Neutral Citation Number: [2010] IEHC 440

THE HIGH COURT

FAMILY LAW

2007 65 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

XY

APPLICANT

AND

YX

RESPONDENT

JUDGMENT of Mr. Justice Abbott delivered on the 14th day of July, 2010

The applicant and the respondent shall be referred to in this judgment as XY and YX respectively for the purpose of ensuring anonymity and the Court sets out the operative part of its order herewith in the Appendix hereof for the reasons as follows:

1. The applicant wife and the respondent husband were married to each other on the 27th December, 1982. At all times they were and remain domiciled within this jurisdiction and are habitually resident here. There are two children of the marriage. Both children are not dependent, but the older child more securely so.

Entitlement to Judicial Separation
2. The parties are agreed, and the Court is satisfied on the evidence, that the circumstances are such that, subject to provision being made pursuant to the relevant legislation, each of them is entitled to a decree of judicial separation pursuant to s. 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989.

Scope of Case
3. This is a case involving very substantial assets, but even more substantial debts, in consequence whereof the assets of the parties (apart from property isolated in a trust, namely the family home and mews attached thereto) are in very substantial negative equity. A major implication of this situation is that it is likely that the debts attaching to the vast majority of the assets of the husband will be taken over by the National Asset Management Agency (NAMA), established under the National Asset Management Agency Act 2009 ("the Act of 2009").

Case Management
4. This situation is in stark contrast with the picture painted in the affidavits of means of the parties filed after the proceedings were initiated in 2007, which indicated that the husband's assets amounted to some hundreds of millions of euro, even if a forced sale of the assets had been effected by the banks.

5. With the likely onset of NAMA, and the ever worsening financial situation, the case assumed a greater degree of urgency in terms of case management towards the end of 2009, and a number of case management sessions were held, principally on the 28th October, 2009. On this date, it was decided by the Court (largely with the agreement of the parties) that the husband should present the details of his assets in a schematic way and in a format which would assist the Court in ascertaining how value might be generated from the assets, notwithstanding the massive debts, over a period of time, and which would also isolate any trust property which might or might not be affected by these debts subject, of course, to the extensive queries in relation to a limited amount of detail sought by each party from the other, but mainly by the wife from the husband. This approach proved very successful and time saving for the Court, through the emergence of a spreadsheet prepared on behalf of the husband with which the financial expert, Mr. Kevin Byrne on behalf of the wife, could interact in his evidence regarding the effect of NAMA, and in respect whereof the other witnesses gave their evidence. A feature of this case (which sets it apart from the general approach in family law cases) is that valuers were largely dispensed with by both sides, the values set out in the spreadsheet depending solely on the expertise of the husband and his internal management team and sometimes derived from valuation reports commissioned by them in the ordinary course of business. The agreed attitude of the parties to this approach was that, due to the massive negative equity, the exact valuations were not very much at issue in the case, but that what was important was the dynamic of interaction between the assets and various attributes thereof, as described in the spreadsheet, and NAMA and any non-participating banks. This case management approach resulted in the case being heard intermittently between November, 2009 and March, 2010 over a period of approximately ten days, instead of the period of in excess of ten weeks anticipated had the case proceeded in a less collaborative form.

Provision
6. Subparagraphs (a) to (l) of s. 16(2) of the Family Law Act 1995, as amended, ("the Act of 1995") set out the criteria to be considered by the Court (subject to the overriding test of justice) in deciding the provision to be made to spouses on a judicial separation. I set out the consideration of the Court in respect of each of these subparagraphs *seriatim*, as they affect the provision to be made to each of the parties as follows:

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

The Spreadsheet

In dealing with subparagraph (a) criteria, it is important to set out the style of the spreadsheet describing and analysing the properties of the husband. These properties include properties held in the children's trust and also the family home, which is held on a separate trust, herein called the B Trust. These trust properties were not initially disclosed by the husband as his assets, but in case management the Court directed that they be included in the spreadsheet, as they relate to the other properties and the indebtedness of the husband, especially in the case of the children's trust. Further it is likely that NAMA will take over the debts attached to the properties comprised in the children's trust as these properties are effectively in the management of the husband. The spreadsheet lists on the vertical axis five broad categories of assets as follows:

1. Assets owned under the children's trust arrangements;

2. Assets solely owned in personal name of husband (this includes the family home property which is in a separate trust);

3. Assets owned with S.V.;

4. Assets jointly owned with others; and

5. Shareholdings in companies (which own property assets).

On the horizontal axis at the top of the spreadsheet, the various items within these broad categories are analysed as follows:

1. Forced sale by bank value;

2. Market value 2-3 years out;

3. Total borrowings;

4. TAB loan statement;

5. Percentage held (by husband);

6. Husband's forced sale value;

7. Husband's long term market value;

8. Husband's borrowings;

9. Net value (forced sale); and

10. Net value (long term market value).

The spreadsheet has a similarly analysed subset of residential apartments and houses for rental, which are referred in aggregate at subcategory 2 of the spreadsheet, as having a bank forced sale value of €7,281,746.00. An indication of the scale of the assets and the dire financial straits of the husband is indicated in the overall totals at the end of the spreadsheet relating to the following values:

1. Forced sale by bank value: €1,401,479,881.00.

2. Market value 2-3 years out: €2,082,982,871.00.

3. Total present borrowings: €2,306,645,772.00.

As is apparent from these figures, the second last horizontal column gives a total net value forced sale loss of €304,309,445.00. The final horizontal column on the spreadsheet gives an equivalent net value, having regard to estimated long term market values of the husband at the end of the ten year term of NAMA operations, at a negative €112,073,477.00.

Main Issue on Asset Value

Principally, on the 28th October, 2009, with the essential agreement of the parties, and subject to the further answering of a limited number of detailed inquiries on each side, the Court decided that the parties should take a schematic approach towards the furnishing of information and valuations. This was done with a view to enabling the Court, at the hearing, to take a broad-brush approach towards ascertaining the possibility of the parties generating value out of the assets in which they had an interest, through the proceedings in the context of intervention by NAMA, and the savage debts and market conditions. The results of this case management shall be described briefly elsewhere in this judgment. The hearing of the case commenced on the 9th November, 2009.

