THE COURT OF APPEAL

Neutral Citation Number: [2016] IECA 421

Ryan P.
Irvine J.
Hogan J.

Record No. 2014/1016 M

Q.R.

Applicant/Appellant

- and -

S.T.

Respondent

Judgment of Ms. Justice Irvine delivered on the 19th day of October 2016

1. This is an appeal seeking to vary the judgment and order of the High Court (White J.) made on 25th April, 2013, and 6th September, 2013, respectively, in relation to the lump sum payment ordered to be paid by the respondent ("the husband") to the applicant ("the wife") in judicial separation proceedings. The main question for consideration by the Court is whether the High Court judge made proper provision for the parties by attaching appropriate weight to each of the attending circumstances of the case and the statutory requirements provided for in s. 16(2) of the Family Law Act 1995 ("the 1995 Act") and whether the husband's conduct particular to this case, should have resulted in a greater lump sum than that which was awarded.

2. On the 1st November, 2013, the husband served a notice of appeal against the judgment and order of the High Court. In response, on the 7th November, 2013, the wife served a notice of variation seeking to vary upwards the order which provided for the payment to her of a lump sum of €3,800,000 and also an order pursuant to s. 15A(10) of the 1995 Act to the effect that the order made in the husband's favour would be conditional upon full performance by him of his obligations under the order and judgment of the High Court at the date of his death. The husband later withdrew his notice of appeal and the wife did not seek to argue in the course of the appeal that the High Court judge had erred in failing to make an order under s. 15A (10) of the 1995 Act. Thus, this Court is only concerned with the wife's appeal against the lump sum payment ordered by the High Court judge.

Background Facts

3. The parties were married in a non EU jurisdiction in, 2006, and there are two children of that marriage. The wife has three other adult children and a grandchild and the husband has two other children, one an adult daughter and the other a son born in 2009. At the time of the High Court hearing the parties were in their 50's and 60's respectively.. The length and nature of their relationship was disputed in the High Court with the wife maintaining that they had enjoyed a twenty year committed relationship whilst the husband claimed that they had had an on/off style relationship and a marriage which was only undertaken for the sake of their daughter.

4. In the course of his judgment the High Court judge made the following findings concerning that relationship. The parties had been in a relationship since the early 1990's, had been engaged for three years and had made some arrangements to marry in the mid 2000's. The relationship deteriorated in 1999 but had continued in some form until 2010. The husband had made financial payments to his wife commencing in 1994, and had also purchased and transferred to her a substantial property. That was later sold and replaced by another substantial property which was transferred into her ownership in 2009. The husband had also discharged legal fees incurred by the wife which were in a sum in excess of €100,000. The judge in general accepted the credibility of the wife's evidence subject to some allowance for exaggeration. He concluded that she had provided a strong family environment for all of her children as well as her granddaughter. As to the husband, the judge was satisfied that from Christmas 2009, he had treated his wife in a dishonest and disrespectful manner and that he had deliberately misled her about his personal life. However, he also was satisfied that she should not have threatened him with the loss of contact with their children or tried to force him to sign certain financial documentation.

5. Relevant to the aforementioned findings is the fact that in or about 2009 a statement had appeared in a public forum to the effect that another woman had given birth to his child. He had denied the truth of that statement to his wife and he had also made a public statement to the same effect. However, it ultimately transpired that the original statement was indeed true. As to these events the Court did not accept the husband's evidence that it was his wife who had forced him to issue the untruthful statement.. The High Court judge also concluded that the husband had been responsible for the unwelcome attention which followed these events.

6. It is common case that between 2008 and 2011 the husband paid a sum of €1.2m to a woman with whom he had had an intimate relationship and that over the same period he gave her two properties. The total value of these transactions was approximately €2.4m. Further, in 2008 and 2009, he gave the sum of approximately €250,000 to a third woman for whom he also had purchased a property.

7. On the 28th January, 2010, the husband issued nullity proceedings, which were served on his wife at her family home, in which he claimed that their marriage was invalid as it was not in accordance with the law of the jurisdiction in which it had taken place. In the alternative, he sought a decree of judicial separation under the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act") on the grounds that having regard to the conduct and behaviour on the part of his wife, which was irrational, unreasonable and cruel, he could not reasonably be expected to continue residing with her. While those proceedings were later discontinued, at all times relevant to these proceedings the husband maintained that he had never been in a committed or loving relationship with his wife.

8. On 18th March, 2010, the wife issued the within proceedings seeking a decree of judicial separation and ancillary relief. The first affidavits of means were sworn by the wife and husband on the 24th November, 2010, and the 15th February, 2011, respectively.

9. Relevant also to these proceedings is the fact that the wife brought a number of applications to the High Court under s. 35 of the 1995 Act regarding the transfer by the husband of certain properties and one cash amount to third parties. Two such properties had been transferred by the husband after the issue of these High Court proceedings. These applications were dealt with in the written judgment of White J. delivered on the 7th June, 2012. In that judgment White J. held that these properties, as a result of a series of

transaction, ended up the subject matter of an irrevocable trust for the benefit of his adult daughter from another relationship for her lifetime and thereafter for the benefit of his descendents. One of these properties had been his daughter's home since her youth and the other, with which she had no connection, had been included, because of a significant fall in its value, for tax efficiency purposes. At p. 5 of his judgment White J. stated that while he would not set aside those transactions it was his intention to attribute the value of those properties to the husband for the purposes of the judicial separation proceedings.

The High Court Order

10. Following a hearing which lasted some sixteen days the High Court judge made, inter alia, the following orders:-

(i) An order that the husband pay the wife a lump sum of €3,800,000 on or before the 4th October, 2013, (s. 8(1)(c)(i)).

(ii) An order that the husband pay the wife the sum of €20,000 per month (€7,000 for her own maintenance and €6,500 in respect of each child (s. 8(1)(a)(i)(ii) and (b)(ii)).

(iii) An order that the parties would have joint custody of their children.

(iv) An order providing that the wife should have the entire beneficial and equitable interest in the property in which she was then residing (s. 36).

(v) An order extinguishing the share that either party would otherwise have been entitled to in respect of the estate of the other (s.14).

(vi) A declaration that the husband had no claim on two other properties beneficially owned by the wife.

(vii) That the husband discharge the costs of the proceedings including the proceedings under s. 35 of the Act, the same to be taxed in default of agreement.

Submissions

11. Helpful written submissions were filed by the parties in addition to which the Court had the benefit of two days of oral submissions. That being so, I will do no more than identify the principal arguments advanced by the parties in the course of the appeal and confirm that I have taken into account, in reaching my conclusions, all of the matters referred to in the written submissions insofar as they relate to issues that remained live at the time of the hearing.

The Wife's Submissions

12. Mr. Durcan S.C. submits that the High Court judge did not make proper provision for his client having regard to the matters to which he was obliged to have regard to by reason of the provisions of s.16 of the 1995 Act. He submits that the use of the word "shall" in s. 16(2) of the 1995 Act makes it mandatory for a judge, when considering the appropriate orders to be made in respect of ancillary financial relief in the context of proper provision, to consider and take into account each of the matters provided for in s. 16(2)(a) - (i) and that he erred in law in failing to do so.

13. Mr. Durcan submits that the High Court judge erred in law in failing to increase the lump sum payable to his client by reason of the gross and obvious misconduct on the part of the husband and he relies on the provisions of s. 16(2)(i) of the 1995 Act which brings the conduct of the parties into the Court's consideration. He submits that the concept of conduct in this section encompasses personal, financial and litigation misconduct. He relies on individual acts of misconduct and in the alternative on the cumulative effect of the husband's misconduct and submits that the same was so egregious that the trial judge erred in law in failing to conclude, as per the section, that it would be unjust to disregard such conduct, when making proper provision. He submits that a series of reprehensible actions can have a cumulative effect such as to engage the provisions of s. 16(2)(i). He relied upon the decision in *Wachtel v. Wachtel* [1973] Fam. 72., which was approved of by the Supreme Court in *D.T. v. C.T.* [2002] 3 I.R. 334 as to the circumstances in which obvious and gross misconduct should be taken into account when making proper provision for the parties.

14. As to the events relied upon by Mr. Durcan in support of his submission that the trial judge erred in law in ignoring the husband's misconduct when purporting to make proper provision by way of lump sum payment, he relies firstly upon the husband's personal misconduct. In particular he relies upon his infidelity to his wife, the false statement made by him to the media concerning the birth of a child to another woman, and the property and monies paid by him to other women in the course of his marriage.

15. Secondly, counsel relies upon conduct which he submits was destined to undermine the personal confidence and financial security of his client, namely the husband's commencement of nullity proceedings, which he later withdrew, and the fact that he denied ever having had a meaningful or loving relationship with his wife. Overall, the husband's personal conduct had been demeaning and was designed to demean his wife and intended to subject her to public ridicule. It was conduct that was, in the context of the wording of s. 16(2)(i) of the 1995 Act, unjust to ignore.

16. Thirdly, Mr. Durcan relies upon the husband's litigation misconduct and in particular his failure to make full disclosure as to his means. He relies upon the fact that he omitted from his first affidavit of means a number of assets to the approximate value of €30,000,000 and further that he had sought to procure his wife's agreement to his affidavit of means without the need for him to vouch the value of his assets. The Court was referred to the correspondence exchanged between the parties' respective accountants concerning a nominee company which had been used by the husband to purchase property, and which property only came to the attention of the wife in the course of the High Court hearing. The husband conducted his finances in a manner which allowed him own property which could not easily be connected to him and but for the discovery of updated bank statements his connection to two valuable properties, one worth approximately £2.7m. and the other £1.8m. would not have been made. In relation to the consequences of financial misconduct reliance is placed on the decision of McMenamin J. in *H v. O'N* (Unreported, High Court, McMenamin J., 23rd June, 2011) wherein, having found deliberate financial misconduct, he held that a proportionate response to that conduct was warranted in the context of making proper provision.

17. As a further aspect of the husband's financial misconduct counsel relies upon his conduct concerning the properties and financial payments referred to at paras. 6 and 9 above and also the trial judge's conclusion that the husband had greater influence over the manner in which his finances were dealt with than that which he had maintained in the course of his evidence.

