UNAPPROVED

THE COURT OF APPEAL

Court of Appeal Record Number: 2023/148
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Faherty J.
Binchy J.
Meenan J.

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

AND

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

BETWEEN/

A

APPLICANT/
RESPONDENT

- AND -

A

RESPONDENT/
APPELLANT

Judgment of Ms. Justice Faherty delivered on the 27th of January 2025

1. This is an appeal taken against two judgments of the High Court (Barrett J.) delivered on 2 June 2022 ([2022] IEHC 340) and 25 January 2023 and the orders made on 3 March 2023 (as perfected on 8 June 2023) consequent on those judgments. The appellant is the respondent in the judicial separation proceedings commenced by his wife. He is the applicant in the divorce proceedings. For the purposes of this judgment, I will refer to the parties as the "Husband" (the appellant) and the "Wife" (the respondent). In essence, the Husband maintains that Barrett J. (hereinafter "the Judge") erred in the manner in which proper provision was assessed in the context of the decree of divorce granted to the parties.

2. In order to put the particular ancillary orders which are under appeal into context, it is first necessary to set out the background facts and the procedural history of the proceedings.

3. The parties were married in 1988. There are children of the marriage, but none are dependants for the purposes of the proceedings. The parties separated in or about mid-2019 and it is not in dispute but that the marriage has irretrievably broken down. At the time of the trial in the High Court in late 2021/early 2022, the Husband was aged 61 and the Wife was approaching her 60th birthday.

4. The Wife continues to reside in the family home. The Husband resides outside of the jurisdiction, where he is employed.

5. The uncontested evidence of the parties is that the family lived outside the jurisdiction for various periods during the marriage, in circumstances where the Husband's employment took them abroad.

6. Throughout the marriage the Husband was and continue to be employed by a global industrial group of companies (hereinafter referred to as "the Company") headquartered outside of the jurisdiction. During his employment with the Company, he has worked in a number of countries. Since in or about 2013, his role for the Company has been based in the country where he is presently resident. Whilst the Husband's contract with the Company

was approaching its end in 2023, his evidence was that he anticipated that he would continue with the Company on a new contract until retirement aged 65.

7. Judicial separation proceedings were commenced by the Wife in mid-2019 pursuant to the Judicial Separation and Family Law Reform act 1995 ("the 1995 Act"). Due to Covid restrictions there were delays in bringing the matter on for hearing but, ultimately, a trial date was fixed by consent for four days in November 2021. By the time the judicial separation proceedings came on for hearing, the Husband had issued divorce proceedings pursuant to the Family Law (Divorce) Act 1996 ("the 1996 Act").

8. The hearing of the judicial separation/divorce proceedings commenced on 2 November 2021 for four days. By the fourth day (5 November) the case was not finished and so, was heard further on 3 December 2021 and 28 January 2022.

9. On the latter date, the Judge fixed timelines for written submissions to be completed by March 2022 which were duly furnished.

10. As no doubt will be appreciated, the hearing of the actions was concerned with the issue of proper provision for the parties. For the purposes of what orders might be made such as would constitute proper provision, apart from the evidence heard from the Wife and the Husband, the Judge had the evidence of experts called on behalf of the Husband and Wife, respectively, namely:

-Ms. Olga Daly (the Wife's pension expert)

-Ms. Jacqueline McShane (the Wife's accountant)

-Mr. Michael Marsh (the Husband's pension expert)

-Mr. Brian Hyland (the Husband's accountant)

-Mr. Rory Crerar (an auctioneer engaged by the Husband) and

-Mr. Robert Downey (the auctioneer engaged by the parties to conduct a joint valuation of the parties' properties).

11. The Judge also had the benefit of a *D v D* schedule compiled on 29 October 2021.

The property and other financial resources of the parties

12. The assets of the parties were set out in the reports of their respective accountants, and in the *D v.D* schedule and consist in general of the following:

1. The family home which is jointly owned and subject to a mortgage of €73,655. The Wife ascribed it a value of €975,000. The Husband's initial valuation was €1.1m, later increased to €1.15m.
2. An investment property ("Property 1"), jointly held, and subject to a mortgage of €136,551. The Wife's valuation was €260,000 and the Husband's €295,000.
3. A further investment property (hereinafter referred to as "Property 2") jointly held and subject to a mortgage of €254,000. The Wife valued Property 2 at €270,000, the Husband at €295,000.
4. A holiday home in France, again jointly held, which is free of mortgage. The Wife's valuation was €295,000 and the Husband's was €310,000.

(At trial, the difference between the parties in terms of the total value of all the properties was €240,000 approximately).

5. Cash deposits in various bank accounts. As of the trial date, the total cash deposits amounted to ca. €926,000.
6. Share and share options held by the Husband, save one joint "Keytrade" account.
7. Pensions.

13. The Judge was also aware of an open offer made by the Husband during the trial. In essence, the Husband's offer consisted of:

- The transfer of the family home to the Wife with the mortgage.
- The transfer of Property 1 to the Wife with the mortgage.

- A declaration that the Wife is the sole legal and beneficial owner of the French property which is mortgage free.
- That Property 2 would be transferred to the Husband with the mortgage.
- A declaration that the Wife is the sole owner of monies held in her sole name amounting to circa €332,000.
- A declaration that the Husband is the sole owner of two named accounts held by him amounting to circa €490,000.
- An order granting the Wife a lump sum of the joint monies, being compensation monies in the total sum of circa €100,000 held in her solicitors' client account.
- An order granting the Wife the appropriate pension adjustment orders as to give her 100% of the entire of the Husband's Zurich pension scheme (hereinafter "the Irish Pension") valued at €738,196.
- An order declaring the Husband to be the sole owner of the pension held by him in the Isle of Man (hereinafter "the Isle of Man Pension") valued at €1,018,796.
- An order declaring the Husband to be the sole owner of the share portfolio accumulated by him whether jointly or solely held.
- An order that the Husband shall continue to pay the current maintenance to the Wife by informal arrangement without order until April 2022 (so no tax would arise) and then from April each year starting in 2022 and ending in April 2025, a lump sum payment of €60,000, being 4 instalments of an order for the payment of a lump sum of €240,000 which was to be a payment from capital. (This, it was said, doubled the Husband's previous maintenance offer).
- Mutual orders pursuant to ss. 14 and 15A(10) of the 1995 Act save monies as would be paid from the Husband's estate to satisfy any outstanding monies due under court order.

- No order as to costs.

14. The main differences between the parties as to the net value of their assets centred on the difference in value attributed to the family home and differences in bank balances and share values.

15. As noted already, the parties had agreed prior to the hearing of the action to have a joint valuation of their properties carried out. They retained the services of Mr. Downey to do so. However, when the valuations were furnished, the Husband proceeded to obtain separate valuations from Mr. Crerar.

16. This led to a difference in value in relation to the properties, in particular the family home, as indicated above. Mr. Downey valued the family home at €975,000. Mr. Crerar valued it at €1.1m and subsequently, in evidence, revised that valuation upwards to €1.15m. There was thus a difference of €175,000 in respect of the family home. As can be seen above, there were other differences also between the auctioneers in relation to the other properties, but these differences were not as significant.