The Issue on the Spreadsheet Conclusions

Mr. Kevin Byrne, financial expert, who gave evidence for the wife, took issue with the bare conclusions of the spreadsheet in relation to an overall continuing negative equity facing the husband over the lifetime of NAMA. Mr. Byrne is a fellow of the Institute of Chartered Accountants and has been qualified as an accountant since 1984. He trained in Coopers & Lybrand in Dublin, which now forms part of PricewaterhouseCoopers, and, in total, was with that firm for 18 years. He then went into private practice and for a period held the position of acting secretary to the Northern Ireland Legal Services Commission. Following that, he joined the firm of Moore Stephens in Belfast, and since February, 2009 he has been practising on his own account. More specifically important to this case, he was assistant to the administrator of PMPA Insurance plc. when the ongoing insurance business of PMPA was sold on to another company, leaving the old company with €87,000,000 in cash and the residual liabilities of the insurance company at that date. The administration of this company essentially involved the 'run-off' of the old PMPA

Insurance Plc. Mr. Byrne was further involved in the examinership of the Goodman International Group, which required emergency legislation in August, 1990. He said that the 33 credit banks of that group were interested in having the liabilities of the Goodman International Group discharged in their favour. He gave evidence that the manner in which they were discharged was through a buy-back with a discount of the indebtedness. From the most up to date valuations supplied by the husband in the spreadsheet, Mr. Byrne calculated that the level of indebtedness was 77% in respect of personal assets to a range of 97 to 109% on property office assets and shareholdings in companies. Mr. Byrne's basic thesis was that the husband's net worth is clearly highly sensitive to any decrease or fall in property asset values and also any potential debt borrowings downward adjustments which may well accrue to the husband and his business partners as the work of NAMA commences. When Mr. Byrne gave his evidence, the Act of 2009 had not been passed, but he had the benefit of the speeches in the second stage of the Dáil debates. By that stage, however, the draft NAMA business plan had been published in anticipation of the legislation and regulations thereunder being passed. From an analysis of the draft NAMA business plan, Mr. Byrne concluded that the plan, based on breaking even or better after ten years, involved significant percentage write-downs. He stated this was consistent with his experience in the Goodman case and that it is hence likely that there would be debt reductions in respect of the husband's indebtedness. He constructed a mathematical model in two dimensions, whereby the effect on debt reductions at nil, 10%, 20% and finally at 30% could be evaluated. In tandem with this he considered increases in property values over time. Various combinations of property value uplift and debt reduction were exemplified. By way of demonstration, his evidence was that at a 15% uplift with no debt recovery or debt reduction, the €112,000,000 deficit on the far right bottom line of the spreadsheet (net value (long term market)) would turn into a deficit of €25,000,000. At a 10% debt reduction, the husband would be moving into positive territory again, with a net value or net worth of €14,000,000 positive. At a 20% debt reduction, that would become €20,000,000 positive, and at a 30% debt reduction it would be €26,000,000 positive. Mr. Byrne agreed that a software programme could be devised from the simple model whereby all the combinations and permutations of value and discount could be applied to the spreadsheet. This assertion was not challenged and I accept it as technically acceptable and Mr. Byrne, in fact, intimated when queried that he had put together his own programme along these lines. In cross-examination, Mr. Durcan, senior counsel for the husband, queried whether any positive value could be obtained from the practical workings of the application of Mr. Byrne's analytical model on the following grounds:

1. The values of property after ten years in the NAMA model, in fact, represented a discount on the likely long term value as calculated by NAMA;

2. The model did not allow for the influence of payment of further interest;

3. Many of the husband's assets were quality assets, and NAMA might not write-down loans in respect thereof, when the values thereof were sufficient to discharge these loans;

4. It was the duty of NAMA to service the taxpayer's interest in maximising return on monies invested by NAMA on behalf of the taxpayer in purchasing the loans from the banks in the first instance;

5. The NAMA business plan did, in fact, envisage an uplift in values over the ten year life of NAMA; and

6. Not all of the husband's properties were quality assets, the value of which could be expected to rise.

Mr. John Moran, a chartered valuation surveyor and managing director of the firm Jones Lang LaSalle also gave evidence on behalf of the wife. Mr. Moran has been in practice for 23 years and has a bachelor of science in surveying from Trinity College, a diploma in environmental economics from Dublin Institute of Technology and is a member of the Society of Chartered Surveyors in Ireland, the Royal Institute of Surveyors in the U.K., and also the Irish Auctioneers and Valuers Institute. Mr Moran's evidence was in relation to the technical analysis behind the assertion made by Mr. Byrne that property values would recover significantly in Ireland over the life of NAMA in the next ten years. He said that the property market in Ireland is no different to any other market and, in particular, to the economy which is capable of being measured, and that it has gone through peaks and troughs like any other market. His analysis indicated that on average there is a period of approximately seven years between each trough and peak. He said that research had been undertaken by the Royal Institute of Chartered Surveyors which analysed property market performance going back to 1921. Arising out of that analysis, measuring the rise and fall of values, each property cycle lasts anywhere between five to nine years, averaging at seven years over a prolonged period. He gave evidence that prior to the hearing there was virtually no market activity, but instanced sales indicating that German buyers were coming into the market looking for trophy assets, such as buildings on Grafton Street, Henry Street and very modern office blocks. He said that there were a number of United Kingdom property companies looking to buy slightly different types of properties, such as shopping centres. He said that as at the date of the hearing (19th November, 2009), there was probably too much 'capital chasing' and not enough product as vendors were reluctant to sell, hoping for a better market. Local banks did not necessarily have to lend for these transactions and he mentioned that a number of foreign banks not subject to the NAMA regime were involved. He said that the husband's portfolio was of pretty good quality, comprising, from what he had seen (with the exception of several development sites), primarily income producing property, a number of residential units and some service sector assets, together with some short leased office buildings which would have very strong or medium term redevelopment potential. He said generally it was a portfolio of high calibre with the prospect that if the market recovers, these types of properties will also recover in value in accordance with the market. He went on to analyse in his evidence the positive aspects of various properties, but conceded some properties might be slow to improve in value and depended on redevelopment planning permissions etc. He considered that the rental market for office and retail in Dublin was still in decline, but noted that the 30 year average for prime office yields in Dublin is 5.9% as against 7.5% at present. He said there is currently a glut of such property for sale, depressing the price by reason of redemptions in insurance funds etc. Mr. Durcan cross-examined Mr. Moran on the basis that while there were some good properties, there were also many poor properties. Mr. Moran conceded that that was so. Mr. Durcan also cross- examined Mr. Moran on the irregularity of the cycles saying that it depends which seven year cycle one looks at, and instanced the first seven years of the series of cycles where prices went up by 202%. Mr. Moran countered that over 35 years the peaks smooth over the troughs so as to give a more or less regular seven year cycle. He agreed that he had never seen a structure like NAMA in his professional experience, and that the country was in a unique situation insofar as the banks had handed out so much money that, in effect, they went bust. When it was suggested to him that the history of the property market might be an unreliable guide, he said that nevertheless it was still a guide. Mr. Moran said that the property market was relatively close to the bottom and that the market