18. Mr. Durcan submits that even if the High Court judge was entitled to conclude that the husband's individual acts of personal or financial misconduct might not have been sufficiently "gross and obvious" that he should be considered to have erred in law in failing

to take such conduct into account when making proper provision. When considered cumulatively it reached the threshold at which it was unjust not to reflect that conduct when making proper provision. Counsel submits that the authorities which deal with the conduct of spouses in the context of divorce proceedings and in particular proper provision under s. 20 of the Family Law (Divorce) Act 1996 ("the 1996 Act"), are not necessarily applicable here. He emphasises the different statutory regimes in respect of judicial separation and divorce. While the 1996 Act provides for a no-fault system of divorce, the within proceedings are brought pursuant to the 1989 Act which provides for what he describes as a quasi-fault type system within which conduct such as adultery, unreasonable behaviour and desertion are all material. Such matters are accordingly material to the Court's consideration of the conduct of the parties for the purposes of proper provision under s. 16. Conduct which the court might reasonably ignore under s. 20 of the 1996 Act is conduct which the court is mandated to consider under s. 16(2)(i) of the 1995 Act. He seeks to support his argument concerning the difference between the statutory regimes by highlighting s. 16(3) of the 1995 Act which provides that if a spouse has deserted they are not entitled to ancillary relief, unless they can persuade the court that there are circumstances which would render it unjust not to make such provision. Thus, conduct is at the very core of the right of a spouse to ancillary relief. In other words, s. 16 is all about conduct and fault. The word conduct in s. 16(2)(i) has to be seen in the overall statutory context and has to be treated consistently throughout the entire section. Had the trial judge properly construed the section and considered the entirety of the husband's misconduct for the purposes of s. 16(2)(i) he could not, on the evidence, have reasonably concluded that he could justly ignore that conduct when making provision for the wife.

19. Counsel further submits that the trial judge erroneously took other matters, such as the husband's financial generosity, into account and in so doing erroneously excused conduct on his part which he was not entitled to ignore having regard to the provisions of s. 16(2)(i) of the 1995 Act. Further, he argues that it is difficult to see how other factors referred to by the trial judge, such as the location of the husband's assets, the fact that he could have made the disclosure procedure more difficult for his wife, and that he had made very substantial disclosure, could mitigate his failure to make full and proper disclosure in his first affidavit of means particularly in light of his finding that it was "unacceptable that very substantial assets were not disclosed initially" and that he had greater influence over his financial affairs than he had admitted. Accordingly, the trial judge should have approached the matter of disclosure in a manner which would have visited the consequences of that non-disclosure upon the husband. Such conduct had to have consequences.

20. Mr. Durcan also submits that the trial judge failed to consider or attach sufficient weight to a number of other matters to which he was obliged to have regard when determining the nature and extent of the proper provision which he was required to make under the provisions of s. 16(2) of the 1995 Act.

21. Firstly, counsel asserts that the trial judge overlooked the wife's contributions as a homemaker, in determining proper provision. While her role as a homemaker was mentioned in his judgment when recording the history of the relationship, he did not advise what effect that role had on his approach to the issue of proper provision. He also submits that the trial judge failed to have regard to the degree to which the wife's earning capacity had been impaired by reason of her having relinquished the opportunity of remunerative activity while living with and married to her husband.

22. Secondly, the husband had, prior to the commencement of these proceedings, agreed to fund certain litigation commenced by his wife concerning the property in which she and the children of the marriage were residing. At the time of the hearing she was exposed to significant risks in relation to the costs of those proceedings. She had commenced that litigation thinking she was in a happy marriage and that she had the support of her husband. The trial judge stated in the course of his judgment that he had taken into account, when making proper provision, the risks to which she was exposed in terms of costs. However, he did not identify the sum she might need to discharge any such costs. Neither did he say how, in making proper provision under s. 16(2), he had sought to protect her against that risk. Mr. Durcan submits that the wife should not have been left to shoulder the full risk associated with this litigation and that the approach adopted by the trial judge did not protect her against the potential erosion of the security which the lump sum payment was intended to provide. Mr. Durcan likens the error on the part of the trial judge to the failure of the Court in *B.D. v. J.D.* [2005] IEHC 407 , *D. v. D.* [2004] IESC 101 where the High Court judge failed to have regard to the tax consequences for the husband or the companies of the extraction of the relevant funds to enable him to pay over the specified amount to the wife with the result that the matter had to be sent back for a re-hearing so that proper provision might be made in light of the tax liability. Here Mr. Durcan suggests the same result.

23. Thirdly, Mr. Durcan maintains that having regard to his judgment in the s. 35 proceedings, the High Court judge was obliged to include within the lump sum payment a sum to reflect the value of the property which had been disposed of by the husband after the commencement of the proceedings and which he stated in the course of his judgment in the s. 35 proceedings would be taken into account in the present proceedings. Having regard to his conclusions in those proceedings, he erred in law in making proper provision which excluded these assets from his consideration. As well it was submitted that the value of the house provided by the husband for his mother to live in should have been included. The effect of excluding these was to undervalue his assets by approximately €1.8m.

24. Fourthly, it is submitted that the trial judge erred in law in failing to take into account the husband's future income from overseas work, having concluded that the husband was likely to continue with work of that nature, albeit on a reduced basis.

25. Finally, Mr. Durcan submits that the trial judge did not have sufficient regard to the extent of the husband's income, property and financial resources when he made his lump sum award. The effect of his judgment was to award the wife 11% -12% of the total value of the husband's assets and that was too low. She should have been awarded ancillary relief with a value amounting to not less than 20% of the husband's overall assets. Reliance was placed on the decision of McMenamin J. in H v. O'N wherein he stated that a practice had developed in large cases for the judge to use as a benchmark of 30% of the total assets as a starting point for their assessment of what might be considered proper provision.

The Husband's Submissions

26. Mr. Hayden S.C., on the husband's behalf, submits that his client's conduct was not such that it could be said that the trial judge erred in law in deciding to ignore it when making proper provision for the wife. He relied upon the judgment of the Supreme Court in *D.T. v. C.T.* wherein it was decided that conduct had to be obvious and gross for the same to impact on the amount of the provision to be made for the other spouse. Even repeated infidelity would not constitute the type of conduct envisaged by s. 16(2)(i). Counsel referred to the decision in *S v. S (Non-Matrimonial Property: Conduct*) [2007] 1 F.L.R. 1496 at 1514 para. 38, in which there is a helpful summary of many of the cases in which conduct was considered relevant to the assessment of orders ancillary to divorce under s. 25 of the Matrimonial Causes Act 1973, a section not dissimilar to s. 16(2)(i) of the 1995 Act. He also relies upon the judgment of Keane C.J. in D.T. v. C.T. to argue that conduct that might warrant an adjustment of the amount payable was usually conduct which had led to a reduction in the assets available for consideration by the court.

27. In terms of the respondent's litigation misconduct, counsel relies upon the fact that the trial judge was satisfied that his client had eventually complied with his disclosure obligations. He had not found that he had sought to mislead his wife or the Court as to

the extent of his assets. The judge had had the opportunity of observing the witnesses relevant to the disclosure issue and had made his findings based on his assessment of the husband's credibility. He was entitled to take the approach which he did, which was to say he was unable to conclude that there had been deliberate concealment. That being so, the facts of this case were distinguishable from those in *A.A v. B.A.* [2014] IESC 49 a case in which there was continued an d deliberate concealment. It was also submitted that the consequences to the wife of the husband's non-disclosure were more properly a matter for costs and she had been awarded her costs of both the judicial separation proceedings and the s. 35 applications.

28. Mr. Hayden further submits that if any individual act of misconduct might be ignored by the Court for the purposes of s. 16(2)(i) the aggrieved party could not rely upon a series of such events to warrant an increase in the provision that would otherwise have been made. The test as to the type of conduct that it would be unjust to ignore in divorce proceedings was precisely the same as that to be applied in proceedings in which judicial separation was sought. The statutory provisions in the 1995 Act were the same as those in the 1996 Act.

29. Mr. Hayden submits that the trial judge fully complied with his obligations under s. 16(2)(f) and (g) of the 1995 Act. He did not overlook the wife's role as a homemaker. He had acknowledged her commitment as both mother and homemaker and had not downplayed the importance of her role notwithstanding the fact that she had always employed significant levels of staff to assist her in such roles. As to the impact of her role as a homemaker on her potential income generating capacity, counsel submits that the wife produced no evidence that she had sacrificed her career for her husband and family. There was no evidence on which a claim to have proper provision adjusted by reason of her role within the home could be calculated or justified. The trial judge in making what he considered to be proper provision had clearly taken into account that fact that she was unlikely ever to return to work or to have any income available to her from such a source, despite her stated interest in returning to studies.

30. Counsel submits that the Court did indeed have regard to the litigation between the wife and third parties, when deciding on proper provision. The judgment set out a comprehensive and detailed account of that litigation and its possible outcome. The trial judge took a number of factors into account including the fact that the husband had supported the litigation at the start. However, he also noted that only one set of proceedings had issued in 2009 and that it was eight months after the marriage had broken down that the wife had issued her second set of proceedings. The High Court judge, he submits, was correct in placing responsibility for the outcome of that litigation on the party who would have control over it and in this regard he relied upon the decision of Denham C.J. in *Y.G. v. N.G.* [2011] 3 I.R. 717. Mr. Hayden also relies upon the fact that the litigation has since been concluded and that this Court had not being informed as to its outcome. In such circumstances, it was reasonable to assume that the wife had not become liable for costs of the type which she had relied upon to support her complaint that the trial judge had failed, in making his lump sum award, to provide her with the security to which she was entitled.

31. It was not correct, as had been submitted on the wife's behalf, that the trial judge had failed to comply with his statutory obligation to have regard to the properties the subject matter of the s. 35 application. The judge clearly considered the two properties in question but for the reasons stated in his judgment did not include their value in the sum he awarded when making proper provision. The making of proper provision for a spouse does not, counsel submits, require the division of every asset. If proper provision can be made without interfering with the husband's obligations and responsibilities to his other family members, it was within the discretion of the trial judge to take such an approach.

32. Mr. Hayden submits that the High Court was entitled, having regard to the husband's age and the unknown costs incurred in further overseas work, albeit of a reduced nature, to exclude any potential future income from such overseas work when making proper provision for the wife.

33. As to the overall level of provision made by the trial judge under s. 16(2) it could not reasonably be asserted that he had erred in law as to the manner of his approach or that the provision made for the wife was so disproportionate or objectionable having regard to the evidence that this Court should vary the lump sum to correct such error. The High Court judge had a broad discretion as to the manner in which he might meet his statutory obligation when making proper provision. It was not the function of this Court to reconsider the evidence and reach its own view as to what it might consider to be a more appropriate regime of ancillary relief. He relied upon the decision in *Hay v. O'Grady* [1992] 1 I.R. 210

34. Mr. Hayden submits that the trial judge does not have to treat all property and assets in the same way when addressing the issue of proper provision. It was entirely appropriate for the High Court judge to have had regard to the fact that the husband's most valuable asset, being an intellectual property asset valued at €22m., predated his relationship with his wife and was the result of his owncapacities. He likened the position of his client in relation to many of his assets to that of the husband in the case of *McCartney v. Mills McCartney* [2008] 1 FLR 1508, [2008] EWHC 401 (Fam) [para. 311]. A judge is entitled, he submits, to discount the value of assets depending upon the relevant circumstances. He instances assets or property which may have been inherited or acquired by one party long prior to the marriage without the involvement of the other spouse. A similar approach might be taken to property held in trust or other assets which the parties were not dependent upon for the purposes of maintaining or securing the lifestyle which they enjoyed. Mr. Hayden stressed that the making of proper provision did not require division of all of the assets.