17. In relation to the shares and share options held by the Husband they consisted of shares and share options in the Company as well as a general share portfolio held by him. As regards the former, the High Court heard evidence that as part of the Husband's reward/remuneration as a member of senior management of the Company, the Company provided a stock/share option scheme. Each year the Husband receives notification of the number of shares he will be entitled to purchase at the option (or exercise) price. The option/exercise price is determined by the Company as the average trading price for the Group shares over the 10-day period after the Group published its annual accounts. In the case of the stock options acquired by the Husband, they had a period of three years before they could be exercised, with a right to exercise over a further four years. There was evidence that the Husband would

receive further share options in 2022 the strike price for which had not been announced. The Husband had up to seven years within which he could exercise those options.

18. Part of the case made on behalf of the Wife was that it was likely that the Husband would continue to have the benefit of share options as part of his renumeration package, thus enabling him to accumulate further wealth over the next number of years until his retirement. This was also something she emphasised at the appeal hearing.

19. Each year as part of the option plan, the Husband also receives an entitlement to purchase a number of matching shares corresponding to the number of shares purchased by the Husband under the share option plan at a price of 75% of the option/exercise price. In order to be able to receive the maximum number of stock options the Husband was required to invest 20% of his net salary base into shares in the Company ("participation shares"). The participation shares are purchased by the Husband on the stock market and are required to be held in order for him to be eligible to participate in future share awards by the Company. The Wife accepted that the participation shares were required to be held in order that the Husband would be eligible for both the share options and matching share awards available to him as part of his employment.

20. The main difference between the parties on the share valuations was the value of the Husband's participation shares. In was contended by the Husband that the participation shares should be valued at a discounted price rather than at their market value (as of the dates of the respective experts' reports) to reflect the fact that they may fluctuate in value over time. The Wife's position was that the parties had never suffered a loss in value of the shares.

21. Another issue which arose in the course of the trial related to [certain named shares] held by the Husband which he asserted were no longer available. Ms. McShane, the accountant for the Wife, testified that she could find no documentation to suggest that the

these had been disposed of and so included them in her schedule of assets. Mr. Hyland, the Husband's accountant, for his part, agreed that there was no documentation to show that the shares had been disposed of but his evidence to the court was that he was instructed that they had been disposed of.

22. The High Court also heard evidence concerning litigation that was outstanding in connection with two of the properties held in the joint names of the parties. The Wife had brought proceedings in respect of the Property 2 in circumstances where water ingress had rendered it unhabitable for a period of in excess of two years. Included in those proceedings was a claim for damages for inconvenience/personal injury to the Wife. The evidence was that the damage to Property 2 had been rendered good and that the property had been let out to tenants since the repairs were completed. In December 2021, the Wife's claim against the Management Company of Property 2 was settled for a sum of €24,500, divided as to €12,000 special damages and €12,500 to the Wife. The High Court was told that the Wife had no objection to any damages she received being divided equally between the parties.

23. There were also proceedings in being in respect of the property in France. This property had been purchased on a sale and leaseback arrangement in respect of which there was litigation. The matter had proceeded to hearing before the French courts and the decision of the French trial court was under appeal at the time the within proceedings came on for hearing. Judgment was in fact given by the French appellate court on 28 January 2022. Subsequently, the Wife was advised that there would be a cassation appeal against the decision given by the French appeal court. Accordingly, in her submissions to the High Court, the Wife was of the view that a sum of €70,000 (to which each party would contribute €35,000) should be set aside to meet any further contingency arising from the litigation in the French courts. Any part of the €70,000 sum not required to meet any award made against

the parties on foot of the litigation or the payment of legal fees or other expenses would be divided between them equally once the litigation ended.

24. As regards the family home, there was a longstanding dispute in respect of the boundary between the garden of the family home and the garden of a neighbouring property. At the time of the hearing in November 2021, that dispute had settled without the necessity for legal proceedings. In the period between November 2021 and the resumed hearing on 28 January 2022, costs of approximately €5,642 plus outlay had been identified in correspondence from the solicitors dealing with this matter. Furthermore, the Wife had paid the sum of €750 towards the legal costs of her neighbours in settlement of the dispute. The Wife also testified that a sum of €25,000 would be necessary to reinstate the physical boundary between the family home property and the neighbour's property. In the *D v.D* schedule, the Husband provided for a sum of €29,500 in respect of rectification of the boundary.

25. It was not in dispute that the Husband is entitled to and is a member of two pension schemes in connection with his employment. I have earlier referred to these as the Irish Pension Scheme and the Isle of Man Pension Scheme. The Husband's service in respect of the Irish Pension Scheme (a defined contribution scheme) is from 1986 to 2011. In the *D v. D* schedule, the transfer value of the Irish Pension was €738,198. The transfer value of the Isle of Man Pension was valued at €1,045,801. It was accepted that over a further €27,000 had been paid by the Husband's employer into the Isle of Man Pension since the *D v D* Schedule was agreed so that the fund was worth €1,072, 801 as of 28 January 2022.

26. As previously indicated, part of the Husband's open offer to the High Court was that the Wife would receive the benefit of 100% of the Irish Pension and would therefore have no interest in the Isle of Man Pension which the Husband would retain. The Wife's position was that she wanted pension provision representing 50% of the value of the two schemes.

In her submission, that required that she receive some benefit from the Isle of Man scheme, or a lump sum in lieu.

27. It was accepted by all concerned that the trustees of the Isle of Man Pension would not be bound by any Irish pension adjustment order granting the Wife a share in the Isle of Man Pension. However, after the hearing in November 2021, there was correspondence between the two pension actuaries for the parties (Mr. Marsh and Ms. Daly) who had given evidence on the issue of whether the trustees of the Isle of Man Pension would accommodate an arrangement whereby the Wife obtained a benefit from that scheme. The thrust of the post-hearing correspondence was that whilst the trustees of the Isle of Man Pension could not comply with or be bound by any pension adjustment order made by the High Court, nonetheless, by voluntary arrangement between the parties, it was possible for the Wife to obtain a share in the Isle of Man Pension scheme. That required the consent of the Husband, his employers and the trustees.

28. The Husband, however, opposed any order being made in respect of his Isle of Man Pension and he submitted that the pension proposal he had made in his open offer was appropriate and made proper provision for the Wife, particularly when coupled with the Irish assets being offered to her. On the other hand, insofar as the High Court was minded to grant the Wife an equal share of the pensions, the Wife's position was that the court could consider directing the Husband to pay her a lump sum of €167,305, being the sum required to equalise the pensions.

29. Mr. Marsh, the Husband's actuary, gave evidence that based on the Wife receiving the Husband's Irish Pension, she could achieve an income in retirement from that pension of €4,000 gross per month, representing a rate of return of in excess of 4% above price inflation. That evidence was challenged by Ms. Daly, the Wife's actuary. Her evidence was that the figure the Wife could realistically achieve by way of income was €2,010 per month

approximately. It was pointed out that over the years until his retirement, the Husband's Isle of Man Pension would increase by €470,000 by way of future contributions from his employers. In Ms. Daly's view, that would give the Husband a further €16,000 per annum on retirement. On its current value, it would give him an income of €39,000 per annum.

