a key to the property. He said it is not let. He also said in his evidence that he is uncertain how much the management charges for the property are, but that periodically he visits the town where the property is located and pays STG£100 into the management company bank account. That he does not know the exact amount of the management charges is somewhat surprising given that bank statements which the appellant discovered show monthly payments of STG£25.00 were being made to a company bearing the name of the town followed by MGT Ltd from 2nd December, 2013 up to 2nd January, 2015. This account was then closed on 6th January, 2015. It can only be assumed that this is the management company charge for the Apartment and it is clear that these charges were for a time being made by way of direct debit, on the same day, or as close as possible to the same day (allowing for weekends and/or bank holidays) every month.

32. The appellant stated in evidence that the Apartment is a one bed apartment, and in his affidavit of means of 7th March, 2017, he places a value on the Apartment of €17,500.00. Since the respondent did not have the benefit of a valuation of this property through no fault of her own, counsel for the respondent informed the Court that a two bedroomed apartment in this complex was advertised for sale in February, 2017 for STG£32,000.00 and invited the Court to place a value on the one bedroomed apartment in the sum of €28,500.00. Counsel for the appellant understandably objected to this on the basis that the respondent had not advanced any evidence in this regard. In an earlier affidavit of means dated 3rd October, 2016, the appellant had placed a value of €20,000.00 on the same apartment. In four previous affidavits of means sworn between 11th March, 2014 and 7th July, 2016, the appellant failed to refer to this property at all.

33. The appellant says that the Apartment was leased until the end of 2014 at a rent of STG£50.00 or €50.00 per week (it is unclear which currency he was referring to) when the tenants left complaining of dampness in the Apartment. He said that the Apartment has not been let since. He said that he purchased the Apartment for STG£15,000.

Undisclosed Ulster Bank Account

34. During the course of the hearing, the appellant disclosed the existence of a bank account in Ulster Bank which he had not

previously disclosed. He said that he used this account for business purposes only, and he had not understood that it was necessary for him to disclose the existence of the account because the account was only used for the purpose of lodging monies from his business affairs and payments out in respect of the same. The account was opened on the 21st November, 2012 and closed on 21st July, 2014. During this time there were lodgements totalling €102,663.84 to the account. The single biggest lodgement was made on the date that the account was opened in the sum of €45,000.00. This, according to the appellant, was the return of the loan made by the appellant (with the knowledge of the respondent) to J.M.. However, the appellant did not disclose the return of this money to the respondent.

35. The appellant said that he opened this account because of the previous actions of the respondent in drawing down funds, to the full extent of the overdraft limits, on the accounts of the Electrical Company and the joint business account of the parties. The appellant said that, acting upon the advice of an official in Ulster Bank, he then proceeded to draw down funds to the maximum overdraft limits on these accounts in order to prevent the respondent from doing so, and he lodged those monies also to this account, €6,000.00 in the case of a draw down from the account held in the joint names of the parties in Ulster Bank, and €23,000.00 from the account of the Electrical Company. He has since repaid €20,000.00 from this account to the account of the Electrical Company, and is in the course of repaying the balance due to Ulster Bank, by instalments, on the joint account.

36. Other lodgements to this account included the rental income of which the appellant is in receipt in connection with Property no. 3. It is somewhat unclear from the evidence as to why the appellant felt it necessary to open this account when he had at the same time, in his sole name, a separate business current account in Bank of Ireland, although it appears that that account was only opened on 13th August, 2013. The appellant was thoroughly cross-examined in relation to this account and it was put to him that there is approximately €22,000.00 unaccounted for, to which he responded that he had not "added up" the account by which he meant that he had not done an analysis of all payments in and out of the account. The appellant was asked why he did not simply use his other business account rather than opening this account to which he responded that he did not want to fall out with Ulster Bank on account of monies owing to Ulster Bank in respect of the overdraft facility (which had been fully used) on the jointly held Ulster Bank account.