represents a good buy at the moment. He agreed that while the country has never been in a situation where one entity, namely NAMA, was, in effect, managing the market, he insisted that banks had been bailed out before. He said that it could take longer than the ten years minimum period of NAMA's lifetime to deal with certain assets, and that more realistically NAMA is not a ten year exercise in the long run.

Conclusions in Relation to Value in Ten Year Liftetime of NAMA

1. Having read the preamble and recitals, together with the provisions of the Act of 2009, I consider that while NAMA is not a bank properly so called (by reason of the fact that it does not take deposits), it nevertheless has all the characteristics of a collecting bank and, in relation to realising the assets representing the loans taken over by NAMA from the participating banks, it must maximise the return for the taxpayer, its shareholders and itself and, if possible, make a surplus or a profit along the lines envisaged by the draft business plan published in October prior to the passing of the legislation.

2. The Act of 2009, although enacted after the publishing of the draft business plan, is very substantially consistent with the business plan exhibited at the hearing.

3. While the business plan envisages situations where NAMA may still break even, or even make a profit at the end of a ten year period, by disposing of assets at a discount to the value of the loan cost to it, I consider that it is unsafe to proceed from the general position of a discount on the total assets of NAMA to a conclusion that, in the case of the husband's assets, as variously described in the spreadsheet, such discount would uniformly or in part apply, for the reason that the evidence was that a very substantial part of these assets are high quality assets, and even where the assets are of lower quality, they are certainly not of the lowest quality in the country. In order to have an overall discount of 20% on the entire national asset holding disposed of by NAMA, it is more likely that the discounts for very inferior property, onerous property, fast depreciating property, and the loans represented by them would be higher than average, and the discount for the higher to medium quality property in the spreadsheet will be lower. If the loans in respect of a property are deeply discounted on purchase (i.e. suffer a haircut), then while such deep discount may give more scope to Mr. Byrne's analysis at the disposal end by NAMA, it must still be remembered that the large discount or haircut at the acquiring end by NAMA is indicative of a lower than usual price for the loan acquired, reflecting a poor underlying property or security value. Individual developers may not be in a position to exploit poor prices paid by NAMA for poorly documented loans, as a failure to complete documentation may indicate a lack of cooperation with NAMA with the consequent loss of the possibility of managing their other properties. The chances of such properties rising in value in a sluggish market are very poor, and it is difficult to see business people, such as the husband, searching for, or being funded to purchase, that type of property, while under severe pressure to pay the full value of the loans which they undertook to pay the banks in the first instance. I accept the arguments made by Mr. Durcan, and borne out by Mr. Browne of Browne & Murphy, in his evidence on behalf of the husband, against the assets in the spreadsheet achieving a positive net value within the ten year term of NAMA. I accept these arguments , primarily because of the lack of accounting for interest in Mr. Byrne's analysis and also by reason of the possibility that interest rates may rise rather than fall over that ten year period, coupled with the fact that the seven year market cycle analysis of Mr. Byrne may have little relevance to a situation where there has been a once off and historical deflation of property prices and decline in liquidity which, by reason of the lack of availability of interest-only loans to the extent enjoyed hitherto. will leave buyers unwilling to pay the high prices for property that they did in more liberal past borrowing conditions, significantly influenced by the interest-only policy. The implication of this conclusion is that the husband will not have any positive value in the assets referred to in the spreadsheet.

Although they were not included in his assets by the husband in his initial affidavit of means or disclosures on case management, the assets of the children's trust are appropriately included in the husband's assets for the reasons that they are intimately connected through guarantees, indemnities and cross-charges with the rest of the husband's assets and are managed by the husband as a unit with his other assets. The assets in the children's trust thereby carry the management overhead with the husband's other assets on the spreadsheet and so reduce average management costs over all the property in the spreadsheet and (in the event of the husband being retained as a manager by NAMA), will continue to do so. Mr. Rogers, senior counsel for the wife, highlighted during the course of the hearing the possibility that the husband was free to transfer to the wife a number of unencumbered properties, including a property in the United States. The husband countered that this would not be possible as these properties would eventually be caught under personal guarantees he had given on an extensive basis in relation to the other heavily indebted properties. The Irish properties, which were unencumbered and attracted the attention of Mr. Rogers in that regard, consisted of the second, third and fourth properties in the list of residential apartments and houses for rental annexed to the spreadsheet, and the husband's shareholding in the T.B.Q. Company.