30. The Husband's Isle of Man Pension also offered a death-in-service benefit, valued at €1,080,000 as of January 2022. At the hearing in the High Court, it was not immediately apparent whether the death-in-service benefit would be paid out in addition to, and not in lieu of, the funds in the Husband's Isle of Man Pension in the event of his death-in-service. The Husband's proposal was that in the event of his death while employed by the Company, only the lump sum of €240,000 payable in instalments, as proposed by him in his open offer, should be paid out to the Wife in that event. In other words, the Husband would assign the death -in-service policy to cover (on a decreasing basis) the €240,000 maintenance lump sum he was offering over four years. The Wife's submission was that since the Husband's Isle of Man Pension fund was accumulated over the course of their lengthy marriage, in the event that the Husband were to die in service, there was no logical reason why she should not receive the entire of the said fund. Whilst it was accepted that the High Court could make no binding order in respect of this fund as the fund was outside the jurisdiction of the High Court, the Wife's submission was that if the Husband was not willing to give an undertaking to the Court to direct his trustees to pay out whatever portion of the death-in-service benefit the High Court deemed meet and just in the event of his death-in-service, then the Wife should retain her right to seek provision from the estate of the Husband for whatever sum was specified by the court.

31. Overall, the Wife's case as made to the High Court was that only an equal division of the assets would constitute proper provision. Pursuant to the Wife's proposal, all the properties owned by the parties (being the family home, Property 1, Property 2 and the

property in France) should be transferred to her. Insofar as the Irish properties were subject to mortgages, the Wife undertook to use her best endeavours to have her husband released from those mortgages.

32. The Wife's ultimate proposal regarding the Husband's pensions was that a pension adjustment order should be made in her favour in respect of 100% of the Irish Pension Scheme, together with an additional lump sum of €167,305 to her payable by the Husband in order to equalise the pension benefits that each party is to receive. If, however, the Husband made arrangements with the trustees of the Isle of Man pension and his employers to pay that sum into a pension scheme nominated by the Wife and took all steps necessary to give effect to that arrangement, then the obligation to pay the applicant the equalising lump sum would be satisfied.

33. As regards maintenance, the Wife's position was that the Husband's maintenance offer of €240,000 payable by instalments of €60,000 over four years did not include the future salary earnings of the Husband until his retirement. This was in circumstances where evidence was given on the last day of the hearing that the Husband's employers had achieved excellent results in the last financial year and that, as a result, it was likely that the Husband's bonus would revert to the level of the bonus he received in the years pre-Covid. In accordance with the evidence of Ms. McShane, the average bonus in the three years pre-Covid was in the order of €98,955. This, it was said, would add an additional €46,000 to the Husband's annual income in 2022 so that he would receive €30,273 net per month on average. Moreover, this excluded possible dividend income on the shares held by the Husband. It was submitted that in the event that the Husband would retire in March 2025, his total income between February 2022 and March 2025 would be approximately €1,089,828. Furthermore, his employer would be contributing €27,000 per quarter to the Husband's Isle of Man Pension scheme and in addition would be covering the costs of his

car, health insurance and other expenses. Hence, it would be unfair if the Court were to ignore the Husband's income and earning capacity between 2022 and 2025 on the basis that he is proposing to pay a lump sum in instalments to the Wife, which, according to the Husband, would be out of capital. The Wife's submission was that the relevant statutory provisions required the High Court to take into account *"income, earning capacity and other financial resources"* of both parties, that either would have now or in the foreseeable future.

34. The Wife also argued in her written submissions in the High Court that the Husband's proposal that he had no liability to pay maintenance after the final payment of his proposed maintenance lump sum was unfair in circumstances where the Husband had a far greater earning capacity than her. That earning capacity, it was submitted, was built up over the years of the marriage with the help and support of the Wife.

35. As recorded in her written submissions, the Wife's proposal was that the Husband would pay her a lump sum of €240,000 payable in instalments of €120,000 over two years, the first instalment to be paid on a date in 2022 and the second on the same date in 2023. Thereafter, from a specified date in 2024, the Husband would pay to the Wife such gross sum as would pay her the sum of €10,000 net of all taxes per month for her maintenance and support, until further order of the High Court or agreement between the parties.

36. On 1 April 2022, an indication was given by the court that judgement would be given in April 2022.

37. However, on 6 April 2022, counsel for the Wife made an application on notice seeking that the High Court would delay giving judgment in the matter. It was said that the delay was necessitated as a result of a recent judgment delivered by the CJEU relating to tax law and maintenance in the jurisdiction where the Husband worked and resided. One of the issues which had been canvassed at the trial related to whether the Husband could claim tax relief in the jurisdiction in which he was employed. It was contended by counsel for the Wife that

the effect of the CJEU judgment was that the Husband would be able to claim tax relief on maintenance he paid to the Wife, irrespective of whether he earned more or less than 75% of his income in that jurisdiction. Counsel for the Husband argued that the CJEU judgment was not relevant as maintenance was proposed to be paid by the Husband by way of a lump sum payment to the Wife and that in any event, any tax reliefs were payable to the Husband's employer since they paid him net. However, in light of the Wife's submission that she would need to call a tax expert with expertise pertaining to tax matters in the relevant jurisdiction to give evidence, delivery of the judgment was postponed, and the matter was duly adjourned.

38. The matter came back before the High Court on 6 May 2022. On that occasion, counsel for the Wife applied for a further adjournment due to "an issue" arising between the Wife and her legal team.

39. On 13 May 2022, after hearing submissions from the parties' legal representatives, the Judge decided that he would give his judgment in any event, and that an application in respect of the tax issue could be made arising from the judgment.

40. Judgment was duly delivered electronically on 2 June 2022. As matters transpired, albeit the Judge duly address the CJEU judgment in his judgment, nothing further was heard from the Wife arising from the CJEU judgment.

The High Court judgment of 2 June 2022

41. The Judge commenced his judgment by reference to the longevity of the parties' marriage. He noted that they had worked throughout their marriage *"as a team"*. Whilst the Wife had pensionable employment outside the family home for some periods during the course of the marriage, it was the Husband who was the primary earner, whilst the Wife worked as a homemaker. The Judge accepted that between 2013 and 2019, the children of the marriage were of an age that the Wife could conceivably have sought work outside the

family home in that period. However, *"a degree of reality"* fell to be brought to bear in this regard given that having spent years as a homemaker and being a middle-aged woman who had been gone from the job market for some time, the Wife's prospects of returning to the jobs market had been negatively impinged by her commitment to being a homemaker. He opined:

> *"This homemaker – related impairment of [the Wife's] future employment prospects continues to present at this time…".* (para. 3)

42. The Judge then turned to the Wife's contribution to the family finances. He noted her successful efforts in resolving a dispute with a particular mortgage lender. This was a reference to the Wife's success in securing a reversion to tracker mortgages that had been taken away by the mortgage lender and also securing substantial compensation of approximately €460,000 from the mortgage provider most of which was utilised to reduce the mortgages on the parties' properties. The Judge also noted the Wife's successful efforts in dealing with disputes that arose concerning the property in France and Property 2, as well as the boundary dispute concerning the family home.

43. In terms of proper provision for the parties, the Judge noted that he himself had considered the applicable authorities in some detail in *M v. S* [2020] IEHC 562 and that since that judgment was delivered the Court of Appeal had given judgment in *N.O. v. P.Q.* [2021] IECA 177. He stated that his making financial provision for the parties had largely, though not entirely, been decided by reference to those two cases. The Judge noted that in making proper provision the various factors to which he was required to have regard were those under s.20 of the Family Law (Divorce) Act 1996, which was the equivalent of s.16 of the Family Law Act 1995 in the context of judicial separation.