35. Another factor which counsel submits is material to this Court's consideration of appropriateness of the provision made for the parties by the trial judge, is the duration of the marriage which was limited to 4 years prior to which co-habiting partners enjoyed no statutory entitlements.

36. Finally, Mr. Hayden submits that, having regard to the entirety of the ancillary relief granted to the wife, it cannot be said that the sum awarded to her by way of lump sum was so obviously deficient or objectionable that the trial judge should be considered to have erred in law in making the order which he did.

Issues

37. Having regard to the submissions the following would appear to be the principal issues that need to be addressed by this Court:-

> (i) Did the trial judge properly interpret and apply s. 16(2)(i) of the 1995 Act having regard to the circumstances of the case.
>
> (ii) Did the trial judge fail to comply with his statutory obligations to have regard to each of the statutory factors in s.16(2)(a)-(l).
>
> (iii) Did the trial judge impermissibly factor into his consideration of the statutory factors matters to which he was not entitled to have regard.

(iv) Did the trial judge make proper provision for the wife in all of the circumstances or can it be said that such provision fell short of her lawful entitlement to such an extent that that this Court should vary the lump sum to reflect the trial judge's error.

The Law

38. For the purpose of establishing the principles material to the Court's consideration on the appeal I propose to refer to some of the relevant case law and the relevant sections of the Acts of 1995 and 1996.

39. Section 16 of the 1995 Act provides as follows:

> (1) In deciding whether to make an order under section 7, 8, 9, 10(1)(a), 11, 12, 13, 14, [15A] 18 or 25 and in determining the provisions of such an order, the court shall endeavour to ensure that such provision [exists or will be made] for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case.
>
> (2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters-
>
> (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,
>
> (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),
>
> (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,
>
> (d) the age of each of the spouses and the length of time during which the spouses lived together,
>
> (e) any 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,
>
> (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,
>
> (h) any income or benefits to which either of the spouses is entitled by or under statute,
>
> (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,
>
> (j) the accommodation needs of either of the spouses,
>
> (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,
>
> (l) the rights of any person other than the spouses but including a person to whom either spouse is remarried.
>
> (3) (a) The court shall not make an order under a provision referred to in subsection (1) for the support of a spouse if the spouse had deserted the other spouse before the institution of proceedings for the decree or, as the case may be, a decree, specified in that provision and had continued such desertion up to the time of the institution of such proceedings unless, having regard to all the circumstances of the case (including the conduct of the other spouse), the court is of opinion that it would be unjust not to make the order.
>
> (b) A spouse who, with just cause, leaves and lives apart from the other spouse because of conduct on the part of that other spouse shall not be regarded for the purposes of paragraph (a) as having deserted that spouse.
>
> (4) Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family concerned and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:
>
> (a) the financial needs of the member,
>
> (b) the income, earning capacity (if any), property and other financial resources of the member,
>
> (c) any physical or mental disability of the member,
>
> (d) any income or benefits to which the member is entitled by or under statute,

(e) the manner in which the member was being and in which the spouses concerned anticipated that the member would be educated or trained,

(f) the matters specified in paragraphs (a), (b) and (c) of subsection (2),

(g) the accommodation needs of the member.

(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.

(6) In this section "desertion" includes conduct on the part of one of the spouses concerned that results in the other spouse, with just cause, leaving and living apart from the first-mentioned spouse.

Section 20 of the 1996 Act:

(1) In deciding whether to make an order under section 12, 13, 14, 15(1)(a), 16, 17, 18 or 22 and in determining the provisions of such an order, the court shall ensure that such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and any dependent member of the family concerned.

(2) Without prejudice to the generality of subsection (1), in deciding whether to make such an order as aforesaid and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(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,

(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 [or registration in a civil partnership] of the spouse or otherwise),

(c) the standard of living enjoyed by the family concerned before the proceedings were instituted or before the spouses commenced to live apart from one another, as the case may be,

(d) the age of each of the spouses, the duration of their marriage and the length of time during which the spouses lived with one another,

(e) any 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,

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

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

(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,

(j) the accommodation needs of either of the spouses,

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

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

(3) In deciding whether to make an order under a provision referred to in subsection (1) and in determining the provisions of such an order, the court shall have regard to the terms of any separation agreement which has been entered into by the spouses and is still in force.

(4) Without prejudice to the generality of subsection (1), in deciding whether to make an order referred to in that subsection in favour of a dependent member of the family concerned and in determining the provisions of such an order, the court shall, in particular, have regard to the following matters:

(a) the financial needs of the member,

(b) the income, earning capacity (if any), property and other financial resources of the member,

(c) any physical or mental disability of the member,

(d) any income or benefits to which the member is entitled by or under statute,

(e) the manner in which the member was being and in which the spouses concerned anticipated that the member

would be educated or trained,

(f) the matters specified in paragraphs (a), (b) and (c) of subsection (2) and in subsection (3),

(g) the accommodation needs of the member.

(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."

Discussion

40. The present proceedings come before the Court under the 1989 Act and the 1995 Act. Relevant to the submissions advanced on behalf of the wife concerning the conduct of the husband is that under s. 2 of the 1989 Act an applicant may seek a decree of judicial separation on a number of grounds including adultery or conduct of a type that they should not reasonably be expected to tolerate, both of which were relied upon by the wife in the present case.

41. The granting of a decree of judicial separation triggers the Court's jurisdiction to grant ancillary relief and this is provided for in Part II of the 1995 Act as amended by s. 52 of the 1996 Act. Such orders may include periodical payment orders, lump sum orders, property adjustment orders, orders for exclusive residence in a particular property, orders for the sale of certain property, financial compensation orders, pension adjustment and/or pension entitlement orders and orders which provide for the extinguishment of one spouse's Succession Act rights against the estate of their spouse. While a number of such orders were made in the present case (see para. 10 above) and are thus material to the wife's complaint concerning the adequacy of the provision made for her under s. 16 of the 1995 Act, it is only the lump sum order which this Court is asked to vary.

42. In making an order for judicial separation the court is obliged, pursuant to s. 16, to "endeavour to ensure" that proper provision will be made for the parties and their dependant family members "having regard to all the circumstances of the case". The analogous provision in divorce proceedings is to be found in s. 20 of the 1996 Act . It is important, because of the aforementioned wording, to be careful when seeking to identify or formulate any general propositions concerning the proper approach of the court to its obligations under s. 16 as every case will, to a greater or lesser extent, necessarily turn on its own circumstances.

43. It has long been accepted that the trial judge enjoys a relatively broad discretion when it comes to making an order for proper provision as was stated by Keane C.J. in DT v. CT where at p. 365 of his judgment he described that discretion, albeit in the context of the 1996 Act, in the following manner:-

> "...While section 20(2) of the act of 1996, lists in detail the factors to which the court is required to have regard in making the various financial orders provided for in part III of the said Act, it is obvious that the circumstances of individual cases will vary so widely that, ultimately, where the parties are unable to agree, the trial judge must be regarded as having a relatively broad discretion in reaching what he or she considers a just resolution in all the circumstances. While an appellate court will inevitably endeavour, so far as it can, to ensure consistency in the approach of trial judges, it is also bound to give reasonable latitude to the trial judge in the exercise that discretion."

44. It is nonetheless clear that the Court's discretion when making proper provision under either s. 16 of the 1995 Act or s. 20 of the 1996 Act is not a free one. The use of the word "shall" in ss. 2 imposes upon the trial judge a mandatory obligation to have regard to each of the factors set out in sub. paras. (a) - (i) as was made clear by McGuinness J. in *MK v. JP (otherwise SK) and MB* [2001] 3 I.R. 371 where at pp. 383 to 384 she stated, concerning the Court's discretion under s. 20 of the 1996 Act, as follows:-

> "The provisions of the Act of 1996 leave a considerable area of discretion to the court in making proper financial provision for spouses in divorce cases. This discretion, however, is not to be exercised at large. The statute lays down mandatory guidelines. The court must have regard to all the factors set out in s. 20, measuring their relevance and weight according to the facts of the individual case."

45. McGuinness J. also explained the approach which she considered should be adopted by a trial judge when making proper provision; namely, that they should give reasons explaining the manner in which they exercised their discretion in light of the statutory guidelines. A bald pronouncement by a judge that they have had regard to the statutory factors is not satisfactory. On this subject, Denham J. in the course of her judgment in *D.T. v. C.T.*, concerning the pronouncement by the trial judge that he had considered the relevant statutory factors and had taken them into account, stated that the "better practice would be to consider all the circumstances and each particular factor *ad seriatim* and give reasons for their relative weights in the case". Such an approach is, however, neither universal nor mandatory and there appears to be no authority to suggest that failure on the part of a trial judge to adopt such an approach necessarily warrants interference from an appellate court. Indeed at p. 386 of her judgment Denham J. observed that while it was better practice to consider more expressly the needs of the parties, a failure to do so would not necessarily warrant allowing the appeal by reason of that omission.

46. What is required of the trial judge under the section is that they "have regard" to each of the factors specified in s. 16(2)(a) – (l). This statutory obligation, in my view, provides an invaluable guide or check list without which a trial judge might easily omit to consider matters of fundamental or critical importance to a just and fair result in terms of proper provision. That said, the Court's obligation is to consider and reflect upon each of these statutory factors. The relevance and weight to be attached to each of them is a matter for the trial judge who may decide that any one or more of such factors should not influence the overall provision to be made for the parties and dependant family members. A judge is quite entitled to consider a matter and then exclude it as immaterial in the exercise of their discretion. As was said by Murray J. in *D.T. v. C.T.* at p. 401, again in the context of s. 20 of the 1996 Act, "Often many of the factors mentioned in s. 20 will have no pertinence to the particular case and, therefore, will not be taken into account".

47. Given that the provisions of s. 25(2)(a)-(h) of the English Matrimonial Causes Act 1973 as amended by the Matrimonial and Family Proceedings Act 1984, corresponds fully with s. 16(2) of the 1995 Act and s. 20(2) of the 1996 Act, regardless of other differences in the legislation, the English authorities are of some value when it comes to the interpretation and application of the statutory factors which must be considered by the Court for the purpose of determining proper provision. Helpful in this regard are the observations of Hoffman L.J. in *Piglowska v. Piglowska* [1999] 1.W.L.R. 1360 where, concerning the statutory factors, he stated that the relevant section established no hierarchy of factors.