37. Under cross-examination, the appellant accepted that he did not inform the respondent that J.M. had repaid the €45,000.00 loan and he accepted that this money originated from prize bonds held in the joint names of the parties. It was pointed out to him that at the time that this money was repaid by J.M. the parties were not actually separated. He said that this money was intended for use in completing works at Property no. 2. He did not want to put it in to the jointly held Ulster Bank business account because it would have been used in order to clear the overdraft at a time when it was needed for works to be carried out at Property no. 2.

Expenditure at Property No. 2
38. As I mentioned above, the appellant maintains that he used the proceeds of the N.I.-BOI account in carrying out outstanding works to Property no. 2. This is of course would have been when those monies had been repaid to him by J.M. The respondent disputes this, contending that that property was almost fully complete and ready for occupation, and did not require any significant expenditure. The appellant handed a list of his expenditure on Property no. 2 in to Court. The principal items with which the respondent took issue were expenditure on the kitchen and on the stairs. A Mr James McEnroe was called to give evidence on behalf of the appellant to prove that he had received, in cash payments, €17,500.00 from the appellant in respect of the installation of a kitchen. He vouched this fully by reference to a VAT invoice and corresponding lodgements to his bank account.

39. The respondent also took issue with expenditure which the appellant claimed he incurred in connection with the fitting of a staircase at a cost of €15,000.00. The appellant provided the respondent (in correspondence through solicitors) with particulars of total expenditure on Property no. 2 in the sum of €86,861.00. With the exception of the kitchen (which was fully vouched in Court) and the staircase, the respondent did not take issue with the expenditure. As to the staircase, a copy of an invoice was furnished. It seems likely that the appellant did incur most if not all the expenditure that he says he incurred in relation to the completion of Property no. 2. The appellant said that he paid for this expenditure using the monies that he took from the N.I.-BOI account, when he received repayment of the loan of €80,000.00 from J.M.. However, this could not be entirely accurate, firstly because it appears likely that some of these accounts were paid before J.M. repaid any money to the appellant, and secondly because it is clear, on the appellant's own evidence, that a number of these accounts were paid for using other funds at his disposal.

The M.R. Account
40. M.R. is the appellant's sister. The appellant asked M.R. if she had a bank account which she was not using, which he could use for a period. She confirmed that she did have such an account and she agreed that the appellant could use it.

41. The appellant had an extraordinarily convoluted reason for using this account. It had to do with an error made by one of his suppliers as regards the price they quoted to the appellant for goods supplied. Between May, 2016 and September, 2016, the appellant lodged almost €32,000.00 to this account. The last transaction on the account indicates that five drafts having a total value of €28,321.00 were purchased on 18th October, 2016. The appellant said that he used €24,600.00 of this to pay his supplier.

42. M.R. gave evidence and confirmed all of the above. She said she did not know why the appellant wanted to use her account and he did not give any explanation for doing so.

Income and outgoings of the Appellant
43. In his first affidavit of means sworn on 11th March, 2014, the appellant averred that he had a net monthly salary of €1,250.00. In his last statement of means sworn on 7th March, 2017, he averred that he had an estimated net monthly salary of €2,000.00.

44. The accounts for the appellant's business for the year ended 31st December, 2016 became available during the course of the hearing. These accounts indicated sales for that year in the sum of €182,194.00, with a net profit before tax of €35,471.00. Allowing for some adjustments that took place during the course of the hearing this net profit was increased to €40,571.00. Of course this income is subject to tax.

45. In 2015 the appellant made a gross profit of €16,880.00 and in 2014 he made a gross profit of €16,506.00. His business improved in 2016 owing to work on a particular project associated with restoration of houses affected by pyrite.

46. Based on the 2016 accounts, the estimated monthly income as stated in the last affidavit of means of the appellant appears reasonably accurate. The appellant also receives rental income of €550.00 in respect of Property no. 3. His total income per month therefore is €2,550.00, and his personal monthly expenditure as stated in his affidavit of means of 7th March, 2017 (which was not disputed) comes to €3,479.00.