44. He stated that *"mindful that there was a roughly equal partnership in terms of the out-of-home and in-home work undertaken respectively by the parties",* his aim was to secure a

"roughly equal division of assets" (para. 7). He noted however that the division of assets in such a way as to secure proper provision to the parties *"will not always result in a 50/50 of assets"*. Furthermore, the establishment of two households in place of one from the same pool of assets will result in there being *"some diminution in the standards of living previously enjoyed".*

45. At para. 8, the Judge set out his general response to the various key issues that were the subject of focus at the hearing. He first addressed income. He noted that the parties' primary source of income was the Husband's substantial employment income. Furthermore, the parties were fortunate to enjoy some rental income from their investment properties. He noted that neither party was entitled to any payment under statute at this time.

46. He accepted the evidence of Ms. McShane that the Husband's monthly income in 2021 was just under €26,000. In the same year, he received an annual bonus of €52,000. He noted that this bonus *"was unnaturally diminished because of under-performance at the height of the Covid lockdowns"* (para. 10). In the three-year period between 2018 – 2020, the Husband's annual bonus averaged at around €99,000. Thus, in this wider historical context, that meant (again per Ms. McShane) that the Husband would, *"all else being equal, enjoy an income of in or about €31,000 per month"* although the Judge was mindful that that income included provision for rent for the Husband that would cease when he retired from the Company.

47. He noted that albeit the Husband was uncertain about his future plans, *"it does seem that he will be retiring from his present employment when he turns 64 (sic) years of age (in 2025)".* It was, however, *"conceivable"* that the Husband may take up some form of employment of an unspecified nature post-retirement but, as the Judge noted, the Husband was not sure about this or even whether he wanted this.

48. In addition to the Husband's employment income, the parties also had a monthly post-tax rental income deficit of €810. This deficit arose when the applicable mortgages were set against the applicable income. It would thus be necessary to reduce the mortgages on the rental properties to generate a surplus income from same. He noted that the mortgages on the rental properties had about ten years to run to completion.

49. The Judge next addressed the Husband's tax arrangements. In the first instance, he noted that the Husband could be described as an *"expat worker"* in that he is told what his net salary will be and his employer *"grosses up"* what he is paid so that the Husband gets this agreed net income. On the other hand, the Husband's stock option earnings were viewed by his employer as private income and thus something in respect of which the Husband must sort out his own tax affairs. It was also clear from the evidence of the Husband's accountant, Mr. Hyland, that the Husband's employer takes the benefit of any tax allowances. He noted that the Husband's income, from the evidence, comprised his basic salary, various allowances (including an accommodation allowance), annual bonus, pension payments, and certain share options. He also enjoyed a significant travel exemption relief under the laws of the jurisdiction in which he is resident. The Judge noted that following the divorce that would issue, the Wife would no longer be covered under the Husband's health insurance scheme and would instead need to source her own health cover, as indeed would the Husband when he retired.

50. The Judge then went on to address *"earning potential"*. He noted that the Husband, should he wish to, would *"likely enjoy income-generating potential past his mandatory retirement age"* (para. 14). This was thanks to his long work experience which, the Judge noted, was achieved in part as a result of the Husband having been *"freed"* to work outside the family home by virtue of the Wife's years-long commitment to her work as a homemaker. By contrast, the Wife had low or no earning potential by virtue of long years spent as a

homemaker. The Judge had regard to the observations of the Court of Appeal in *N.O. v. P.Q.* on how to approach the issue of the earning capacity of a dependent spouse. He considered that the Wife *"finds herself broadly positioned in a similar way to the wife in N.O."* albeit there were differences between that cases in that *N.O.* concerned a farm and farmland and that *"perhaps more significantly" N.O.* was not an ample resources case, whereas this case was an ample resources case *"albeit not the most ample of ample resources cases".*

51. The Judge next turned to the contributory state pension entitlements of the parties. He noted that the Wife will be entitled to a contributory State pension when she turns 66 albeit there was some dispute between the parties' respective financial advisors as to how much this would be. The dispute centred on whether her likely pension should be calculated as if she turned 66 years of age today or how it seems likely to be calculated when she in fact turns 66 years of age (there being imminent changes in the pension system in this regard). The Judge considered it to be *"inescapably"* the case that one should proceed on the latter basis. Proceeding thus, it suggested that the Wife *"stands eventually to receive a relatively paltry contributory state pension of [€118 per week]"* (para. 15). Additional contributions between now and the Wife reaching the age of 66 would yield an increase in the pension. However, her contributory state pension would never be large. The Judge considered the suggestion that the Wife would find employment in the next few years so as to accrue her full state pension *"unrealistic"* given her age and her long absence from the workforce.

52. The evidence also indicated that the Husband would be entitled to a contributory state pension in the jurisdiction in which he now resides albeit no complete evidence was placed before the court as to the likely amount of same.

53. The Judge noted that the Husband was currently paying net monthly maintenance of €8,500. He considered this was a sizeable sum but was one that represented a drop in the Wife's previous income.

54. He then considered the Husband's suggestion that the current level of maintenance should be reduced to €60,000 per year payable over four years by way of four lump sum payments with maintenance ending after the fourth payment. In the view of the Judge, there were a number of problems with this proposal. First, it would see an *"unjustifiable reduction"* in the Wife's income when one had regard to the total assets available. Second, it would impede or even *"frustrate"* the Wife's ability to pay off existing debt (including mortgages and the costs of the proceedings) and end up with unencumbered title to property that has earning potential in the years ahead. Third, it would leave the Wife with net monthly maintenance that would be barely one-quarter of the Husband's present monthly income despite the fact that her efforts as homemaker greatly *"freed"* the Husband to pursue the career that had led to his current relative financial wealth. Fourth, there was no evidence before the court to suggest that the Husband had encountered any difficulty in making his current maintenance payments to the Wife. The Judge went on to state, at para.18:

> *"I respectfully do not accept that the 'clean break' contended for by [the Husband] is sustainable when it comes to my making proper provision. If he works post-retirement (and that is a big if – [the Husband] did not seem entirely enthused by the prospect) he will be making income on the basis of professional experience that he was freed in part to gain by his wife's working as a homemaker. Again I accept, of course, that he worked hard at his career also. Even so, it seems to me there would be a fundamental unfairness (want of proper provision) at play in the notion that [the Husband] could continue to 'cash in' fully on the continuing proceeds of a career that he was freed in*

part to enjoy by [the Wife's] action, retaining 100% of the profits from a career in which his wife has also invested."

55. Having regard to the foregoing, the Judge proposed to order *"(a) the lump sum maintenance payments in four annual tranches of such amount as would yield 12 x net monthly payments of [€10,000 per month] in that year plus (b) after the payment of the fourth tranche in four years' time I will order the payment of maintenance to [the Wife] of such gross amount as will yield to her a net monthly payment of [€10,000], provided that the net monthly amount payable under (b) may well need to be revisited at some future time if [the Husband] elects not to work post-retirement or such work brings in a still much-reduced income."* (para. 19) (Emphasis in original)

56. The net effect of (b) above was that on 1 April 2026, the Wife would revert to receiving €10,000 net per month by way of period maintenance, subject only to the Husband bringing an application to court to reduce the said sum or otherwise set it aside.

The Judge's treatment of the parties' assets

57. The Judge noted that the assets available to the parties comprised (i) the family home; (ii) the two other Irish properties; (iii) the holiday home in France (iv) certain cash deposits (including compensation monies held by the Wife's solicitors); (v) shares and share options; and (vi) pensions. He noted that there were two principal areas of dispute between the parties in this regard, namely the value of the family home and the value of shares and share options.