Conduct in the context of s. 16 of the 1995 Act

48. The Court's discretion to reflect its findings concerning each of the statutory factors in its orders for ancillary relief would appear to be a relatively free one save when it comes to consider "the conduct of the parties" as provided for in s. 16(2)(i) in respect of which the legislature has specified the test or threshold against which such conduct is to be assessed. The conduct of a spouse is only to be considered relevant to the issue of proper provision if it would be "unjust to disregard it".

49. The wording of the aforementioned section would suggest to me a strong presumption in favour of discounting conduct as immaterial to the issue of proper provision and that something relatively exceptional in terms of conduct would be required before the court would reflect that conduct in the manner in which it made proper provision for the parties. Further, any such conduct relied upon by a spouse for the purpose of the section is to be considered having regard to "all the circumstances" and it is only if it would be unjust to ignore the conduct in that context that it should be taken into account. In other words in considering the conduct of a spouse for the purposes of s. 16(2)(i), and whether it would be unjust to ignore it, the court may have regard to countervailing circumstances.

50. As to whether s. 16 of the 1995 Act and s. 20 of the 1996 Act are analogous when it comes to the court's obligation to have regard to the conduct of the parties when making proper provision, I am of the view that they are. Consequently, I reject Mr. Durcan's submission that in judicial separation proceedings the court can adjust the provision to be made in favour of one of the parties based upon a lesser degree of misconduct than might warrant such an adjustment in divorce proceedings or that a spouse in judicial separation proceedings may rely upon an accumulation of misconduct, the individual components whereof would not meet the threshold advised in the authorities in relation to divorce proceedings as a basis for claiming an adjustment in what might otherwise be considered proper provision. It follows that I am satisfied that such authorities as have been relied upon concerning the conduct of a spouse in the context of divorce proceedings may properly be relied upon when considering the wife's submission that the trial judge erred in law in excluding from his consideration, when making provision for the parties, the husband's misconduct.

51. My principal reasons for rejecting Mr. Durcan's submission are as follows. First, s. 16(1) of the 1995 Act, as originally enacted, was amended by s. 52(h) of the 1996 Act with the result that the words "adequate and reasonable" as originally appeared in that section were replaced by the word "proper" thus bringing that section into conformity with s. 20(1) of the 1996 Act. That amendment would suggest that the legislature intended to standardise the approach of the court to the making of proper provision and to eradicate any distinction between the two regimes regardless of whether the court was dealing with divorce or judicial separation. Second, the twelve statutory factors to which the court is required to have regard to when making proper provision are identical as is the wording of the relevant subparagraphs, and the test to be applied. I see no reason why the provisions of s. 16 of the 1995 Act would have been replicated in s. 20 of the 1996 Act if it was intended that the sections would operate differently. Third, if Mr. Durcan is correct in his submission, conduct which might not be sufficiently gross or obvious as to warrant some adjustment in the provision to be made for an aggrieved spouse in divorce proceedings could warrant such an approach in proceedings for judicial separation. In my view such inequality and inconsistency could never have been intended. If the position were to be as posited by Mr. Durcan, a spouse subjected to objectionable conduct in the course of their marriage would be best advised to seek judicial separation in the first instance, given the possibility that by raking over the entrails of their broken marriage they might obtain a better financial result in terms of proper provision than by proceeding to seek a decree of divorce. Fourth, while Mr. Durcan is correct that, unlike the position in divorce proceedings, conduct is relevant in judicial separation proceedings as a spouse may rely upon infidelity or other conduct which they ought not be expected to tolerate as grounds for a decree, I am satisfied that this is not material to the proper interpretation of section 16(2)(i). Once the court is satisfied that such grounds exist, the relevance of the conduct that underpinned those grounds should, save in the very exceptional circumstances to which I will later refer, be at an end. At this point, regardless of whether it is s. 16 of the 1995 Act or s. 20 of the 1996 Act that is being deployed, the role of the court is precisely the same, namely, to seek to ensure that the parties and their family dependants are properly provided for, in all of the circumstances having regard to the same statutory factors. Fifth, it is not inconsistent to interpret "conduct" as provided for in s. 16(2)(i) as potentially excluding conduct such as adultery and desertion. It does not follow that because adultery entitles a spouse to a decree of judicial separation that it is necessarily conduct to which the court must have regard when making proper provision. The legislation only specifically refers to adultery as relevant to a party's entitlement to a decree of judicial separation. As for desertion, that is indeed conduct which is material to the court's consideration of proper provision given that s. 16(3) provides that desertion will disentitle the deserting spouse to proper provision unless it would be unjust for the court not to so provide. Having regard to the fact that the consequences for a spouse found guilty of adultery and desertion have been specifically provided for in the statutory provisions relevant to judicial separation, it is difficult to accept that conduct such as adultery or desertion is to be routinely considered by the court for the purposes of section 16(2)(i). Finally, no authority was advanced to support the submission that a lesser threshold might be applied by the court when considering s. 16(2)(i) than that which applies when the court is considering s. 20(2)(i) of the 1996 Act or that accumulated misconduct which if considered individually would not be considered gross and obvious, might be reflected in a financial penalty when making proper provision. Besides which in para. 2.3 of the wife's written submissions the sections are stated to be equivalent.

52. While perhaps only of marginal significance to the proper construction of s. 16(2)(i) of the 1995 Act, it is probably worth considering the potential effect of the interpretation proposed by Mr. Durcan. Every claim for judicial separation would have the potential to require the trial judge, for the purpose of making proper provision, to make a series of findings concerning alleged acts of misconduct on the part of one or other, or both of the parties over many years or even decades. It is not to be forgotten that both parties may rely on the conduct of the other for the purposes of s. 16(2)(i). Parties aware of the potential financial advantage to be gained by establishing a significant number of episodes of misconduct, which individually could not be considered either gross or obvious, but which could have a cumulative value, might pursue such an approach in the hope of improving their position. Apart from promoting bitterness and disharmony, lengthy proceedings of the type envisaged would, in many instances, seriously deplete the funds from which proper provision is intended to be made quite apart from the disproportionate demands such claims would have on scarce court resources. Thus, I cannot accept that the legislature intended s. 16(2)(i) to capture conduct other than that which might be considered both obvious and gross.

53. I would also add that the entire scheme of proper provision in the context of the 1989 Act is not predicated on personal fault on the part of the spouses. As I have already explained, spousal misconduct generally is, of course, relevant to the question of whether a decree for judicial separation should be granted. But once the Court has decided to grant such a decree and has then proceeded to consider the issue of proper provision, then save, perhaps, for quite special and unusual cases, issues of personal fault and misconduct in the course of the marriage can rarely be relevant in any consideration of issues of proper provision.

54. For the aforementioned reasons I am satisfied that the authorities which consider the conduct of the parties for the purposes of s. 20(2)(i) of the 1996 Act are material and relevant when considering the approach of the trial judge in the present case to the issue of conduct under s. 16(2)(i) of the 1995 Act.

Personal Misconduct

55. As to the type of personal conduct that might lead to the imposition of what has often been described as a financial penalty upon

the offending party, the authorities advise that it is only conduct which can be described as "obvious and gross" that should result in either the imposition of a financial penalty or the denial of provision. Keane C.J. in his judgment in *D.T. v. C.T.* endorsed the approach of Lord Denning MR, to this issue in *Wachtel*, a decision given at a time when there was no statutory equivalent in England to s. 20(2)(i) of the 1996 Act or s. 16(2)(i) of the 1995 Act. This is what he said at page 370:-

> "In *Wachtel v.Wachtel* [1973] Fam. 72, Denning M.R. said at p. 90 that:-
>
> > "There will no doubt be a residue of cases where the conduct of one of the parties is… "both obvious and gross", so much so that to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice. In such a case the court remains free to decline to afford financial support or to reduce the support which it would otherwise have ordered. But, short of cases falling into this category, the court should not reduce its order for financial provision merely because of what was formerly regarded as guilt or blame. To do so would be to impose a fine for supposed misbehaviour in the course of an unhappy married life … in the financial adjustments consequent upon the dissolution of a marriage which has irretrievably broken down, the imposition of financial penalties ought seldom to find a place."

56. As to whether significant infidelity should be considered conduct that is so obvious and gross such that it would be "unjust to ignore" it for the purposes of s. 16(2)(i), there are a number of helpful decisions in this jurisdiction, albeit concerning the interpretation of s. 20 of the 1996 Act. In the course of his decision in *M.L. v. S.L.* [2007] IEHC 438 Sheehan J. had cause to consider the wife's adulterous relationship in the context of proper provision. The wife had accepted that she had been guilty of repeated acts of infidelity and had conceded that she had broken a written agreement to disengage from her extramarital relationship. She also accepted that her conduct had had devastating consequences for her husband. Nonetheless, the trial judge concluded that this was not conduct which ought to be taken into account when making proper provision. Similar conclusions were reached by Keane C.J. in *D.T. v. C.T.* a case in which the husband admitted a number of extra marital affairs and had fathered a child with his new partner, facts not too dissimilar to those in the present case. Relevant also to the wife's complaint in the present case is the fact that the wife in *D.T. v. C.T.* relied upon the manner in which her husband's conduct had demeaned her privately and publicly. Nonetheless it was the unanimous view of the Court that infidelity was not a matter that ought to be reflected in the Court's decision as to what amounted to proper provision.

57. A further decision on point is that of O'Higgins J. in *C v. C* [2005] IEHC 276. In that case the husband and wife were married with four children. On the morning of a planned two week family holiday the husband announced that he would not be going. In the family's absence he first moved another woman [female partner] into the family home and upon their return moved to a nearby house. There were generally bad relations and a number of unpleasant interactions. The husband closed the bank account and credit card of the wife. These facts notwithstanding, the trial judge concluded that the husband's infidelity and related misconduct were insufficient to warrant any adjustment in proper provision.

58. Finally, the summary of cases in which personal conduct was considered material to the exercise by the court of its discretion, which is to be found in the decision of Burton J. in *S v. S* [2007] EWHC 2793 (Fam) at para. 38 would tend to suggest that conduct must be truly exceptional before it should be considered unjust to be excluded. These include, *inter alia*, cases where the husband attacked the wife with a razor, the wife shot the husband intending to endanger his life and where the husband's serious drink problem and disagreeable behaviour resulted in the forced sale of the family home and other serious financial consequences for the wife.