The Family Home and Assets of the Wife

While initially the husband claimed in the proceedings that he was solely entitled to the family home, it transpired that the family home and mews attached to it are the subject of the B Trust, of which the husband is a beneficiary. It was indicated throughout the case (and even at case management), that the husband may be in a position to procure a decision of the trustees amending the trust to name the wife a beneficiary, so as to leave the wife in a position to eventually take a vested interest in the family home. If this cannot be done by the wishes of the husband, then it can be effected by the statutory powers of the Court to bring about the required alteration of the trust to leave the wife in a position where she may become a beneficiary. The wife, if she becomes a vested owner of the family home, would own a property valued in the sum of €4.4million, which may well be subject to a further tax charge on it being vested (in the wife) in the region of €1,000,000. The wife, through her counsel, indicated that such ultimate vesting might be postponed by her in consultation with the trustees, if she is named as a beneficiary, until such time as the market conditions improve so as to allow her some scope to pay this substantial sum of tax and still have some capital for reinvestment in housing and income generation. The wife also has, at the date of hearing, the sum of €600,000 in cash and owns 140 Q.Sq. of net value €300,000.

As regards the income at the disposal of the parties, the husband states that he is earning a sum in the region of €40,000 gross from his company which manages the assets in the spreadsheet. He anticipates that NAMA will continue to employ his company to manage the assets at a cost of €700,000 per annum, and he is prepared to pay €40,000 maintenance to the wife. In the fullness of time, I anticipate that the wife will be in a position to earn a sum in the region of €20,000 per annum as rent for the mews attached to the family home, should she be left in possession of the family home. Ultimately, should the family home re-achieve its value and saleability, the wife must consider selling same, discharging the considerable sum of tax accumulated by the initial avoidance measures in the B Trust and, after providing more modest accommodation for herself, invest the balance to secure an income for the rest of her life. The Court regards the family home as a consumer item as a residence for the first few years but, ultimately, it will have significant investment value on a sale, and the new economic reality is such that the wife should make immediate plans for the orderly and efficient disposal and preservation of the house. An indication of the changed times through which this case has progressed is given by the fact that in his first affidavit of means, prior to the collapse of Lehman Brothers, the husband could freely declare his income from all sources at €6,000,000 per annum while, at the same time, the wife indicated *de facto* household expenses of €694,418 per annum, although she said she received only monthly payments from the husband's company averaging €6,750.

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

At €40,000 per annum the wife would probably survive with a very modest standard of living but there is no question about meeting the standard to which she was accustomed prior to the collapse of Lehman Brothers. Part of her living expenses will be the maintenance of the family home and she has expressed great concern about this. In view of my comments in relation to the duality of valuation of the house as a consumer and investment item, it is imperative that it be maintained up to its current very high standard and the valuable furniture therein retained so as to be in a position to present it well for sale in the medium term. One of the best means of preserving an old house such as this is to reside in it, and the wife is likely to reside there ensuring that side benefit. However, I consider that at €40,000 per annum, and even at €60,000 per annum, the wife will have to delve into her cash sum of €600,000 to ensure the upkeep of the house, not as a luxury item to be indulged in the face of very straitened circumstances, but as an item to ensure the preservation of the only capital of any significant worth left in the family. The husband's financial needs, obligations and responsibilities (apart from ensuring the provision of maintenance for the wife), are to ensure his own personal survival and, I am satisfied that any provision less than what he is allowing for himself at €40,000 per annum, would affect his efficiency as an extremely important operative in the project of preserving and maximising the assets for which he is now responsible, all of which are deeply immersed in debt. I have reached this conclusion regardless of whether he is left, through his company, in the management and control of the assets by NAMA. The wife will most likely have to bear her own costs and these will eat into the value at Q. Sq. and possibly even some of her €600,000 savings.

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

I have already given a sample of the income enjoyed by the family concerned before the proceedings and before the spouses separated. This is a standard of living which might be expected of a couple whose net worth could be stated in the region of €230,000,000. They enjoyed the facility of a luxurious home, a choice of private air flights, good holidays and a good social life generally. However, notwithstanding their generous lifestyle, it could not be said that they led the life of the idle rich.

The only trappings of their former standard of living which may be enjoyed on a continuing basis by the family are the houses which both the husband and wife will occupy. In the case of the husband, this is a period house at D., some 100 miles away from Dublin. Again, on the basis that this house, although in good condition, is not marketable, save at fire sale prices, it will benefit greatly from the continued occupation and care of the husband for investment reasons.

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

The husband is in his mid sixties and the wife in her early sixties. Their marriage was a long marriage.

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

There is no physical or mental disability of either of the spouses.

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

The contribution of the wife in looking after the family, having given up her employment at middle management in a commercial company after the marriage, is not disputed by the husband. However, her contributions to the family businesses are not agreed by the husband. He has given evidence that he was well established as a consultant working from part of the family home when the parties married, and all the planning and decoration for the various elegant tourist properties developed by the family businesses were planned and designed by employed consultants and agents, rather than the wife. The wife gave evidence that she was always on hand in relation to the choice of décor, furnishing and quality touch for these properties which required a luxurious and quality image, not always obtainable from the employed professionals. She also stated that because much of the business was run from the family home, or in close proximity thereto, she had to deal with correspondence and other documentation arising in the business and was always there as a standby organiser, manager and even clerk of works on the occasional job to supplement and support her husband. My conclusion in relation to this conflict is that while the husband had commercial and professional personnel to do the finishing work on the various tourist properties and development of residential units, the interest and presence of the wife ensured that a premium was placed on quality and style, which now enures to the benefit of the family businesses insofar as many of these facilities continue to trade or be rented successfully in the face of general attrition among their competitors. Having regard to this conclusion and the other factors in relation to the contribution of the wife to the family, I am of the view that there is no other

conclusion to make other than that both partners contributed equally to the family and its welfare and resources.

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

The husband's earning capacity was not challenged in any way by the marriage. Far from it, he developed his career significantly after the marriage and moved from being a highly successful consultant to being a developer of residential and tourist units, and developed the significant company T.B.Q. in conjunction with an esteemed partner. The wife, on the other hand, ceased employment to look after the family, and I have no doubt that had she continued in her employment she would have at least achieved the status of manager at branch level of her commercial company. She also owned an apartment which was sold. This was reinvested in a business which, unfortunately, failed. These conclusions lead me to the view that the wife's entitlement to half the assets of the family would be grounded in usual circumstances. She is certainly entitled to have the benefit of such encumbrance free assets of the family as are available in the B Trust holding the family home, rather than let them be immersed in the debt of the husband's businesses, in a situation where the husband's encumbrance free assets must be dealt with in the context of the decisions of this judgment on bankruptcy and/or NAMA court review.