58. He turned first to the value of the family home. He noted that *"most unhelpfully"* he had been presented with two competing valuations in circumstances where the Husband had departed from the agreement of both parties to abide by the valuation of a single valuer selected by the parties. He was inclined to accept the lower valuation (being the joint valuation as given by Mr. Downey) for the reasons he gave at para. 22 of the judgment. The

valuation thus accepted was €975,000. In respect of the contents of the family home, he accepted the value which the Wife had accorded them.

59. As to the monies credited to the parties' various bank accounts, and the compensation monies currently held by the Wife's solicitors, it seemed to the Judge that the fairest way to proceed in this regard was that: (i) the Husband would be credited with the monies in two specified bank accounts, (ii) the Wife would be credited with the monies in the other bank accounts and also (iii) receive the bank compensation monies held by her solicitors as well as (iv) an *"equalisation payment"* from the Husband *"such that the division of the monies in the accounts is done on a 50/50 basis overall".* (para. 24)

60. The Judge next turned to the value of share and share options. He considered that the issue of whether [certain named shares] were in fact disposed of had not been properly resolved. Albeit the Husband had stated that they were disposed of, there was no evidence to support this. On that basis the Judge considered that they must have been retained.

61. As to the value of the Husband's participation shares, the Judge noted that whilst they may have diminished in recent weeks, that was the way of shares. He noted that, historically, the participation shares had always appreciated in value over a longer window of time. Accordingly, he did not accept that any circumstance presented which justified their being valued at a discounted price.

62. The Judge also considered the litigation in which the parties were involved. He noted that the litigation concerning Property 2 and the property in France appeared largely to have resolved and that the boundary dispute relating to the family home had also largely resolved. He noted that the Wife had no issue with the damages received in respect of the Property 2 being divided on a 50:50 basis. Regarding the possibility of ongoing proceedings in France, it seemed to him that the sum of €70,000 (as mooted by the Wife) should be set aside as a contingency sum in this regard rather than the smaller sum of €50,000 (as mooted by the

Husband). If there was money left over at the end of the day from the €70,000 amount, this could be divided equally between the parties. Insofar as there was a sum required for the rectification of the garden boundary of the family home, as understood from the *D v. D* schedule the Husband had actually offered €40,000 more in this regard than the cost which the Wife had estimated. The Judge thus proposed to order the amount estimated by the Wife.

63. The parties' accommodation needs were addressed at para. 33 of the judgement. Regarding the Wife's needs, the Judge proposed to order that the family home be transferred to her. He also proposed transferring Property 1 to her, noting that that property would be a good source of income when the mortgage was cleared. The property in France (which was mortgage free) would also be transferred to the Wife.

64. In the trial of the proceedings, the Wife had sought that she would also be given Property 2 so that she could use it, as noted by the Judge, as a *"possible"* tax shelter in the future if she disposed of another property or asset. The Husband had opposed this. The Judge noted that although the Husband lived abroad, he was from Ireland and, understandably, *"wants a wants a toehold here when he retires"* (para. 33). He noted that the Husband owned no other property in Ireland or in his jurisdiction of residence (save his joint ownership of the parties' four properties (of which three were being transferred to the Wife)) and that his accommodation in his jurisdiction of residence was rental property rented using a generous accommodation allowance which would come to an end when he retires from the Company.

65. The Judge was not persuaded by the Wife's argument that the Husband was getting a large portfolio of shares and would therefore have future earnings therefrom. He noted that the Husband had only a few years of employment left with his present employer and that the Husband had struck him as not *"entirely enthusiastic"* about the prospect of his taking up post-retirement employment. As matters stood, the Wife was being awarded three of the

parties' four properties and the Husband (by comparison) was getting a relatively modest property. It thus seemed to the Judge that he would not be making proper provision for the Husband were the Wife to get all the properties, leaving the Husband with nowhere to live in Ireland unless he raised the funds to do so at a time when he was *"advanced in years and when rising property prices seem again to be the norm in this jurisdiction"* (para. 33).

66. Addressing the two pension funds available to the Husband, the Judge noted that one pension scheme sat in Ireland and was therefore susceptible to an Irish court order. The assets of the second pension scheme sat in the Isle of Man and were not so susceptible. Consistent with his general approach of making roughly equal provision for the parties, the Judge considered that the only way open to him was to order the (smaller) Irish pension fund to the Wife, leaving the (larger) Isle of Man pension fund to the Husband, and also to require the Husband to make an equalising payment of €167,000 to the Wife so that, in effect, they both get an equal division of the total present pension funds.

67. Dealing next with the death-in-service benefit which accrues to the Husband's employment, the Judge noted that this benefit was a substantial one. Whilst he could see the logic of ordering that the Wife should receive some of this benefit, the fact of the matter was that the fund in question was outside the jurisdiction of the court and, hence, any proposed order would be *"futile"*. He went on to state, however:

> *"If before I come to making my orders in this matter the parties can agree some alternative form of order regarding the death-in-service benefit that would not be futile for me to make, I will consider including same in my final orders (and almost certainly will include it if it has been agreed)."* (para. 36)

68. One of the issues of contention between the parties concerned a gift of €100,000 advanced by the Husband to one of the parties' children. The Husband had done so without consulting the Wife. Whilst it was not clear to the Judge what the cause of the Wife's

umbrage was, he considered that it may be because the Wife considered that all of the couple's children should be treated equally. However, the Judge did not factor the €100,000 that had been advanced by the Husband into the provision to be made for the parties and he stated that, ultimately, the Wife could arrange matters in her Will to ensure that, after she dies, provision in a suitably lower amount is made by her for the child who benefited from the advance than the provision made by her for her other children.

69. Ultimately, having regard to the provisions of Article 41 of the Constitution, the provisions of s. 20(2) of the 1996 Act, and the applicable case law (to which the Judge had referred in his judgment), the Judge considered that the orders he proposed to make constituted proper provision for the parties.

70. As to the petition for a decree of divorce, the Judge was satisfied that the parties met the criteria for the grant of a decree of divorce. The post-divorce *"proper provision"* would be as indicated by the Judge in his judgment. To that end, he requested the parties to agree a form of order that reflected his judgment.

71. At para. 42 he directed that the Husband would retain his shares portfolio (para. 42).

72. At para. 43, the Judge repeated his view he had earlier expressed regard the Husband's death-in-service benefit.

73. As regards the €100,000 which the Husband advanced to one of the children of the marriage, the Judge's sense was that this should be a liability of €50,000 for each party.

74. Para. 46 of the judgment is in the following terms:

> *"Finally, I note that …thanks to the delay caused by [the Wife] in bringing the decision of the Court of Justice to my attention after I reserved judgment (and when I was on the verge of issuing my judgment) – and I make no criticism but there <u>was</u> a delay – the markets-related figures at play in these proceedings may have moved on considerably, thanks to the battering that the stocks and commodities markets have*

taken in recent weeks. It may therefore be that exceptional circumstances call for an exceptional re-visitation of the share/pension values at play in these proceedings. If [the Husband] wishes to make this contention, I will hear the parties on whether I can/should proceed in this exceptional manner before I make my final orders."

The procedural history following the delivery of the 2 June 2022 judgment.

75. The matter came back before the High Court on 28 July 2022. This was in circumstances where pursuant to para. 46 of the judgment, the Husband had intimated by letter of 14 June 2022 to the court from his solicitors, that he wished to revisit the valuation of his share portfolio. On 28 July 2022, counsel for the Husband advised the Judge that he would be calling Mr. Hyland, the Husband's accountant, to deal with the matter.