Financial Misconduct

59. It is very clear from the authorities that in certain circumstances it would be unjust for a court, when determining proper provision under s. 16(2)(i), to fail to reflect the financial misconduct of one of the parties. This makes particular sense if that conduct led to the depletion or diminution of the assets available for consideration, as was the position in *H v. O'N*. In this case the husband's conduct had interfered with resources such that the court's ability make proper provision was undermined. The Court, apart from concluding that the husband had been verbally and physically abusive to his wife was satisfied that the husband had engaged in post separation transactions which included the making of possible unsecured and undisclosed loans to a woman with whom he may have been having an inappropriate relationship and also to her company. He had not been forthcoming about his assets, means or expenditure. He had purchased an expensive car which was left outside the jurisdiction, had never made complete disclosure and new matters had emerged during cross examination. Further, he had breached company law in order to defeat the wife's rights. Given that direst damage was not established as a result of his actions the husband's misconduct was reflected only to the extent that the wife was given a slightly higher percentage in the apportionment of realisable assets than would otherwise have been the case.

60. Other conduct which it might be unjust to ignore, regardless of whether it be classified as personal or financial misconduct, would be gambling or financial recklessness which had grossly diminished the assets available from which greater provision might otherwise have been made for the innocent party. Likewise efforts on the part of a spouse to hide money or dispose of assets to frustrate the court's ability to make proper provision are but a few examples of the types of conduct it might be unjust to ignore. However, as the section clearly provides, the decision to take conduct into account ultimately depends on all of the circumstances of the case. As the case-law shows, the conduct in question will generally amount to financial misconduct affecting the capacity of one spouse to make proper provision for the other.

Litigation Misconduct

61. As to whether litigation misconduct and in particular the failure of a party to meet their statutory obligation in terms of disclosure is conduct which it would be unjust for a court to ignore in the context of s. 16(2)(i), that is a matter for the discretion of the trial judge having regard to all of the circumstances of the case.

62. The policy considerations which underlie the obligation of parties to be candid and to fully comply with their disclosure obligations in judicial separation and divorce proceedings are well described by Baroness Hale in her decision in *Prest v. Petrodel* [2013] AC 415 where, in the context of divorce proceedings, she stated the following at p. 504:

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

63. Further guidance is to be found in the decision of Ryan J. in *K.C v. T.C.* (Unreported, Court of Appeal, 12th February, 2016) , where in the context of one party's alleged litigation misconduct he stated as follows:

> "To the extent, therefore, that the court was deciding that one party's conduct constituted litigation misconduct giving rise to grave consequences in the case, I think there had to be clear evidence to establish it and anything tended to demonstrate the innocence of the party has to be carefully weighed up by the court. One can have a situation where somebody makes a mistake- as opposed to telling lies or seeking to mislead - and the court must be alive to that possibility.
>
> It can also be the case that a person is reluctant at first and then comes forward with the relevant information so that he or she is open to legitimate criticism in respect of previous behaviour, but may not now be engaging in similar conduct. The short point is that before a party is condemned for failure to co-operate, and even more so, before somebody is declared to be guilty of litigation misconduct by actively trying to mislead the court, the trial court must be careful about its findings."

64. This helpful passage from the decision of Ryan J. would suggest that when determining the manner and amount of the provision to be made for the parties it would be unjust to rely upon litigation misconduct, unless, having considered carefully all of the evidence which might favour a finding of mistake or innocence, the court was convinced that the party concerned had deliberately told lies, had sought to mislead the court and/or had still not made full disclosure.

Consequences of failure to have regard to the Statutory Factors

65. As to what an appellate court should do if it is satisfied that a trial judge failed to have a regard to one or more of the factors provided for in s. 16(2) each case must turn on its own facts. Depending on the circumstances in any given case it might be necessary for the appellate court to order a retrial particularly if satisfied that the omission had resulted in significantly lesser, greater or different provision than would otherwise have been have made. This is what occurred in *D v. D* [2004] IESC 101 a case in which the trial judge, in making proper provision for a spouse, failed to have regard to the taxation consequences of a particular transaction.

66. An appellate Court should not, however, jump to the conclusion that a trial judge omitted to consider a material circumstance or one of the statutory factors because they did not set out in detail, as perhaps they might more properly have done, the attention they paid to that particular factor. In *Magmatic Ltd v. PMS International Group plc* [2016] UKSC 12 at para. 39 Lord Neuberger advised as followed:-

> "It is unrealistic for an appellate court to expect a trial judge in every case to refer to all the points which influenced his decision. As Lord Hoffmann said in *Piglowska v Piglowski* [1999] 1 WLR 1360, 1372:-
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> > "Reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account".
>
> He also rightly said that an
>
> > "appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself".
>
> and that applies equally to an assessment such as that required by article 10(1) of the Principal Regulation. However, when a judge is given a full and careful judgment, conscientiously identifying and specifying a significant number of points which weigh with him, an appellate court can properly conclude that his failure to mention a significant point means that he has overlooked it."

General Guidance

67. Apart from the court's mandatory obligation to have regard to the factors set out in s. 16(2), the 1995 Act does not set out any prescriptive guidelines to be followed by the court when dealing with the income and assets of the parties for the purpose of making proper provision. Thus I will briefly refer to some of the more general guidance to be found in the authorities and in particular to that which has been considered material in what are commonly referred to as 'ample resource' cases, this being a case which falls into that category.

68. Keane C.J. in *D.T. v. C.T.* stated that in the typical case, where the joint assets of the parties are not of particularly significant value, the first task of the court is almost always to consider what the financial needs of the spouses and dependent children are and how those needs or subsistence requirements might be met. However, he noted that at the other end of the spectrum were cases such as the present one, which involve significant assets and where there is substantial income available when the court comes to consider proper provision. In such cases, the needs of the parties and their dependant family members are not particularly material as they are not to be confined to provision sufficient only to meet their "reasonable requirements". In cases involving ample resources it is the standard of living enjoyed by both parties before the breakdown of marriage which should guide the court as to how it should make proper provision having regard to the available assets, income and property.

69. This is what Murray J. had to say about the matter in the same appeal: -

> "Proper provision for a spouse who falls into the category of a financially dependant spouse (where the other spouse is the source or owner of all or the bulk of income or assets of the marriage) should seek, so far as the circumstances of the case permit, to ensure that the spouse is not only in a position to meet her financial liabilities and obligations, continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers without necessarily being dependent on receiving periodic payments for the rest of her life from her former husband."

70. As to the assets to which the court must have regard when determining proper provision, the authorities make clear that all property and income, no matter how it was acquired is available for the purposes of making proper provision. This is so regardless of whether any particular asset was acquired by one of the parties through inheritance or as a result of their own endeavours prior to marriage. However, not all assets are to be treated in the same manner and the fact that an asset may have been acquired, in the

aforementioned manner will be a factor to be taken into account by the court in the exercise of its discretion. If it is established that an asset had absolutely no connection with the other spouse, as might be said concerning many of the husband's assets in the present case, it might be unjust to take such an asset into account when determining proper provision. As Fennelly J. remarked in *D.T. v. C. T.* at p. 416:-

> "This suggests that any property, whenever acquired, of either spouse and whenever and no matter how acquired, is, in principle, available for the purposes of the provision. Thus, property acquired by inheritance, by chance, or the exclusive labours of one spouse does not necessarily escape the net. I lay emphasis on the term, "in principle." On the other hand, not all such property is automatically available either. It is easy to think of cases where such a result would not be just. A short-lived marriage by a fortune hunter to a wealthy heiress comes to mind."

71. In this regard, the date upon which an asset was acquired and the duration of the relationship are often relevant considerations.

72. The legislative scheme whereby proper provision is to be made for the parties and their dependent family members is not one which requires the redistribution of wealth, as was noted by Denham J. in *D.T. v. C.T.* at p.383 albeit in relation to 1996 Act. It does not however follow, as was observed by Murray J. at p. 407 of his judgment in the same case:-

> "… that in cases where there are very substantial assets belonging to one spouse which greatly exceed any conceivable day-to-day needs of either spouse, whatever their standard of living, those assets should not, as a matter of course, remain with the spouse who owns them, with the other spouse being confined to depending on periodic payments"

73. Where substantial assets and income have accrued to one spouse in the course of the marriage, these should be taken into account by the court in determining the proper provision to be made for the other spouse. This is because such assets are to be treated as "fruits of the marriage". To do otherwise would, in many cases, prove discriminatory to a wife who may have devoted the greater part of her married life to looking after children and caring for the home generally and by doing so has enabled her spouse pursue financially rewarding work. The wife ought not to be disadvantaged by reason of the fact that she took on the burden of child rearing and homemaking. Concerning this issue, Murray J. at p. 409 of his judgment in *D.T v. C.T.* stated:-

> "It seems to me that, where substantial assets and income have accrued to one spouse in the course of the marriage, the court should take them into account in determining the proper provision to be made for the other spouse."

74. If, however, there is a surplus of assets beyond what is required to make proper provision, a court is entitled in its discretion to decide that one or other party should be permitted to retain such assets. That this is permissible is clear from the following extract from the judgment of Murphy J. in *D.T. v. C.T.* where he stated the following at pages 399 to 400:-

> "If there is a surplus beyond making proper provision, I see no reason why the party entitled to that surplus should not retain it. This is in no sense discriminatory. If an impoverished man were to marry a wealthy heiress and he, whether through illness or indolence, contributed little or nothing in financial contribution or social commitment to the marriage, he would still be entitled under Irish law to have proper provision made for him on the dissolution of the marriage. That having been achieved and a surplus remaining, I see no reason why it should not be retained by the heiress. The significance of either party to a marriage having substantial assets or significant income is that these are factors which would determine the lifestyle of the married couple and, to a large extent, dictate the nature of the provision which would properly be made for each of them. Regretfully, I can find no formula by which this can be achieved."

75. As to whether there is any benchmark to which the trial judge ought to have regard when fixing proper provision, such as a percentage of the overall assets as stated at the date of trial, recent authorities would suggest that such a formulaic approach is one which is unlikely to be of much assistance particularly in ample resource cases. Nonetheless, McMenamin J. in *H v O'N* at para. 109 of his judgment noted that there appeared to be a tendency towards an apportionment of approximately one third of the total assets to the wife.

76. While this concept was also referred to by Denham J. in *D.T. v. C.T.*, a case like the present one concerning ample resources, she also cautioned that while one third of the overall value of the available assets and income might be a useful benchmark and if applied might provide a just and fair result in certain cases, in other cases such an approach might have no application. At p. 384 she observed as follows:-

> "The concept of one third as a check on fairness may well be useful in some cases, however, it may have no application in many cases. It may not be applicable to a family with inadequate assets. It may not be relevant to a family of adequate means if, for example, such a sum could only be achieved by a sale of assets which would destroy business, or the future income of a party or parties, or if it related to property brought solely by one party to the marriage, or any other relevant circumstances. It may not be applicable to a situation where a party has wealth from his or her own endeavours to which the other party has no claim except under the factors set out in s. 20(2)(a) to (l) of the Act of 1996."