Income and Outgoings of Respondent

47. The respondent receives a net salary of €2,700.00 per month from the HSE. She is also receiving the children's allowance of €260.00 per month and rental income of €100.00 from one of the apartments at Property no. 1. In addition, she receives maintenance from the appellant in the sum of €460.00 per month. All of this is as per the last affidavit of means of the respondent dated 15th February, 2017, and results in an income to the respondent of €3,520.00 per month. As against this, she has outgoings (which were not queried) of €4,724.37 per month.

48. The respondent's position is of course pensionable. The appellant on the other hand has made almost negligible pension provision for himself, and has a pension having a value of just €9,609.

49. One last matter to which some regard must be had in arriving at conclusions in these proceedings is in early 2014 the appellant suffered a burst blood vessel in one of his eyes, which resulted in the loss of sight in his left eye. Following treatment, some sight in the eye has been restored, but only to the extent of 10%. The appellant has been continuing to receive treatment, but the prognosis is uncertain. While he is now being cared for under the public health scheme, the appellant, who did not have health care insurance, had to pay for his initial care in the Mater Private clinic, in order to receive immediate care which was necessary because of the urgency of the matter for him in the context not just of his health but also his livelihood.

Decision

50. In his closing submissions, Mr Corrigan S.C., for the appellant stressed the obligations imposed upon the court in s. 16(2) of the Family Law Act 1995 to take certain matters into account when considering what constitutes proper provision for the parties and the children of the marriage and in deciding whether or not to make any of the orders referred to in s. 16(1) of the Act. He also laid some emphasis upon an s. 16(5) of that Act which provides that a court shall not make any of the orders referred to in s. 16(1) of the Act unless the court is satisfied that it would be in the interest of justice to do so. He stressed the need to make proper provision for each of parties, and of course the children of the parties. He emphasised that:-

> (i) the respondent has a secure job and a guaranteed pension;
>
> (ii) in contrast, the appellant is self-employed, subject to the vagaries of the economy and has minimal pension provision;
>
> (iii) the appellant has a severe eye condition which may impair his income earning capacity in the future and
>
> (iv) to a significant extent, the asset base of the family was created by the work of the appellant alone.

He submitted that all of these are factors to be taken into account by the Court in deciding what orders should be made to make proper provision for the parties.

51. As against that, the thrust of Ms Brown S.C.'s submissions for the respondent is that the Court, in deciding what constitutes proper provision for the parties, should take into account what she submits is the misconduct of the appellant in this litigation, and in particular his failure to make full and proper disclosure of all of his assets, instancing in this regard the Apartment, the M.E. account and inconsistencies in the appellant's evidence regarding the use of funds in the J.M. account. She submitted that it is open to the Court to conclude, on the evidence, that J.M. made five cash payments out of the J.M. account to the appellant of €20,000 each. She further submitted that the costs of the appeal escalated because of the on-going reluctance on the part of the appellant to tell the truth about his finances, thereby eroding the value of monies allocated to the respondent by the Circuit Court, and this Court should take that into account in considering the appeal.

52. It seems very likely that, in making the orders that he did, the Circuit Judge was influenced by what he considered to be misconduct on the part of the appellant. In any case, it is clear that before considering what constitutes proper provision for the parties, it is necessary to consider whether or not there has been misconduct or non disclosure of assets by the parties in the course of these proceedings, and if so the extent to which the Court should take that into consideration in its decision. It must also be borne in mind that in this case each of the parties has complained about the conduct of the other, specifically as regards each taking unilateral action to take possession of monies, concealing monies from the other and using bank accounts of third parties for this purpose.

53. I will deal first with the conduct of the appellant. A number of things are clear and indeed not in dispute:-

> (1) Two weeks before he left the family home, on 14th February, 2014, the appellant withdrew almost the entire proceeds of the NI-BOI account, amounting to STG£102,350.00. On 11th March, 2013 he lodged this into another account in Northern Ireland in his sole name. He did all of this unbeknownst to the respondent, and the transaction effectively cleared the account held in their joint names.
>
> (2) The lodgement of this sum into the account in his sole name was the first transaction in that account. Between the date of lodgement of the monies on the 11th March, 2013, and 11th February, 2014, the balance in the account reduced to €90,082.63. It appears most of the funds drawn down from that account up to the 14th February, 2014 were expended by the appellant in the purchase of the Apartment , which transaction was also concealed from the respondent.