76. It is also the case that by the time the matter came back before the High Court on 28 July 2022, the Wife had served a notice of motion returnable to 10 October 2022 to *"discharge her Solicitors".* The notice of motion was accompanied by an extensive affidavit filed by the Wife on 19 July 2022 which referred to numerous issues and purported to attach fourteen exhibits (which were in fact not served).

77. Counsel for the Wife was present in court on 28 July 2022 and, with the agreement of the Wife, applied to the High Court for the Wife's legal team to be discharged, an application to which the Judge acceded. The matter then proceeded with the Wife as a lay litigant.

78. Further to submissions made by counsel for the Husband, and the submissions of the Wife (in particular with regard to what were described as two *"Keytrade"* accounts and also alleged difficulties in receiving maintenance), the matter was duly adjourned to 6 October 2022 with directions to the Wife to file a motion setting out what she was seeking with regard to the matters set out in her affidavit of 19 July 2022, and for her to serve the exhibits referred to in her 19 July 2022 affidavit. She was not obliged to refile the affidavit sworn by her on 19 July 2022. The Wife's erstwhile solicitors were directed to furnish the Husband's legal

team with the draft order which counsel for the Wife had drafted consequent on the judgment delivered on 2 June 2022.

79. When the matter came back before the High Court on 6 October 2022, counsel for the Husband duly applied for a date for the court to hear the evidence of the Husband's accountant, Mr. Hyland, in relation to the alleged decrease in value of the Husband's share portfolio and he undertook to provide Mr. Hyland's report to the Wife in advance of the hearing date. The Wife intimated that she wished the court to revisit what she described as *"the true values of the stock options and shares and pensions"*, said by her to have been confirmed by two tax lawyers in the jurisdiction in which the Husband worked and resided, and which she claimed had been obscured by the Husband in the course of the trial, the consequence of which was that the true values were not before the court for the purposes of the judgment it gave on 2 June 2022. The Wife also advised the court that she had new solicitors ready to come on board.

80. The matter was duly adjourned to 9 December 2022 for hearing.

81. By the time the matter came back before the court on 9 December 2022, the Wife had procured a new legal team. She had also sworn a further affidavit on 6 October 2022 supplemental to the affidavit she swore on 19 July 2022. Moreover, she had sworn yet another affidavit on 8 December 2022, also before the court. The court also had the affidavit of Ms. Avril Mangan, the Husband's solicitor, filed on 23 November 2022 in response to the Wife's affidavits of 19 July 2022 and 6 October 2022. The position of Ms. Mangan, as deposed to in her affidavit, was that all matters raised in the Wife's affidavits were *res judicata* and that the court was *functus officio* in the matter save and except the determination of the matters raised at para. 46 of the judgment of 2 June 2022, in respect of which the Husband had duly applied for same to be revisited.

82. On 9 December 2022, the new counsel for the Wife applied for the matter to be adjourned so as to allow her time to review matters, particularly with regard to what was described by counsel as the *"paucity"* of the disclosure that had been made in relation to the Husband's pensions. Counsel also referred to correspondence which had been furnished by the Wife's new solicitors to the Husband's solicitors on 1 December 2022 which adverted to the Wife's understanding that the Husband's position in the Company had changed and seeking clarification on that issue. The solicitors had also asked for a copy of the share plan in respect of the Husband's stock options from 2017 -2021, as well as up-to-date information relating to the Husband's pension plans. Counsel for the Wife advised the court that the Husband's solicitors had responded by letter dated 8 December 2022 enclosing a report from the Husband's accountant, Mr. Hyland. Counsel also advised that the affidavit sworn by the Wife on 8 December 2022 concerned matters in respect of which the Wife was seeking to have further evidence heard. It was intimated that the court may have to hear from Ms. Daly, the Wife's actuary. Counsel also stated that she required time to read the draft order which had been furnished by the Wife's legal team.

83. The Wife's application for an adjournment, and the basis upon which that was sought, was opposed by the Husband. Counsel for the Husband contended that the sole issue that was before the court was the matter of the reduction in value of the Husband's share options and whether that should have any effect on the pension equalisation payment which the court had directed be paid to the Wife, a matter which, counsel stated, the Judge, at para. 46 of the judgment of 2 June 2022, had intimated could be re-visited upon application by the Husband. Counsel pointed out that the value of the Husband's shareholding as of 8 December 2022 was €1.292m, down from €1.4m as of 28 January 2022 and its earlier valuation of €1.6m as per the *D v. D* schedule in October 2021. In this regard, Mr. Hyland, the Husband's accountant had prepared an up-to-date report. It was contended that all other matters

(including those raised by the Wife in her 8 December 2022 affidavit) were *res judicata*. Counsel also advised the court that the Husband's position within the Company had not changed.

84. In response to the Husband's submissions, counsel for the Wife reiterated her argument that there had not been appropriate disclosure in the case and that on the basis of case law to which counsel referred, it was thus open to the Judge to re-open matters.

85. The Judge duly ruled that he would hear from the parties on 20 January 2023 in relation to the matters he himself had raised at para. 46 of his judgment (namely whether adjustments were required to be made in share and pension fund values because of fluctuations that had occurred in the market) and he would also hear argument as to whether it was open to him to *"hear the no appropriate disclosure point at all"*. Submissions were duly directed, and the matter was made returnable for 20 January 2023 for hearing.

86. On 20 January 2023, the High Court duly heard submissions from counsel on behalf of the Wife as to the court's jurisdiction to re-open matters. In support of her substantive submissions, counsel referred to the affidavit sworn by the Wife on 8 December 2022. She referred to a report compiled by Ms. McShane dated 18 January 2023, said to be Ms. McShane's response to the report prepared by Mr. Hyland in December 2022. Counsel also proffered a report compiled by Ms. Daly dated 17 January 2023.

87. Counsel for the Husband's position on the alleged lack of disclosure at trial and the Wife's attempt to re-open matters, was that none of the case law upon which the Wife relied could assist the Wife. He repeated his contention that the only issue left for consideration was the revisitation of shares/pension values. In that regard, the share valuations had been addressed in Mr. Hyland's report/schedule of 7 December 2022 where the Husband's shareholdings were valued at €1,424,360, a difference of €321,956 based on the October 2021 *D v. D* schedule. Counsel conceded, however, that the figures given in Mr. Hyland's

report had improved somewhat in the interim. He also conceded that if the court were to take the figures given in Ms. McShane's schedule of 27 January 2022 (which counsel for the Wife claimed were the figures relied on by the Judge for the 2 June 2022 judgment), then the differential in the value of the shareholding as of January 2023 was €83,431, which, counsel stated, the Husband was prepared to accept as the appropriate differential.

88. As regards pension values, since the time of the *D v. D* schedule (when the Husband's Isle of Man Pension was recorded as worth €1,045,000) there had been two payments into the fund, which brought the value of Isle of Man Pension to ca. €1,121,000. This figure was brought to the court's attention by counsel for the Husband way of a *"screenshot"* of the current value. The value of the Irish Pension Scheme was €738,200.

89. According to counsel for the Husband the total value of the pensions was €1,859,000, of which 50% amounted to €929,500. Subtracting the value of the Irish Pension Scheme, already directed to be paid to the Wife, left a balancing payment of €191,500 to be paid to the Wife. Counsel's submission, however, was that this balancing payment should be reduced by €83,431 to reflect the diminution in share values since the trial (the Isle of Man pension in part at least being dependent on share values).

The High Court judgment of 25 January 2023

90. The various submissions made by the parties on 20 January 2023 (of which only a snapshot is given in this judgment) were duly addressed by the Judge in a judgment delivered on 25 January 2023.