77. The usefulness of seeking to benchmark the appropriateness of any proposed provision to be made for the parties by reference to any particular percentage of the value of the overall assets, in ample resources case, particularly in a case where one of the parties had brought almost all of the assets to the marriage, was also rejected many years earlier by O'Higgins J. in *C v. C* [2005] IEHC 276 where he observed:-

> "In the present case the property assets of the parties were inherited and brought to the marriage by the applicant. The concept of one third as a check on fairness is not in my view useful in the present case."

78. Finally, the objective to be achieved, in the making of proper provision is a fair and just result, in all of the circumstances. As Denham C.J. remarked, in relation to s. 20 of the 1996 Act, in *Y.G. v. N.G.,* at p. 732 para. 25

> "The duty of the court is to make proper provision; that is the court's remit. While significant weight must be given to an extant document of legal separation, the statutory duty prevails. Proper provision means that the provision is reasonable in all the circumstances."

Decision

79. Before setting out my conclusions it is perhaps necessary to reflect once again upon the extent of the discretion which is

conferred on the trial judge when it comes to the making of proper provision for spouses and their dependant family members under the Act of 1995. That discretion has a significant impact upon the role of the appellate court. I emphasis the breath of the court's discretion because throughout her notice of variation the wife's grounds of appeal assert that the High Court judge erred in law in that he failed to have sufficient or any regard or failed to give sufficient weight to the factors identified in s. 16(2)(a) - (i) of the 1995 Act.

80. In addition to what I have earlier said regarding discretion, the following passage from the decision of Fennelly J. in *D.T. v. C.T* at p. 419., albeit written concerning the discretion of the trial judge when making proper provision under s. 20 of the 1996 Act, is particularly apt:

> "I have emphasised the breadth of the discretion conferred on the trial judge by the Constitution and by the Act of 1996. This court is required, on the appeal, to consider whether the trial judge made any error of law. In particular, he should have given consideration to the matters to which the statute requires him to have regard and he should not have regard to matters which are beyond the scope of his discretion. Subject to that, this court must be conscious of the fact that this important and far-reaching statutory and constitutional power is to be exercised by the judge granting the decree of divorce, in this case the judge of the High Court. It is for the High Court Judge to decide on the weight to be accorded to each of the statutory matters. This court should be very slow to substitute its own review."

Section 16(2)(i): Conduct – Personal and Financial

81. Insofar as Mr. Durcan argues that the High Court judge erred in law in failing to have sufficient or any regard to the husband's conduct as required by s. 16(2)(i) of the 1995 Act, or that he failed to afford sufficient weight to such conduct in determining what he considered to be proper provision for the parties, that is a submission which I reject.

82. The submission raises two issues. The first is whether the trial judge complied with his statutory obligation to have regard to the husband's conduct when making proper provision. The second is whether it can be stated that he erred in law in failing to adjust the financial provision which he made for the parties to reflect that conduct.

83. Insofar as the first question is concerned, it is clear from the judgment of White J. that he well understood his statutory obligation to have regard to the husband's conduct when making proper provision. He referred in his judgment to his statutory obligations in the context of s. 16(2)(i). The trial judge then proceeded to make findings of fact that the husband had been disrespectful and dishonest in relation to his dealings with his wife over many years; that he had been repeatedly unfaithful, that he had lied about the detail of one such relation both privately and publicly, that he had been responsible for unwelcome attention as a result of an announcement concerning the birth of a child to another woman and had lied concerning the nature of his relationship with her. Those were findings which were only relevant in the context of his statutory obligations under s. 16(2)(i), given that adultery had been conceded by the husband thus entitling the wife to an order for judicial separation and rendering the consideration of misconduct in any other context irrelevant.

84. The fact that the trial judge said that he was not taking the husband's personal conduct into account when making proper provision does not mean that he overlooked or failed to address his obligations under s. 16(2)(i). It is to be inferred from what he said that he had regard to that conduct but concluded that it would not be "unjust to ignore it" having regard to all of the circumstances of the case.

85. The second issue is whether the trial judge erred in law in concluding that he could justly ignore such conduct "in all the circumstances". In this regard the principal complaints relate to the husband's infidelity and his transfer of significant sums of money and property to two women, with one of whom he had fathered a child, during the currency of the marriage. The wife also relies upon the service by the husband of nullity proceedings in early 2010; an act she maintains was designed to undermine her confidence and feelings of security. She further relies upon the manner in which he dealt with their relationship in the media and his hurtful and allegedly untruthful assertion, in the course of the proceedings, that they had never enjoyed a true and loving relationship.

86. Insofar as infidelity is concerned, the authorities to which I have already referred, (see: *Wachtel v. Wachtel*, *D.T. v. C.T.*, *C v.C* and *M.L. v. S.L.*) provide strong support for the approach taken by the trial judge in the present case, which was to determine proper provision without the imposition of any financial penalty to reflect such conduct. The nature of the infidelity in the present case was not dissimilar to that which was reported and discounted as irrelevant in *D.T. v. C.T.*. Indeed the two cases have another factor in common, that being that the wife in *D.T. v. C.T.* also relied upon the manner in which she had been publicly humiliated by the circumstances surrounding the husband's infidelities. Nonetheless each member of the Court concluded that the husband's conduct could not be considered "obvious and gross" in the manner required such as to warrant the imposition of a financial penalty.

87. As to the husband's conduct in issuing nullity proceedings and his motivation for doing so and his denial that there had ever existed any real or loving relationship between himself and his wife, it is difficult to see how, having regard to the authorities, even allowing for the widest discretion available to the High Court judge, he could have classified that conduct as so obviously gross and obvious as would render it an error of law on the part of the trial judge to have failed to make it tell in financial terms when determining what he considered to be proper provision for the parties.

88. While it is easy to see how the wife felt hurt and humiliated by her husband's infidelity, allied to the fact that he had fathered a child outside of wedlock and had transferred significant assets to the women already mentioned, I am nonetheless satisfied that it was within the discretion of the High Court judge to decline to take such conduct into account when making proper provision. Likewise, the High Court judge was entitled to disregard the manner of the husband's engagement with the media concerning his extra marital relationship and the birth ofa child, the issue of the nullity proceedings and his hurtful allegations regarding the nature of his relationship with his wife made in the course of a lengthy trial. Further, while not to be condoned, it is far from exceptional, in the course of proceedings following marital breakdown, particularly where the parties have much to lose or gain, that exceptionally harsh and hurtful evidence may be given by one or other or indeed both parties concerning the other. Often times that evidence is exaggerated or downright untruthful. But it cannot, in my view, be considered to be gross or obvious to the point that it would be unjust for a trial judge to discount it when determining what would amount to proper provision for the parties. Further no authority has been produced to support conduct of that nature as being of the type that was intended to be caught by the provisions of s. 16(2)(i).

89. Insofar as the aforementioned conduct is concerned, it is perhaps of some relevance to note that under s. 16(2)(i) the trial judge was obliged to consider the husband's conduct, having regard to "all the circumstances of the case". These included the fact that one of the women to whom he had given significant money and property was the mother of his child and to whom he would by reason of that fact have an obligation which would fall to be considered under s. 16(2)(b). Further, there was no evidence to suggest that

the transfer of these assets had interfered in any way with the husband's ability and willingness to provide an extremely generous standard of living for his wife during the entire period of their relationship. Finally, it could not be said that the transfer of these assets by the husband had any material impact on the Court's ability to make proper provision for the wife. This is a case in which there were assets surplus to those required by the trial judge to make proper provision for the wife and dependant family. It is not a case where the disposal by one spouse of assets in the course of their marriage diminished the assets available at trial to the point that the Court could not make proper provision for the parties.

90. Of some relevance in this regard is the fact that the husband's financial misconduct in the present case can be clearly distinguished from that of the husband in H v. O'N where such conduct had resulted in a diminution in the assets available for the purpose of making proper provision.

91. Accordingly I am satisfied that the trial judge had regard to his statutory obligation in that he had regard to the conduct relied upon by the wife for the purposes of s. 16(2)(i) and I am further satisfied that he did not err in law when he declined to take that conduct into account when determining what he considered to be proper provision.

Litigation Misconduct
92. At the core of the wife's submission that the High Court judge erred in law in not taking her husband's financial misconduct into account when determining proper provision, is her assertion that on the evidence he was obliged to conclude that he had deliberately and wilfully sought to hide his assets from the Court for the purposes of these proceedings. She also relies upon the fact that he asked her to sign an agreement that she would not seek to have the assets referred to in his affidavit of means vouched, thus potentially disadvantaging her in her claim for proper provision.

93. As already stated, the role of the appellate court is not to reconsider all of the evidence which was before the High Court judge and to reach its own conclusions concerning the conduct of the husband. Its function is to assess whether the findings of fact made by the High Court judge are supported by the evidence. In this case the husband omitted from his affidavits of means very significant assets. These includedintellectual property, two properties, one of which was purchased after the first affidavit was sworn and certain directors loans, all of which when taken together had a value of something in the region of €28m.

94. In the present case the wife sought to establish wilful and deliberate misconduct on the part of her husband concerning the nature and extent of his disclosure made in his affidavit of means. To this end, the husband and his accountant were cross examined as to the circumstances which led to the omission of hugely valuable assets from his affidavits of means. The trial judge clearly considered the evidence concerning non-disclosure for the purposes of deciding whether the husband had intended to deceive the Court and his wife concerning the extent of his assets and in this regard carried out the type of analysis described by Ryan P. in *K.C. v. T.C.* Having heard and considered the evidence, he stated in his judgment that he could not be satisfied that the husband had deliberately set out to mislead the Court or his wife, even though satisfied that the husband knew more about his finances than he had maintained in evidence. These findings were made as a result of his assessment of the husband's credibility having seen him give evidence in relation to a vast array of issues over many days. That being so, this court must accept the jurisdictional limitations imposed by decisions such as that of McCarthy J. in the oft cited *Hay v. O'Grady* [1992] 1 I.R. 210 where at 217 he stated:-

> (1) An appellate court does not enjoy the opportunity of seeing and hearing the witnesses as does the trial judge who hears the substance of the evidence but, also, observes the manner in which it is given and the demeanour of those giving it. The arid pages of a transcript seldom reflect the atmosphere of a trial.
>
> (2) If the findings of fact made by the trial judge are supported by credible evidence, this Court is bound by those findings, however voluminous and, apparently, weighty the testimony against them. The truth is not the monopoly of any majority.
>
> (3) Inferences of fact are drawn in most trials; it is said that an appellate court is in as good a position as the trial judge to draw inferences of fact …. I do not accept that this is always necessarily so. It may be that the demeanour of a witness in giving evidence will, itself, lead to an appropriate inference which an appellate court would not draw. In my judgment an appellate court should be slow to substitute its own inference of fact where such depends upon oral evidence or recollection of fact and a different inference has been drawn by the trial judge. In the drawing of inferences from circumstantial evidence, an appellate tribunal is in as good a position as the trial judge."