54. J.M. acknowledged that he received STG£90,000.00 or €108,225.00 from the appellant on 30th April, 2014. The amount actually lodged in the account on that date was €114,225.00, and J.M. was unable to explain the difference except to say that he considered the difference between the amount received from the appellant and the amount lodged into the account is most likely explained by the lodgement on the same date of additional funds from his (J.M.'s) own resources.

55. The full extent of the dealings between the appellant and J.M. as described above did not become fully apparent until the trial of this appeal, when J.M. produced statements for the J.M. account. Indeed, he did not come to Court with those statements (in spite of having been served with a subpoena duces tecum) and only produced statements upon my direction to do so. The explanations given for the transactions on this account are at best implausible and at worst incredible. This is probably best illustrated by the following questions:-

- Why did the appellant "lend" his brother €108,225.00, when his brother says he required only €80,000.00?
- Why did the appellant chose to encash cheques with his brother in respect of accounts due to third parties?
- Why not simply pay the third parties directly?

• Why would the appellant's brother advance a loan to a good friend without even the simplest of documentation to record the transaction?

• Why did he advance that loan in cash and in five instalments?

• Is it credible that he lodged any of his own money to the account during the period in question, when the opening balance of the account at the time of the lodgement of the appellant's monies was just €126.57, and that balance goes back as far as December of 1998, i.e. the account was clearly inactive?

56. This is not the only inactive bank account of another that the appellant used. It will be recalled that he asked his sister M.R. if she had a bank account which she was not using, and which he could use for a period. Between 2nd June, 2016 and 1st September, 2016, there were lodgements to this account totalling €33,397. Asked to explain this in evidence, the appellant said that he had given a quotation for business to a Cork construction company, but that the wholesalers that he was using to purchase goods had made a mistake in their price, and they needed more. He said that he did not want to open a new bank account so, as a matter of expedience, he asked his sister for the temporary use of the account that she was not using. He said that when the bill came from the wholesalers, he paid them from that account. No plausible explanation was given by the appellant as to why he did not simply use one of his business accounts for these transactions. He had two available to him at the time, one in bank of Ireland and another in Ulster Bank.

57. I find the explanations of the appellant in connection with the transactions on the J.M. account and the M.R. account to be unconvincing. This conclusion has certain consequences. In the course of closing submissions, counsel for the respondent referred me to the following passage from the decision of Clarke J. in the Supreme Court in *A.A. v. B.A.* [2014] IESC 49 in which he said:-

> "There does not seem to be any reason in principle while a trial judge could not conclude that, as a matter of probability ,in the light of all the evidence and all the circumstances, there were yet further assets which had not been disclosed. This is particularly so in the light of the evidence (already adverted to) that Mr. A. had specifically asked a person with whom he had financial dealings to structure those dealings in a way which would not expose him to the risk of having those details disclosed in the context of divorce proceedings. Someone who was prepared to go to those lengths to deprive the spouse of the proper provision which the Constitution requires must be open to the risk that a court could properly conclude that not all of their covert actions had been uncovered. Given the scale and nature of the non-disclosures established it was reasonable for the trial judge to infer that there must have been more."

58. In this case, I think that I am entitled to infer from the conduct of the applicant and the extent of his efforts to conceal assets, as well as the implausible evidence given by both the appellant and J.M. as regards transactions on the J.M. account, that all of the funds lodged to the J.M. account belonged to the appellant and not J.M., and that as a matter of probability, J.M. paid to the appellant the proceeds of the five withdrawals totalling €100,000.00 referred to above, and that the appellant still has access to these funds.