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

No income or benefits arise under this heading.

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

It is agreed by the parties that conduct is not an issue in the case. It should be noted that the fact that conduct was not an issue and did not take up the time of the Court is a matter to be considered in the context of the reasonableness of the litigation and the resources spent on it.

(j) the accommodation needs of either of the spouses

The accommodation needs of the wife are catered for in the short term in the family home, and thereafter by more modest accommodation as may be substituted therefor. For the moment the husband requires and will obtain, subject to NAMA approval, bachelor type accommodation in his office in the city and more convivial accommodation at the house in D., subject to NAMA's approval, which I anticipate will be forthcoming by reason of the lack of commerciality of a quick sale of the house at D. and the need to preserve it through human occupation.

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

None arises as it is proposed the pensions will be divided so as to achieve equality.

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

No rights of persons other than the spouses arise in this case, save the creditors represented by NAMA and such minority participation of non-participating banks in the debt. Normally the rights of creditors under this heading are automatically catered for in the process of the valuation of the assets available to the family by the forensic accountants taking into account the debts owed by each. However, in this case there is an important issue arising in relation to the eventualities facing the parties should there be a bankruptcy in response to the negative equity of the husband's businesses, or in the event of NAMA pursuing its extensive rights under the Act of 2009 against the husband, particularly on foot of his personal guarantees for debts throughout the businesses. These concerns are dealt with the in the outline of submissions and authorities on these topics later in this judgment. In view of the exceptional occurrence of a valuable family home held on trust, and the likelihood of NAMA engagement with the husband in the continuing management of his businesses, this factor is not so significant to the outcome of this case, but in other cases it could be quite significant. In any event it is important to set out the principles which apply.

Bankruptcy and NAMA Implications for Insolvency

7. Apart from the B Trust affecting the family home, this is a case involving manifest insolvency where the husband's businesses cannot continue without the support of the banks or, in the event of the takeover by NAMA of much of the debt, the support of NAMA. This case is like many businesses in Ireland which keep bankruptcy and liquidation at bay by paying the normal trade creditors and putting the banks on the long finger. During the course of case management and the hearing of the case, the Court asked the parties to prepare submissions on the implications of bankruptcy and NAMA legislation for provision to be made in this case.

The Law on Bankruptcy

8. Section 59 of the Bankruptcy Act 1988 ("the Act of 1988") provides as follows:-

> "(1) Any settlement of property, not being a settlement made before and in consideration of marriage, or made in favour of a purchaser or incumbrancer in good faith and for valuable consideration, shall—
>
> (a) if the settlor is adjudicated bankrupt within two years after the date of the settlement, be void as against the Official Assignee, and
>
> (b) if the settlor is adjudicated bankrupt at any subsequent time within five years after the date of the settlement, be void as against the Official Assignee unless the parties claiming under the settlement prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in the settlement and that the interest of the settlor in such property passed to the trustee of such settlement on the execution thereof

(2) A covenant or contract made by any person (in this section called the settlor) in consideration of his or her marriage, either for the future payment of money for the benefit of the settlor's spouse or children, or for the future settlement, on or for the settlor's spouse or children, of property wherein the settlor had not at the date of the marriage any estate or interest, whether vested or contingent, in possession or remainder, shall, if the settlor is adjudicated bankrupt and the covenant or contract has not been executed at the date of the adjudication, be void as against the Official Assignee, except so far as it enables the persons entitled under the covenant or contract to claim for dividend in the settlor's bankruptcy under or in respect of the covenant or contract, but any such claim to dividend shall be postponed until all the claims of the other creditors for valuable consideration in money or money's worth have been satisfied.

(3) Any payment of money (not being payment of premiums on policy of life assurance) or any transfer of property made by the settlor in pursuance of a covenant or contract to which *subsection* (2) applies shall be void as against the Official Assignee in the settlor's bankruptcy, unless the persons to whom the payment or transfer was made prove that:

(a) the payment or transfer was made more than two years before the date of the adjudication of the settlor, or

(b) at the date of the payment or transfer, the settlor was able to pay all his debts without the aid of the money so paid or the property so transferred, or

(c) the payment or transfer was made in pursuance of a covenant or contract to pay or transfer money or property expected to come to the settlor from or on the death of a particular person named in the covenant or contract, and was made within three months after the money or property came into the possession or under the control of the settlor;

but, in the event of any such payment or transfer being declared void, the persons to whom it was made shall be entitled to claim for dividend under or in respect of the covenant or contract in like manner as if it had not been executed at the date of the adjudication.

(4) In this section "settlement" includes any conveyance or transfer of property."

There is no case law in Ireland on the application of this section (which deals with the setting aside of transactions made for the purpose of defeating creditors) to property transfers or similar provisions made in separation or divorce, but in recent years a considerable body of jurisprudence has emerged in the English Courts.

9. The first case of most significant relevance is *In re Abbott (A Bankrupt)* [1983] Ch. 45. That was a case in which a wife in family law proceedings sued for maintenance and a property transfer order. She compromised her claim to maintenance by relinquishing her rights to maintenance in return for money on the sale of the house. Gibson J. referred to s. 42 of the Bankruptcy Act 1914, which is similar in its provisions to s. 59 of the Act of 1988 above, as follows:-

"(1) Any settlement of property, not being a settlement…made in favour of a purchaser or incumbrancer in good faith and for valuable consideration…shall, if the settlor becomes bankrupt within two years after the date of the settlement, be void against the trustee in the bankruptcy… 'Settlement' shall, for the purposes of this section, include any conveyance of transfer or property."