95. In light of these restrictions the wife's appeal against the refusal of the high court judge to make a finding of deliberate concealment is, I believe, misplaced. Further, it cannot be said that the evidence was so grossly and obviously in favour of a finding of deliberate fraud and concealment that this Court could interfere with the trial judge's conclusions.

96. I also take the view that in circumstances where the trial judge clearly stated that he was satisfied that at the time he came to make proper provision for the wife there had been disclosure in full of all of the husband's assets, it cannot be successfully argued that it would necessarily have been unjust to ignore any default on the part of the husband, at the time he swore his affidavits of means, when it came to making proper provision. That is the test provided for in the relevant section. It is noteworthy in this regard that no authority was produced to the Court to demonstrate that in a case where there had been initial non-disclosure that had been rectified as of the date of trial, that such conduct warranted the imposition of a penalty when it came to making proper provision for the parties under s. 16 of the 1995 Act.

Alleged erroneous consideration of other factors, when considering conduct under s.16(2)(i)
97. The last matter to be addressed concerning the husband's conduct is the wife's submission that the trial judge erred in law in concluding that his misconduct was to be mitigated by reason of his generosity and possibly because of other factors including the fact that some of his assets were outside of the jurisdiction, that he had made significant disclosure and could have been more obstructive than he had been regarding disclosure. That is a submission which I reject as it is not based upon an accurate account of the trial judge's conclusions.

98. The High Court judge did not find "gross and obvious" misconduct on the part of the husband and then decide that such conduct might be excused by reason of his generosity to his wife or the other factors mentioned in the preceding paragraph. He decided that the conduct of the husband did not reach the required threshold such that it would have been unjust for the Court to have ignored it for the purpose of determining proper provision. Further, it seems to me that the precise wording of the subsection, which requires the court to consider any relevant conduct by reference to "all the circumstances of the case" would, in fact permit a judge, if he considered it just in all of the circumstances to make a finding of gross and obvious misconduct, but conclude that having regard to other circumstances he would not reflect that conduct in the manner in which he made proper provision for the parties. However, whether I am correct in this regard is immaterial as that is not what occurred in the present case.

99. It is also perhaps worth noting that the consequence of the husband's failure to comply with his statutory obligations in terms of disclosure was that many days of the trial were spent canvassing the extent and possible continuation of that default. That being so the proceedings took significantly longer than would otherwise have been the case. It would have been unjust if such circumstances had been permitted to have an adverse affect on the wife's finances. However, she was ultimately awarded her costs of the substantive proceedings and also the costs of the s. 35 proceedings such that it cannot be said that it was unjust for the trial judge to have failed to impose some type of financial penalty to reflect the husband's litigation misconduct relating to the making of proper provision.

The trial judge's alleged failure to have regard pursuant to s. 16(2)(a) to the husband's income, earning capacity and financial resources and in particular the failure to have regard to the wife's potential income.

100. I reject the submission made on the wife's behalf that the High Court judge failed to comply with his statutory obligation to have regard to the factors identified in s. 16(2)(a) of the 1995 Act.

101. From his extremely thorough and detailed judgment, which includes schedules that detail, *inter alia*, the assets and valuations of the available assets, it is simply untenable to argue that the trial judge failed to comply with the statutory obligations under s. 16(2)(a). While the trial judge is obliged to have regard to the factors identified in the subparagraph (a), when considering the issue of proper provision, he nonetheless enjoys a broad discretion as to how those assets, resources and other factors should be reflected in the ancillary orders which he makes for that purpose.

102. It appears to me that the real ground of appeal, based upon this particular statutory provision, is that having regard to the value of the assets and the resources available as of the date of the trial, the likely future income of the husband and the wife's own personal circumstances, that the trial should have made orders which would have had the effect of providing her with not less than 20% of the overall assets, whereas what she got was in the region of 11% - 12%. This is a submission which I reject.

103. To succeed in her appeal on the aforementioned basis, the wife would have to convince this Court that the provision made for her, in all of the circumstances, was patently not proper and did not accord with that to which she was entitled. That is an onus that she has failed to discharge.

104. The authorities, to which I have already referred, make clear that in ample resource cases, to seek to test the fairness of any proposed provision by benchmarking it as a percentage of the overall value of assets available is rarely useful. This is because each case will turn on its own circumstances, and these vary hugely from case to case particularly so in cases where the parties enjoy great wealth. It does not follow, as was asserted by Mr. Durcan, that just because the overall value of the provision made for the wife amounted to between 11% - 12% of the overall assets, that this Court could conclude that the trial judge erred in law in the manner in which he determined proper provision.

105. Of particular relevance is the fact that in ample resource cases, the court is often dealing with valuable assets inherited by one spouse, or, as in the present case, hugely valuable assets built up by one spouse as a result of years of hard work and endeavour before the commencement of the relationship under scrutiny. Such is the position with the husband's greatest asset in the present case to which the High Court Judge ascribed a potential sale value of over €22 million. The scheme provided for by the Act does not require the division of assets. In many instances valuable assets may be surplus to the court's needs for the purposes of providing proper provision in which case the trial judge may, in the exercise of their discretion as advised by Murray J. in *D.T. v. C.T.* decide to leave a particular asset or assets with their owner.

106. The onus on the trial judge in the present case was to consider all of the assets potentially available and then to fashion orders for ancillary relief that would likely secure for the parties and for their lifetime the lifestyle which they enjoyed prior to the marriage breakdown. I am not satisfied that the wife has demonstrated how he failed in this regard.

107. The sole complaint made by the wife concerning the provision made for her relates to the lump sum of €3.8m. She makes no complaint about the rest of the orders already referred to . While she asserts that she ought to have been awarded a greater lump sum, she has failed to identify how the overall provision is deficient. She has not referred to any evidence concerning the lifestyle she enjoyed prior to the marriage breakdown which she can no longer afford or enjoy by reason of the provision made for her by the trial judge. With the exception of her potential exposure to legal costs to which I will later refer, she has not demonstrated how she has not been provided with the security to which she is entitled by reason of the approach of the trial judge to proper provision. After all, as Denham J. observed in YG, the "requirement is to make proper provision and it is not a requirement for the redistribution of wealth."

108. The effect of the orders made by the High Court judge by way of proper provision was to leave the wife in a situation where:

> (i) She was to enjoy the entire beneficial and equitable interest in the prestigious property which had been purchased in the course of the marriage and which had been her family home prior to the marriage breakdown.
>
> (ii) The respondent was to have no claim on two apartments, one of which because it was in negative equity, was treated by the trial judge as a debt to the extent of €376,148. However, he noted that these properties were occupied by the wife's adult daughters, for whom the husband had no liability and were capable of providing a return by way of rent.
>
> (iii) She was to have maintenance of €7,000 for herself per month.
>
> (iv) She was to have a lump sum payment of €3,800,000, a sum which to my mind, when taken in conjunction with the other orders made in her favour, should more than adequately protect her against the myriad of unforeseen events or what may otherwise be described as "the rainy day".

109. As to the specific complaint that the trial judge failed to have regard to the wife's potential income when determining proper provision, that is also a submission that I reject.

110. The first thing to note in this regard is that the trial judge specifically stated in his judgment that the only factors in s. 16(2) that he considered irrelevant for the purposes of his consideration of proper provision were those provided for in paragraphs (e) (k) and (l) from which it can reasonably be inferred that in making proper provision he had regard to all of other factors including the wife's potential income. This conclusion would appear to be supported by what he said concerning her work history and future income generating capabilities at para. 247 of his judgment:-

> "The applicant in her evidence stated that the respondent asked her to give up work in or around 1996 to travel with him

on his work commitments. While the respondent did not deal with this issue, the general tenor of his evidence was that this was a casual relationship would imply that he rejects this evidence and would assert he never prevented the applicant from working. However, the objective reality is that since meeting the respondent apart from working directly with a company as a Consultant, the applicant has not engaged in other gainful employment. The applicant is a very able and intelligent woman but the Court is of the view that it may well be difficult for her at her present age with the commitment of young children and being out of the workforce for so long to constructively re-engage with the labour market. For these reasons the Court has taken into consideration Section 16(2) (g) of the Family Law Act 1995."

111. It is to be inferred from the aforementioned passage that the High Court judge did indeed consider the wife's potential income and having done so concluded that she was unlikely to return to the workforce to earn a living notwithstanding her evidence that she might at some stage participate in post graduate studies and that he took these factors into account when he considered the issue of proper provision.

112. Accordingly, I can see no validity to any of the submissions made based upon the trial judge's approach to his statutory obligations under s. 16(2)(a) of the 1995 Act.

The alleged failure on the part of the High Court judge to pay proper regard to the wife's role as a homemaker and the impairment of her future earning capacity by reason of having relinquished remunerative activity for the benefit of the family (s. 16(2)(g))

113. I am satisfied that the wife's complaint that the High Court judge failed to have any regard to her role as a homemaker or any impairment in her future earning capacity as a result of having relinquished her career in favour of her role as a homemaker cannot be sustained. Firstly, the trial judge specifically stated that he had taken into account all of the statutory factors to which he referred in para. 255 of his judgment and these include the wife's role as a homemaker as required by s. 16(2)(g) and any adverse consequences from the abandonment of remunerative activity. He specifically refers to the fact that she gave up work to accompany her husband on his travels, that she was devoted to her family and had dedicated herself to creating a strong family environment for her children and grandchild. These findings have no significance other than in the context of s. 16(2)(g). He also recorded her work history and family circumstances prior to marriage.

114. While the trial judge might have decided to state whether he considered the wife's role as a homemaker had impacted upon the value of the assets and income to which he was obliged to have regard when making proper provision or whether he had found it necessary in some way to specifically reflect his conclusions concerning her role within the home in the amount or manner in which he approached the issue of proper provision, he was not obliged to do so. His obligation was to ensure that in making proper provision he achieved a just and fair result for the parties taking all of that evidence into account. There is nothing that the wife can point to, in the provision made, to suggest that the trial judge failed in this regard.

115. As to the submission that the trial judge failed to attach sufficient weight to the manner in which the wife's career and/or future earning capacity had been adversely affected by taking up her role as homemaker, that is also a submission which I reject. Without wishing to offend, the Court was not referred to any evidence to demonstrate that in the High Court the wife had advanced that in making proper provision the trial judge should make additional provision for her to reflect the sacrifice by her of her career in favour of that of her husband and the interests of the family unit. The Court was not referred to any evidence given by the wife as to the career path she would have followed but for her relationship with her husband or concerning the level or type of earnings she would have expected to have earned had she not taken up such a role. There was no evidence which obliged him to do more that have regard to the fact that she discontinued work to benefit the family unit and to make sure that this was reflected in the provision made for the wife under s. 16.