59. A question arose in the course of the proceedings as to whether or not the appellant gave a further STG£102,480.00 to J.M. in February 2013 i.e. over and above the €108,225 lent by the appellant to J.M. in April 2014. The former sum is the amount referred to in the letter from Messrs Donohue, solicitors, dated 14th January, 2015 referred to above. In his evidence, J.M. said that he only received one payment from the appellant of this order and that is the payment in the sum of €108,225.00, which he then lodged together with an additional €6,000.00 to the J.M. account on 30th April 2014. He said that during his evidence he got mixed up as between sterling amounts and euro amounts. He could not explain the discrepancies appearing in the letter of 14th January, 2015, which also stated that the loan was paid back to the appellant over the course of the proceeding twenty months. J.M. confirmed that he attended in person with Messrs Donohue, solicitors, and gave them instructions to write this letter. In his evidence however, J.M. said that the loan was repaid over the course of eight or nine months, by two payments to the account of the appellant of €40,000.00 each (in July and October 2014), and the balance in cash payments.

60. It is argued on behalf of the respondent that all of this indicates that there may in fact have been a second substantial payment made by the appellant to J.M., and not just the payment made in April 2014. I think that this is unlikely. Having regard to the similarity in the amounts referred to in the letter of Donohue solicitors of January, 2015 and the amount that we know beyond any doubt was paid by the appellant to J.M. in April 2014, it seems much more likely to me that J.M. gave mistaken instructions to Donohue & Co. solicitors. The letter refers to the last repayment of the loan of €40,000.00 on 1st October, 2014, and there is no doubting that this payment was made. Accordingly, I am going to disregard the possibility that there is the equivalent of another STG£102,480.00 in the possession or control of the appellant, as I consider that to be highly unlikely.

61. Nonetheless, the appellant's conduct overall has been one of evasion and concealment. It has been necessary for the respondent to obtain a freezing order over accounts of the appellant as well as other orders requiring the disclosure of accounts and financial information. Notwithstanding that, another account, a business account in Ulster bank, surfaced during the hearing during the proceedings.

62. It is true that the respondent also engaged in a certain amount of the same kind of behaviour, in particular by drawing down the €45,000 from Permanent TSB and by asking her mother to look after some of these funds. But in fairness to the respondent it is clear from her evidence that in her case she was motivated by a need to keep the household mortgage repayments up-to-date, to have sufficient funds to run the household generally, to pay for the maintenance of the children and to pay her mother for looking after the children. While she had a certain amount of her own funds available, these were limited. So, for example, in July, 2013, when she discovered that the appellant had taken the entire proceeds of the NI-BOI account, the respondent had €10,755 in her own bank account. However, the respondent said that she knew that this would become depleted. In her own words, she knew she "would be in trouble". The appellant's activities on the other hand appear to me to be driven by his own needs alone and his perception of his own entitlements on the breakdown of the parties' marriage, without giving adequate consideration to the needs of the respondent and the children.

63. At one point counsel for the appellant argued that it is the appellant who has been responsible for the generation of the vast bulk of the assets accumulated by the parties over the years, and while that might be true in one sense, it is certainly not a fair reflection of the efforts of the respondent in her own working life, in the business of the appellant and in the household itself. The assets accumulated by this family were quite clearly accumulated as part of a team effort by two hardworking people.

64. As I have said earlier, I think it very likely that the Circuit Judge was influenced by the conduct of the appellant in making the orders that he did on 20th April, 2016. However, notwithstanding the conduct of the appellant, it is my view that the order of the learned Circuit Judge is too harsh and has the effect of imposing too great a penalty upon the appellant. If this was a case in which

full and proper disclosure had been made by the appellant, then this would in my view have been a case in which it would have been suitable to divide the assets between the parties as equally as possible. The order of the Circuit Court has the effect of leaving the appellant with virtually nothing, and on one analysis put forward on behalf of the appellant, leaves him in a situation where he will in effect receive assets having a negative value of the order of €25,000.00. While the appellant must undoubtedly pay some price for his conduct, I consider that the order appealed against goes further than is necessary and, if affirmed, would constitute an injustice.