10. It was held in that case that the words "purchaser…for valuable considerable consideration", for the purposes of s. 42(1) of the Bankruptcy Act 1914, were wide enough to cover a spouse whose claim to a property adjustment order under s. 24 of the Matrimonial Causes Act 1973 had been compromised, and no narrower construction of the words was required as a result of s. 39 of the Act of 1973 which made it clear that transfers of property made under property adjustment orders could be challenged under s. 42(1) of the Act of 1914. It was further held that the wife, by relinquishing her claim under s. 24 of the Act of 1973 in return for the right to part of her husband's share of the proceeds of the matrimonial home, was a purchaser of that right for valuable consideration within s. 42(1) of the Act of 1914, and there was no need that the "*quid pro quo*" which moved from her should replace in the husband's hands the asset he had disposed of. *In re Abbott* is a judgment on an agreement compromising an action, rather than any provision made by court, and there was some doubt afterwards as to whether a court provision such as a property transfer order (for which by definition a husband would give nothing by way of return, as in an agreement), would constitute a transaction which could be set aside. Also, in *In re Abbott* the wife was not aware of the insolvency at the time of the compromise and, thus, easily qualified to be a purchaser "in good faith". The equivalent Irish provision, s. 59 of the Act of 1988, has this requirement of "in good faith". I consider that these concerns were addressed and resolved in the decision of the Court of Appeal in *Hill v. Haines* [2008] 2 W.L.R. 1250, (albeit in the context of widely changed statutory provisions). As the statutory background in this case was much different than that in *In re Abbott* and also different from the position in this jurisdiction, it is important to glean from the judgments of the Court its position in addressing the public policy considerations involved in the division of functions between the family and insolvency courts, which were in focus in that case, and continue to be in focus in the instant case. This approach to policy is best summarised in the judgment of Rix L.J. at para. 82, p.1273 as follows:-

"Finally, as to policy, it would be unfortunate in the extreme if a court-approved, or even (an a *fortiori* case) a court-determined property adjustment order would be liable, in practice, to be undone for up to five years because the husband goes bankrupt within that period. That could even encourage such bankruptcy on the part of a disaffected husband. Although a collusive agreement by a divorcing husband and wife to prefer the wife and children over creditors and thus dishonestly to transfer to her more than his estate can truly bear, if his debts were properly taken into account, and thus more than her ancillary relief claim could really and knowingly be worth, is no doubt susceptible to section 339 relief despite the existence of a court order in her favour (see the decision in *Kumar's* case [1993] 1 WLR. 224): nevertheless, in the ordinary case, where there is no dishonest collusion, and where a court approves or determines the sum or property to be transferred, it would be entirely foreign to the concept of a "clean break" if the husband's creditors could thereafter seek to recover, in bankruptcy, the property transferred or its value. However, in my judgment, it would require the overthrow of long established jurisprudence, the reinterpretation of section 39 [of the Matrimonial Causes Act 1973], the misunderstanding of the doctrine of consideration, and an assault on current views of the statutory entitlement to ancillary relief, to arrive at that unhappy and unnecessary situation."

11. Section 339 relief referred to in the judgment of Rix L.J. explicitly dealt with the right of the court to set aside fraudulent

transactions in family law proceedings as against the trustee in bankruptcy. The English cases indicate that what was provided in the modern statute was what was previously understood by the courts to be the position. While there is no case law in Ireland, and the Report of the Bankruptcy Law Committee, which reported in the mid 1960s, does not mention any such authority, I am satisfied that the courts could set aside an order obtained fraudulently and in bad faith from the family court if satisfied that it was for the purpose of defeating creditors and not for the purpose of making proper provision for a spouse.

12. I am satisfied that the English cases are very persuasive authority in relation to the resolution of the public policy issues arising from the conflict between the provisions of Irish family law legislation and the bankruptcy code. The resolution of such a conflict in the public policy area has been touched upon in a related, but not identical, area of the priority of family law proceedings and claims thereunder by a spouse over judgment mortgages, in the authorities *S. v. S.* (Unreported, High Court, Geoghegan J., 2nd February, 1994); and *A.C.C. Bank Plc. v. Vincent Markham & Mary Casey* [2005] IEHC 437, (Unreported, High Court, Clarke J., 12th December, 2005); *Dovebid Netherlands BV v. William Phelan trading as the Phelan Partnership and Denise O'Bryne* [2007] IEHC 239, (Unreported, High Court, Dunne J., 16th July, 2007). These cases are abundant authority for the proposition that a judgment mortgage does not rank in priority to a claim by a dependant spouse in judicial separation proceedings, even where the proceedings are not registered as a *lis pendens*. While it cannot be asserted that the vesting of property in the official assignee upon the adjudication of a bankrupt has the same limited effect as the registration of a judgment mortgage on a property, the authorities referred to above show the importance that the Irish courts attach to the protection (from creditors' claims) of provision and potential provision to be made by the family courts.

13. It would seem to me, therefore, that it is the duty of a family law court, while bearing in mind the provisions of s. 59 of the Act of 1988, to act with probity and only for the purpose of making such provision as is necessary for the spouses in accordance with the Act of 1989, as amended by the Act of 1995, or, in the case of divorce, the Family Law (Divorce) Act 1996. It would seem that a proper exercise of such jurisdiction involves not the division of assets between the spouses to the exclusion of the creditors, but the provision of necessities such as living accommodation, basic maintenance and in appropriate cases security therefor, or property transfer orders in lieu thereof, bearing in mind that while in social terms creditors have rights, the only protection thereof lies under the bankruptcy code. Such rights should not be allowed to act in an oppressive manner over the rights of spouses, so as to potentially leave them in a position where they must rely on state social welfare supports. It might be considered that the Court in exercising this jurisdiction should be guided by the provisions of the Act of 1988 in relation to exceptions and allowances for bankrupts and adopt the practice of the High Court in relation to these matters. I do not accept this view for the following reasons:

> 1. Family law proceedings may be resolved well ahead of bankruptcy proceedings and in circumstances where bankruptcy proceedings might not be very likely, although there is technically an existing situation of insolvency;
>
> 2. It may well be the case that the resolution of family law proceedings through a provision which (on its face) might reduce the security of creditors in a bankruptcy, might have the effect of bringing about a situation where the bankruptcy may be avoided or where the spouses may improve their asset holding ability to the benefit of the creditors in any eventual bankruptcy. This consideration is often manifested during the course of separation or divorce hearings by the response of the providing spouse, when asked by the court if the bank would facilitate him/her in relation to funding provision or funding his/her business to ensure its survival, that the bank is likely to fund him/her only after the disposal of the family law proceedings, resulting in the type of certainty which will enable the bank to plan for the future and afford the necessary credit; and
>
> 3. Acceptance of this view might well unnecessarily expand the burden of creditors by spouses indulging in litigation, especially appeals in the face of the prospect of an "expense and allowances only" approach.