116. Perhaps in a case where specific evidence was led as to the likely career path and likely future income of a spouse who gave up their career to benefit the family unit and where it could be established that by reason of that fact they were likely to be permanently prejudiced in their future income generating capacity it might be a valuable exercise for the court, if the evidence so permitted, to try to place a capital value of sorts on the value of such lost earnings and then to factor in a particular sum to reflect that loss into the orders making provision for the parties. However, this is not such a case and I am fully satisfied that this ground of appeal must fail for the reasons stated.

The failure of the High Court judge, when making proper provision, to include the value of two properties, one the subject matter of his judgment of 7th June, 2012

117. The background to the wife's submission is to be found in the following facts.

118. In 2011 the wife brought an application pursuant to s. 35 of the 1995 Act seeking to set aside a number of dispositions made by the husband post dating March, 2007.

119. It is only necessary to mention two of these. The first property, valued at approximately €1.6m., as has already stated at para. 9 above, had been occupied by the husband's daughter from an earlier relationship for a significant period of time at the time of the s.35 application. The second was a house valued at approximately €1.7m. Not long after these proceedings were commenced these properties were transferred to a trust with the result that his daughter was given a lifetime interest in both properties. Thereafter, the properties might benefit any one or more of the husband's descendants. In his judgment on the application White J. concluded that the primary purpose of the first transaction had been to benefit his daughter in a tax efficient manner and the second was just for tax purposes.

120. Having heard the evidence and the submissions of the parties the High Court judge considered it appropriate to make an order pursuant to s. 35 concerning both properties. However, having regard to the relevant legal principles, he concluded that it was not necessary for him to set aside the transfers. Instead he exercised his discretion to attribute the value of the properties to the husband such that the same could be considered later for the purposes of s. 16 of the 1995 Act. Having so concluded the wife submits that the trial judge erred in law when, at paras. 114 and 116 of his judgment, he stated that in determining proper provision he would not take the value of the first property transferred via trust for life to the husband's adult daughter and another property with a value of €240,000, not the subject matter of the S.35 proceedings, which was owned by the husband but wherein his elderly mother resided, into account.

121. I do not accept that the trial judge erred in law in excluding the value of these two properties when making proper provision, being satisfied on the evidence, as I am, that it was within his discretion to take such an approach.

122. The statutory provisions which are relevant to this submission require the judge to have regard to 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.

However, the trial judge must also have regard to the financial needs, obligations and responsibilities which each of the spouses has or is likely to have in the foreseeable future (see s. 16(2)(b)). These obligations are to be exercised, not in a vacuum, but rather having regard to the other statutory factors and all of the circumstances of the case.

123. In the present case it is clear from the decision of the High Court judge that he did not omit the value of the two properties from his consideration, as required by the statute. This is not a case where having stated in his decision on the s. 35 issue that he would have regard to the value of the properties when it came to make proper provision he proceeded to give judgment concerning s. 16 without mentioning those assets, circumstances in which this Court might reasonably conclude that he omitted them from his considerations in breach of his statutory obligation. As is clear from schedule 5 to the judgment, the second property the subject matter of the s.35 application was taken into consideration when the trial judge came to consider proper provision.

124. In the present case, material to the exercise of the Court's discretion was the fact that one of the properties concerned had been made available to the husband's daughter from another relationship and the other to his mother, both family members to whom he clearly had responsibilities and obligations. They had each occupied those properties for many years even though one of the properties had remained in the ownership of the husband until 2010 and the other continued to be owned by the husband. Having regard to the evidence, which included evidence as to the special provision the husband had already made for the children of the marriage through setting up a discretionary settlement trust in 2010 and the extent of the provision he was himself making for the parties and their children from other assets, I am satisfied that the High Court judge enjoyed the discretion to take the approach which he did.

125. Even if I am wrong in this regard, the wife's appeal on this point must fail in circumstances where she has not demonstrated that the provision made for her did not accord with her entitlements. Given that what is proper provision is not measured by reference to any percentage of the overall assets, it cannot reasonably be argued that proper provision was not made because the trial judge started from a figure which excluded the value of these two properties. It may, for a range of reasons, in its discretion decide to discount the value of any particular asset. Its discretion to do so is clear from the statutory provisions themselves and from those authorities which deal with proper provision in the context of inherited assets or other assets brought by one party to the marriage in circumstances where it cannot be said that's the other spouse by their conduct had directly or indirectly contributed thereto.

Failing to secure the wife against the potential financial impact upon her of ongoing legal proceedings in relation to the family home

126. It is clear from his very detailed judgment that the trial judge paid great attention to the potential significance that the wife's ongoing litigation concerning the property in which she and the children were living might have for the adequacy of the provision which he was about to make.

127. As to the potential ramifications of those proceedings for the wife, given that they were ongoing at the time of his decision, the trial judge noted that she might prove successful in her claims in which case she would recover party and party costs or that she might lose her claims and have to pay all of the costs. The alternative course available to her was, he observed, to try and settle. He also recorded that the husband had been centrally involved in trying to resolve the dispute up to December, 2009 in addition to which he had agreed to fund the plenary action commenced in November, 2009. However, the trial judge also found as a fact that following the service of the nullity proceedings in January, 2010 the husband could no longer be considered to have been supportive of the legal proceedings and that the judicial review proceedings had only been commenced in October, 2010. He also referred to the fact that the wife had incurred legal fees of €534,660 as a result of her proceedings of which the husband had paid €395,258 as of the hearing.

128. Having carefully considered the submissions of the parties on this issue I am not satisfied that there was any obligation on the High Court judge, when making proper provision, to secure the wife against the potential financial consequences of losing her claims.

129. Firstly, while it has been urged upon the Court that the High Court judge did not adequately protect the wife from the potential adverse consequences of her litigation, the manner in which this could have been achieved was not explained. The judge could not, for example, have required the husband to provide her with an indemnity in respect of proceedings over which he had no control. Neither can it be said he erred in law in failing to provide her with an additional specified lump sum to cover or mitigate any costs orders that might be made against her if she were to lose the proceedings. Presumably she expected to win the proceedings or be in a position to settle them on terms that would at least cover her costs, given that the proceedings were still live in May, 2012.

130. Secondly, s. 16(2)(b) requires the judge to have regard to " the financial needs, obligations and responsibilities which each of the spouses *has or is likely to have* (emphasis added) in the foreseeable future (whether in the case of the remarriage of the spouses or otherwise),". It does not appear that the judge concluded that it was likely that she would ultimately find herself liable for the costs of these proceedings.

131. Thirdly, the Court was advised in the course of the appeal that both sets of proceedings had been settled. It is to be inferred from the fact that the wife did not seek to introduce evidence on the appeal concerning the terms of settlement that she did not end up suffering the adverse costs order in respect of which she complains she was not secured. That being so, even if the trial judge had made any error in his approach to the wife's ongoing litigation for the purposes of making proper provision, which in my view he did not, to allow the appeal on this account would be futile as no case could now be made for an uplift in the proper provision on the grounds originally advanced.

The trial judge's alleged failure to have regard to the husband's likely income from overseas work (s. 16(2)(a))

132. The submission advanced on the wife's behalf is that the trial judge erred in law in excluding from his consideration, when making proper provision, any sum to reflect the future income which the husband would likely earn from his participation in overseas work. The complaint made by Mr. Durcan is that the trial judge had concluded that the husband would likely do some overseas work in the future but yet excluded his potential income from that source when making proper provision.

133. It has to be remembered that the statutory obligation on the High Court judge under s. 16(1) is to "endeavour to ensure" that proper provision is made for the parties having regard to "all the circumstances of the case" and pursuant to ss. (2)(a), to do so having regard to "the income, earning capacity" of the other spouse. The obligation is to "have regard to" any such potential income. The trial judge was not obliged to make some additional financial provision for the wife just because he concluded that the husband was likely to participate in some such overseas work in the future. The judge enjoyed a broad discretion which he was entitled to exercise having regard to "all of the circumstances".

134. In the present case the judge clearly considered the husband's potential income from overseas work, as is apparent from his judgment, and decided for the reasons specified not to adjust the financial provision on this account. In doing so he referred to the

husband's age and his evidence to the effect that the particular nature of the overseas work was extremely demanding. He also referred to the uncertainty of the potential income from such overseas work and to the costs of arranging and participating in these events . He had also heard evidence from the husband that he was not prepared to reduce his contact with his children so that he might be in a position to earn more by participating in overseas work. These were all circumstances which the High Court judge was entitled to take into account when making proper provision for the parties. Thus, I am quite satisfied that the trial judge complied with his obligations to have regard to this source of potential income when making proper provision for the parties and that he acted within his discretion when he decided to exclude any potential income from that source when making proper provision.

135. Finally, it is to be inferred from the careful and detailed judgment of White J. that he was satisfied that he was in a position to make proper provision for the wife and dependant children without the need to have recourse to this potentially uncertain source of income which he considered might place unacceptable personal demands upon the husband were he to so provide.

136. I would accordingly reject this ground of appeal.

Conclusions

137. I conclude that the word conduct in s. 16(2)(i) is to be construed in the same manner as the word conduct in s. 20(2)(i) of the 1996 Act. That being so only conduct that is "gross and obvious" is material to the court's consideration of proper provision. It follows that I reject the submission that in judicial separation proceedings a spouse may rely upon an accumulation of episodes of misconduct, which individually could not be considered "gross and obvious", for the purposes of seeking enhanced financial provision under s. 16 of the 1995 Act.

138. On the evidence in the High Court the conduct of the husband was not so obvious and gross that it was unjust for the trial judge not to reflect it in the manner in which he made provision for the wife under s. 16 of the 1995 Act. In particular, that conduct – however objectionable - did not impact on the capacity of one spouse to make proper provision for the other.

139. The High Court judge was entitled, having had the opportunity of assessing the husband's credibility when giving evidence over many days, to conclude, firstly, that he had not set out to mislead the Court or his wife as to the true extent of his assets and secondly, that for the purposes of reaching his conclusions he had a full picture of all of his assets. That being so, there is no basis upon which this Court could displace his finding that such financial misconduct was not to be reflected in the amount of proper provision to be provided for the wife. I am also quite satisfied that the trial judge paid due attention to each of the statutory factors to which he was required to have regard by reason of the provisions of s. 16 of the 1995 Act. Insofar as he declined to make additional financial provision for the wife by reason of any specific elements the subject of appeal, the trial judge was entitled to reach the conclusions which he did, particularly in circumstances where it has not been demonstrated that the overall provision that he ordered for the wife falls short of that to which she was entitled at law having regard to all of the relevant circumstances.

140. For the reasons which have been elaborated upon in this judgment, I would dismiss the appeal.