91. The Judge commenced his judgment by noting that after he had reserved judgment following the hearings in November/December 2021 and January 2022, and before he delivered the judgment of 2 June 2022, the Russian invasion of Ukraine took place. As a consequence, *"the markets took quite a battering".* Given, therefore, the implications for the stocks and shares valuations which had been given at the hearings, and the values which

had been attributed to the pension funds (given that they too were, at least in part, share value-dependent), he had duly made provision at para. 46 of his judgment of 2 June 2022 for that eventuality.

92. As noted by the Judge, at the same time the revisitation of the shares and pension valuations issue had been put in train by the Husband, the Wife's legal team ceased to act for her, and within a couple of months she had procured new legal representation.

93. The Judge noted that the various claims being made by the Wife post the delivery of the judgment of 2 June 2022 *"in effect require a fresh re-hearing of aspects of the divorce application"*. The Judge observed that whilst he had opened a *"small window"* (in respect to the shares/pension issue), he now found himself *"greeted with a bid [by the Wife] to go much further"*. He categorised the principal concerns which the Wife raised, as follows:

(1) That the Husband had contended (at the hearing of the action) that he was subject to an effective tax rate of 50% on his stock options, whereas the Wife maintained that the true effective tax rate was 32%-35%.

(2) The Husband had failed to provide certain pension fund valuations to the Wife since the judgment of 2 June 2022.

(3) The Husband had misled the court as to the true nature of his employment with the Company.

94. In the view of the Judge, the three points raised by the Wife could be dealt with swiftly. With regard to point (1)-the tax treatment of the parties (including the Husband's effective tax rate of 50.4%)-, the Judge noted that this tax rate had been agreed at the trial by the parties', respective, highly competent forensic accountants. To the extent that there was dispute, that had been adjudicated upon. Accordingly, there was no cause for dispute regarding the effective tax rate.

95. In relation to point (2), the Judge noted that the pension values as of 20 January 2023 had been provided/agreed by the Husband. As regards the Isle of Man Pension, he directed that a supplementary affidavit be filed in this regard exhibiting the *"requisite detail"*. He stated that the court order would duly reflect whatever figure was exhibited.

96. In relation to point (3), the Judge noted that at the principal hearing the Husband's future employment prospects with his employer and his likely pension prospects had been covered in extensive detail. The Judge was satisfied that there had been no promotion of the Husband within the Company and thus no change in the Husband's salary since the judgment of 2 June 2022, and, accordingly, he would proceed on that basis.

97. The Judge next turned to the issue which he had intimated, at para. 46 of his 2 June 2022 judgment, *could* be revisited, namely the valuations which had been given at the hearing in respect of the Husband's shares and pensions. He referred to what he had stated at para. 46 of the 2 June 2022 judgment, namely that there could be *"exceptional circumstances"* that might call for a revisitation of the share/pension values, albeit bearing in mind the *dictum* of Denham J. in *D.T. v. C.T.* [2002] 3 I.R. 334 that assets in proceedings such as the present should be assessed as of the date of trial. He noted that albeit the asset values here had taken *"a very real tumble"* (as he had suspected they might), the fact of the matter was that as their re-appraisal had taken so long to come on for hearing *"matters have largely righted themselves again"*. As matters stood, the Isle of Man Pension fund had increased in value (thanks to additional contributions, and also growth). Whilst the value of the shares had depreciated by about 6%, this was nothing out of the ordinary. It thus followed that the exceptional circumstances which presented at the time of the 2 June 2022 judgment no longer presented.

98. The Judge went on to note that the Husband had indicated on 20 January 2023 that he was satisfied for the court to proceed on the basis of the increase in pension values since

June 2022, even though this increase had accrued in part by dint of the additional contributions the Husband had made to the pension fund. Thus, the Wife would be the beneficiary of that prudence, and the related increase in pension value. It had also been intimated on 20 January 2023 that the Husband would abide by whatever decision the Judge made as regards in the alleged decrease in share values. As already indicated, the Judge did not consider that any exceptional circumstance presented as of January 2023 and, so, did not allow for any decrease in the share values.

99. The Judge considered that the net effect of the foregoing was that the Wife stood to benefit in terms of the proper provision which would be made for her.

100. At paras. 8-10, the Judge went on to consider the case law upon which the Wife relied in aid of her contention that the issues such as the Husband's tax rates and his employment status within the company should be re-opened. He found that none of the cases cited (*Re L and Anor* [2013] 1 W.L.R. 634, *Lavery v. DPP* (No 3) [2018] IEHC 185 and *Shao v. Minister for Justice (No. 2)* [2020] IEHC 68) were of any relevance to the matters before him. Moreover, in relation to other matters which had been raised on behalf of the Wife on 20 January 2023, he found that the draft order (subject to necessary changes which would follow upon the 25 January 2023 judgment) which counsel for the Husband had furnished the court *"well-captures"* what the court was proposing.

101. The Judge then stated he would hear the parties on the issue of costs and as to the detail of the order that was now to issue, advising that this was not an invitation to traverse matters already covered and adjudicated upon.

<u>The hearing of 3 March 2023</u>

102. In the wake of the 25 January 2023 judgment, the matter came back before the Judge on 3 March 2023. By this time, both sides had prepared draft orders consequent on the judgments delivered on 2 June 2022 and 25 January 2023. There were some differences

between the drafts and these differences formed part of the argument that was before the Judge on 3 March 2023. Moreover, as advised to the court, the Wife had sworn another affidavit on 2 March 2023, an unsworn copy of which had been furnished to the Husband's legal advisors two days previously. The affidavit purported to address the Husband's pensions and the joint accounts held by the parties.

103. Counsel for the Husband objected to this affidavit on the basis that the time for evidence was over, and that it was not appropriate for the court to be asked to reconsider factual matters. He submitted that the affidavit was endeavouring to go behind the court's judgment.

104. Ultimately, the Judge was prepared to treat the affidavit as an *"aide memoire"* to counsel for the Wife's submissions but stated that he would not treat it as evidence.

105. One of the issues of contention between the parties on 3 March 2023, in the context of the orders to be made consequent on the judgments, were the two *"Keytrade"* accounts relating to the Husband's share portfolio. Counsel for the Wife argued that the Wife was entitled to a half share in the Joint Keytrade account. She accepted that the Husband would retain the sole Keytrade account.

106. The Husband's submission was that the intention of the court, when it said at para. 42 of the 2 June 2022 judgment *"[The Husband] will retain his share portfolio"* was that the Husband was to receive all of the share accounts, including both Keytrade accounts, the shares being the *"more-risky assets"*. It was submitted that the Joint Keytrade account had always been dealt with by the Husband: the fact that it was a joint account was never an issue between the parties. Accordingly, the order of the court, it was submitted, should provide that 100% of the Joint Keytrade account would go to the Husband.

107. In response to this, counsel for the Wife contended that whilst it was a matter for the court to determine what was appropriate, the understanding of the Wife, at all times, was that the Joint Keytrade account would be divided equally between the parties.

108. Another issue of contention raised by the Wife on 3 March 2023 was the means by which the Husband had provided up-to-date figures for his Isle of Man Pension. It was contended that only a *"screenshot"* and, later, a statement from the pension trustees, had been provided by the Husband which, it was said, did not meet the *"requisite detail"* to which the Judge had referred at para. 7 of his 25 January 2023 judgment where he addressed what was to be provided to the Wife by way of up-to-date information in relation to pensions. Counsel's contention was that the Husband should provide an up-to-date pension statement.