In this particular case, there is no doubt that it will be of particular importance to NAMA and any non-participating banks or creditors dealing with the husband, that these judicial separation proceedings are determined and certainty is established. In this case, proceedings commenced when bankruptcy must have been far from the minds of the parties, given the lifestyle and wealth of the parties. The question arises for further consideration whether it is of relevance whether the proceedings started before the insolvency or after.

14. In relation to the provisions made by order of this Court, the only order which may impinge on the foregoing considerations is the order that the husband provide security for the wife by way of a charge on unencumbered property to secure maintenance for a period of time until disposal of the family home, which is estimated to be at sometime around the end of a period of five years. I consider that as the provision of maintenance is not contrary to the bankruptcy code and certainly not contrary to s. 59 of the Act of 1988, it is prudent and in the interest of the efficient working of the order and avoidance of instability immediately after separation to have some security for the provision of maintenance, and I consider that the order made in this case is commensurate with the protection of creditors and is reasonable. In any event, upon maintenance being paid (which it is likely to be), the order is unlikely to impinge on the eventual security for creditors, even in the unlikely event of bankruptcy in this case.

15. The use of cash reserves by the husband to discharge costs, while questionable under s. 211 of the Act of 2009 (set out below), should also for the same reasons be appropriate.

16. The latitude which a family court has in relation to basic provision in the face of financial difficulties described in this judgment is not be taken as a licence for unnecessary and extortionate claims of litigation. Such high claims and time wasting should not be allowed in the face of the mandate of the bankruptcy code to protect creditors. This has been the first NAMA family law case to have been adjudicated. It has been conducted in exemplary fashion. It is to be hoped that it will be a model for similar cases.

Impact of NAMA Act 2009

17. Section 211 of the National Asset Management Agency Act 2009 ("the Act of 2009") provides as follows:-

> "(1) Where, on the application of NAMA or a NAMA group entity, it is shown to the satisfaction of the Court that—
>
> (a) an asset of a debtor or associated debtor, guarantor or surety was disposed of, and
>
> (b) the effect of the disposition was to defeat, delay or hinder the acquisition by NAMA or a NAMA group entity of an eligible bank asset, or to impair the value of an eligible bank asset or any rights (including a right to damages or any other remedy, a right to enforce a judgment and a priority) that NAMA or the NAMA group entity would have acquired or increased a liability or obligation but for that disposition,
>
> the Court may declare the disposition to be void if in the Court's opinion it is just and equitable to do so.

> (2) In deciding whether it is just and equitable to make a declaration under *subsection* (1), the Court shall have regard to the rights of any person who has in good faith and for value acquired an interest in the asset the subject of the disposition.
>
> (3) Nothing in this section affects the operation of section 14 of the Conveyancing Act 1634 or section 74(4)(a) of the Land and Conveyancing Law Reform Act 2009."

18. Section 4 of the Act of 2009 provides that a 'bank asset' includes a credit facility, or any security relating thereto, or any right connected therewith. 'Security' is defined to include a guarantee, indemnity or surety and a 'guarantor' means a person who has entered a guarantee or indemnity in connection with a bank asset. In this case it is proposed and has been ordered that the husband provide security on an uncharged and unencumbered property to the value of approximately €300,000 in respect of maintenance. In certain circumstances it may well be that NAMA will seek to enforce guarantees against the husband, which he has stated in evidence may amount to a total of €250,000,000. To realise this guarantee it may be necessary to register a judgment mortgage and sell any of the unencumbered property including the property ordered to be charged as security for maintenance and, therefore, it could be argued that the order of this Court could be reviewed by a court exercising jurisdiction under section 211. Mr. Rogers, on behalf of the wife, argued that as the husband is not liable in respect of any of the guarantees unless and until there is a demand made by NAMA or any bank in respect thereof, the value of the asset constituted by the guarantee to the bank or NAMA is currently nil. Therefore, the proposed order could not reduce its value, and this could not be reviewed under section 211. While I accept as a general proposition that a guarantor is not liable to pay under a guarantee until payment has been demanded, the guarantee may have a value, depending on the assets of the guarantor. An example may be that the value of banks in the State has been enhanced by the mere fact of a State guarantee on deposits. Another indication of the inherent value of a guarantee are the provisions in the guarantee contract itself which, in most commercial cases, require the guarantor not to reduce its assets below a certain level.

19. I thus consider that the Court should harken to the provisions of s. 211 of the Act of 2009, when making an order for the charging of maintenance on the unencumbered property of the husband. For the reasons advanced in this judgment when considering the implications of this order for the bankruptcy code, it is unlikely that any court exercising jurisdiction under s. 211 would declare that such limited charging would be a "disposition to be void" on the basis that it was the court's opinion that it would be just and equitable to do so.

Interests of Justice

20. Subsection (5) of s. 16 of the Act of 1995 provides as follows:-

> "(5) The court shall not make an order under a provision referred to in *subsection* (1) unless it would be in the interests of justice to do so."