65. Before setting out the orders that I think are appropriate I should mention the costs of the proceedings. The total costs of the respondent in respect of both the Circuit Court and the High Court come to €79,104.00, including VAT. The total costs of the appellant, though not fully revealed to the Court, are for a greater amount. Undoubtedly the conduct of the appellant has contributed very significantly to the costs of these proceedings and that is also a factor which must also be borne in mind as regards the orders that I am about to make. Those orders are as follows:-

> (1) In accordance with her expressed preference, ownership of Property no. 2 shall be transferred by the appellant to the respondent. The appellant shall execute all documents necessary to effect such transfer and vacate Property no. 2 no later than 28th February, 2018 and deliver up vacant possession of the same to the respondent.
>
> (2) The respondent shall transfer to the appellant all of her estate, title and interest in Property no. 1 no later than 28th February, 2018 and deliver up vacant possession of the same to the appellant by the same date. Other considerations apart, the appellant should have a better prospect of earning more rental income from the two apartments at Property no.1 than the respondent.
>
> (3) The respondent shall take title to Property no. 1 subject to the loans secured over that property i.e. responsibility for repayment of said loans shall, as regards the parties, be a matter solely for the appellant. The respondent is of course also a party to the loans. I had considered requiring the appellant to take such steps as are necessary to have the respondent released from her liabilities to Permanent TSB in respect of the loans, whether by way of refinancing of the mortgage or otherwise. On reflection, however, this may place an impossible burden on the appellant. A lending institution may well be unwilling to advance a loan of this amount to the appellant only, given the unpredictability of his income and his eye condition. Having regard to the equity the parties have in this property, I think that the interests of the respondent are adequately safeguarded by ordering that in the event that the appellant falls into arrears of repayment of six months or more of the loans secured over Property no. 1, then the respondent shall be entitled to arrange for the sale of Property no.1, and the payment of the balance then owing to Permanent TSB. In such event, the balance of any proceeds of sale then remaining shall be paid to the appellant for his own use and benefit provided that he has otherwise complied with the terms of this order. In the event of a sale of Property no. 1 in such circumstances, then the solicitors for the respondent shall have carriage of sale and the property should be marketed for sale through an auctioneer appointed by the respondent. In the event that there is any dispute about acceptance of any offers for the property, then the property shall be sold to the highest bidder by way of public auction. For the purpose of giving effect to this order, the County Registrar of the county in which the parties reside shall be authorised to execute any documents required to effect the sale of Property no. 1, in the event that the appellant fails to do so. For the avoidance of any doubt however, I should add to the above that in the event that the appellant does refinance the loan secured over Property no.1 in his sole name, and secures the release of the respondent of all of her obligations to Permanent TSB, then he shall take Property no. 1 fully discharged from any further obligations to the respondent.
>
> (4) The orders above have the effect of varying Order No. 4 of the Order of the Circuit Judge, which shall stand vacated.

66. Orders No. 2, 3, 5, 7, 8, 9, 10 and 11 are affirmed.

67. As to Order No. 12, if further orders are required, the matter shall be remitted to the Circuit Court.

68. As to Order No. 1, this deals with custody and access of the children. There is one relatively minor issue concerning access to one of the children which requires to be determined, but I can only do so having heard the voice of the child and accordingly, I will adjourn a decision on this aspect of the matter until I have done so.

69. Order No. 6, which required the appellant to pay the applicant the sum of €20,000.00 within six months of the order of the Circuit Court, shall be replaced with an order requiring the appellant to pay the respondent the sum of €75,000.00 by 30th June, 2018. If the appellant shall fail to do so, then the respondent shall, without further order, be entitled to take up judgment against the respondent in this amount, and to enforce that judgment by way of a sale of Property no.1, in the same manner as is provided for in para. 65(3) above.

70. Finally, there shall be an additional order requiring the appellant to pay the respondent €200.00 per month – to be apportioned as to €100.00 per child, in respect of an education fund for the children of the parties. These monies shall be placed in an account to be opened by the respondent in her name, but noting that the funds are held in trust for the children. These funds shall be applied as equally as possibly as between the children of the parties. The respondent shall produce on request to the appellant statements of this account, at quarterly intervals.