21. While on a net asset basis, the wife receives provision in excess of approximately €4,000,000 above the husband who has little net assets, Mr. Durcan in his submissions analysed his asset take on a liberal interpretation of assets, meaning assets which were not encumbered, including the P.B.Q. property, as being €1, 270,000 less than the provision for the wife. In any event, the provision for the wife exceeds equality. It was argued, by Mr. Durcan, that in light of this and the fact that the husband, now in his mid sixties, faces ten difficult years interacting with NAMA and recovering his business, or at least minimising the losses thereof, primarily in the interest of NAMA and the non-participating banks, and in the unlikely event of a surplus ever being generated, he should obtain a larger, if not the total share, of the net assets. I consider that in fairness and justice this should be so, but also I consider the implications of fairness and justice for the wife in the event of her being totally cut off from what might be a speculative enough outcome of net assets at the end of ten years or a longer period. While this outcome might be speculative in the eyes of objective observers, it must be realised that both parties, especially the wife, consider that they were cut off from what was a super rich lifestyle in 2008 and now find themselves with a lifestyle which, while hopefully still comfortable, is extremely insecure. If the wife were cut off from enjoying the prospect of even a speculative return at the end of ten years effort by the husband, I consider that subjectively she would consider it a shattering injustice. Bearing in mind the objective consideration of justice, the Court must balance the intended efforts of the husband against the passivity of the wife over the next ten years and, hence, I consider that a division of 80/20 should be made in favour of the husband in respect of these speculative gains. A further consideration on a practical level which has some bearing on the justice of the case is that to cut the wife off completely would be potentially damaging to her health by making her emotionally insecure and would also engender a propensity to continuously litigate this grievance, either directly or by proxy. This is not in anyone's interest, least of all in the interest of NAMA.

APPENDIX

XY

APPLICANT

AND

YX

RESPONDENT

1. An Order for Decree of Judicial Separation pursuant to Section 2(1)(f) of the Judicial Separation and Family Law Reform Act 1989.

2. An Order pursuant to Section 9(1)(a) of the Family Law Act 1995 directing the Respondent by way of letter to the Trustees of the Settlement (B Trust) relating to the family home and mews attached, namely DTS Limited, to make the Applicant an object of the Trusts of the said Settlement and thereafter to cooperate with the Applicant in securing the vesting of the properties. The Trust shall continue in being in the interim.

3. An Order pursuant to Section 9(5) of the Family Law Act 1995, directing where necessary the County Registrar for the County of Dublin to execute all deeds, documents and instruments necessary to give effect to the transfer ordered herein.

4. An Order pursuant to Section 10(1)(a)(i) of the Family Law Act 1995 granting to the Applicant an exclusive right of residence for life in the said family home to the exclusion of the Respondent.

5. An Order pursuant to Section 8(1) of the Family Law Act 1995 directing the Respondent pay to the Applicant an annual gross maintenance sum of €60,000 being twelve monthly payments of €5,000; the first payment to be made on the 1st of July 2010. The said maintenance sum shall be decreased to €50,000 gross per annum or twelve monthly payment of €4,166.66, from the 1st of July

2012, when the Respondent shall receive rent from the mews premises by this date. The Court directs the payment of maintenance to be effected by the transfer of the Respondent's shareholding in TBQ Limited so that the Applicant receives any dividends from the said shareholding, any shortfall of maintenance remaining after the above sum is paid out of dividends to be paid directly by the Respondent to the Applicant.

6. An Order pursuant to Section 8(1)(b) of the Family Law Act 1995 securing such periodical payments and any further periodical payments as shall arise by Order of this Court over the property being the apartment at BI for a period of five years.

7. An Order pursuant to Section 12 of the Family Law Act granting a Pension Adjustment Order in favour of the Applicant in respect of 100% of the retirement benefits payable under the pension policy with *Hibernian Aviva Policy No. 81*, together with the payment by the Respondent to the Applicant of a lump sum of €7,000, to be paid on or before the 15th of February 2011 and upon the encashment by the Respondent of the *Pension Policy Number 070…* with Irish Life, which thereafter entitles both the Applicant and the Respondent to an equal division under the two pension policies. The formal terms of which Orders are to be approved by the Court on the 16th day of December 2010.

8. An Order pursuant to Section 54(3) of the Family Law Act 1995 dispensing with the requirement of the Respondent's consent to any further disposition of the family home and/or an Order pursuant to Section 10(1) (c) of the 1995 Act and Section 4 of the Family Home Protection Act 1976, dispensing with the consent of the Respondent to any further disposition of the family home.

9. The Court directs the Respondent to indemnify the Applicant in respect of all tax liabilities with regard to the Respondent's business activities and with regard to the activities under the B Trust and, in respect of the B Trust, up to the date of the Respondent's removal as beneficiary under the Trust. The Applicant shall be responsible for any tax payable upon the disposal of the family home or upon any transfer of the property out of the Trust.

10. The Court adjourns further consideration of the case for the purpose of ascertaining the surplus, if any, after discharge of encumbrances and of the NAMA process and/or bankruptcy of the Applicant, which surplus when realised should be divided as to 80% to the Respondent and as to 20% to the Applicant.

11. By way of further protection of the Applicant's right for further provision together with that of the Respondent, directing the Respondent to supply to NAMA in his business plan provisions to ensure succession of management in the event of his death or disablement during the term of the plan.

12. The Court adjourns Orders pursuant to Sections 8, 17 and 15 of the Family Law Act 1995 pending the consideration of the implementation of the division of any surplus which may arise after a period of ten years from the date hereof.

13. The Court postpones the making of any Order pursuant to Sections 14 or 15(a) (10) of the Family Law Act 1995 pending further consideration of provision herein.

14. For the purpose of the protection of the assets, the Respondent shall cooperate with encumbrancers of his property including NAMA for the purpose of maximisation of any surplus, and shall not dispose or alienate any of his assets save in the normal course of business, and shall furnish to the Applicant a brief biennial report setting out the Respondent's income and earnings and showing progress (if any) to include profit/loss, capital gains or loss in establishing positive equity in NAMA and any parallel process involving non-NAMA institutions.

15. No Order as to Costs but liberty to the Applicant to apply to Court in this regard.

16. An Order pursuant to Section 36 of the Family Law Act 1995 that the Applicant and the Respondent shall be entitled to retain their interest in respect of properties and assets held by either of them as of the date of this Order, and as set out in their Affidavits of Means.

17. Liberty to Apply.

AND IT IS ORDERED that this matter be adjourned to Thursday the 16th day of December 2010 in respect of (a) the formal Pension Adjustment Orders provided for at Paragraph 7 hereof and (b) any further matters arising in respect of the Order at Paragraph 2 hereof