109. The Husband's response was that the type of document the Wife was requesting came out only once a year. He also submitted that the kind of information the Wife was seeking was unnecessary in circumstances where she was to be the beneficiary of the Husband's Irish Pension Scheme, and the recipient of an increased pension balancing amount of €191,668 as calculated by the Judge, following the increase that had accrued to the pension funds since the 2 June 2022 and to which the Judge had been alerted in December 2022/January 2023.

110. The remaining issue of contention on 3 March 2023 related to the question of costs. Counsel for the Wife sought an order for costs in her favour from the period 14 June 2022 to date, on the basis that matters had been delayed by the Husband's action, in June 2022, in seeking a revisitation of the values that had previously been attributed to his shareholdings.

111. This was opposed by counsel for the Husband who submitted that in line with a long line of authority, the appropriate order should be no order as to costs. He disputed the contention that the delay which had arisen was the fault of the Husband, and pointed to the fact that from the time the Wife discharged her original legal team (in October 2022), it had taken some time for her to obtain a new legal team and for that legal team to acquaint

themselves with the case. In essence, the Husband's contention was that the delay arose because of the Wife's actions.

The Judge's ruling of 3 March 2023

112. In his ruling on 3 March 2023, the Judge acceded to the Wife's application that the Husband would provide more detail about his Isle of Man Pension. As I read the ruling, the Judge's intention was not to provide a pathway whereby the pension provision that had already been made would be re-opened; rather it was simply to provide *"comfort"* to the Wife. As regard the Joint Keytrade account, the Judge observed that *"it wasn't really as simple as property and risky assets, so I think that account, the joint account, should be divided equally between the parties*" and he so directed.

113. He went on to direct that the equalisation payments previously provided for should be made by 30 June 2023.

114. On the issue of costs, he accepted that a delay had arisen because of the application the Husband made in June 2022 pursuant to para. 46 of the 2 June 2022 judgment. However, he also accepted that there had been delay on the Wife's side. Therefore, he did not see any circumstances in which he should depart from making an order that each side would bear their own costs.

The High Court orders

115. Consequent on the judgments delivered on 2 June 2022 and 25 January 2023 and the 3 March 2023 ruling, by Order of 3 March 2023 (as perfected on 8 June 2023) the Judge granted the parties a decree of judicial separation pursuant to the 1995 Act and, pursuant to the same Act, made the following ancillary orders:

1. Pursuant to s.8(1)(c) and s.8(3), that the Husband pay to the Wife a sum of €360,000, to be paid in instalments of €120,000 over three years, to wit, on 31 March 2023, 31 March 2024 and 31 March 2025.

2. An order pursuant to s.8(1)(c) that the Husband pay the Wife a lump sum of €191,668 free of all deductions in order to equalise the pension benefits between the parties, the said sum to be paid on or before 30 June 2023.
3. An order pursuant to s.8(1)(c) that the Wife pay the Husband €12,250 being 50% of the damages recovered by her in respect of proceedings brought by her in respect of Property 2. The said sum to be paid on or before 31 March 2023.
4. An order pursuant to s.9 that the Wife shall transfer Property 2 to the Husband together with the contents thereof for his sole use and benefit subject to the mortgage thereon.
5. The parties acknowledged that the said transfer is subject to the consent of the lender. The Husband to be solely entitled to the rents and profits from the said property and solely liable for the mortgage repayments, with the Husband to indemnify the Wife irrespective of any liabilities arising in respect of the said property.
6. An order that the transfer of Property 2 into the sole name of the Husband take place as soon as practicable after the consent of the lender to the said transfer.
7. Orders pursuant to s.9(1) that the Husband transfer to the Wife for her sole use and benefit the family home, the French property and Property 1. An order pursuant to s.10(1)(a)(i) that the Wife be entitled to live in the family home for her lifetime to the exclusion of the Husband. An order pursuant to s.9(5) enabling the Registrar of the High Court to sign all necessary documents to give effect to the property orders made by the court should either party refuse following 21 days of a written request to do so.

8. Orders pursuant to s.36 that the Wife shall be entitled to retain sums in named bank accounts and credit card accounts (to include 50% of the Joint Keytrade account).
9. An order pursuant to s.36 declaring the Wife be entitled to retain the compensation funds held in her erstwhile solicitors' client account.
10. An order pursuant to s.36 declaring that the Husband shall be entitled to retain the funds in a number of named accounts.
11. An order pursuant to s.8 that the Husband pay to the Wife a sum of €77,500 for the purposes of equalising the amount held by the parties in the aforementioned bank and other accounts, such sum to be paid on or before 31 March 2023.
12. An order pursuant to s.36 declaring that the Husband shall be entitled to retain named credit card accounts and his share portfolio accounts (including 50% of the Joint Keytrade account).
13. An order pursuant to s.8 directing both parties to set aside €70,000 as a fund to deal with ongoing litigation concerning the French property, the said fund to be contributed to equally by the parties in the sum of €35,000 each, with any remaining sum from that fund to be divided equally between the parties following the completion of the litigation.
14. An order pursuant to s.8 that the Husband pay to the Wife a sum of €15,000 by way of contribution in respect of the costs of the boundary dispute concerning the family home, the said sum to be paid on or before 31 March 2023.
15. An order that all financial payments other than the pension payment shall be made to the Wife by electronic transfer to a named account in the Wife's sole name.

16. An order that all financial payments to be made to the Husband to be made by an electronic transfer to a named bank account held in the Husband's sole name.

17. An order pursuant to s.8 that the Husband pay to the Wife such gross sum as will pay to the Wife after tax the sum of €10,000 per month. The said maintenance to commence on the 1st day of April 2026 and each month thereafter until further order.

18. (a) The parties shall each discharge equally any income tax arising on the profits from the (previously) jointly owned rental properties up to the date of the court order being the income for 2021 and 2022. (b) The parties each to discharge 50% of the local property tax for the years 2020, 2021 and 2022 and any arrears. (c) The parties each discharge 50% of the management fees due on the (previously owned) joint properties up to the date of the court order and any arrears.

19. An order pursuant to s.12(2) that the Husband's Irish Pension Scheme and all the benefits payable thereunder be transferred to the Wife for her sole use and benefit, with Ms. Olga Daly, actuary for the Wife, to draft the necessary formal pension adjustment order to give effect to the judgment of the court.

20. An order pursuant to s.36 declaring the pension scheme based in the Isle of Man be held by the Husband for his sole benefit subject only to the equalisation payment directed by the court.

21. The court noted that the Husband has and will continue to nominate the Wife as 50% beneficiary of his death-in-service benefit while he is employed and noted his undertaking to do so.

22. A declaration that €100,000 given to one of the children of the marriage was a joint gift of the parties.
23. An order and a cross-order pursuant to s.14 on the basis of the undertaking given by the Husband in respect of his death-in-service benefit.
24. An order and cross-order pursuant to s.15A(10) on the basis of and subject to the aforesaid undertaking of the Husband in relation to his death-in-service benefit.
25. The Husband to provide full details to the Wife of his Isle of Man Pension Scheme by 30 April 2023.

116. In respect of the divorce proceedings instituted pursuant to the 1996 Act, by Order of 3 March (perfected on 8 June 2023) the court granted the parties a decree of divorce pursuant to s.5(1) of the 1996 Act, together with an order pursuant to s.26(2) of the 1996 Act, as amended, that all orders made pursuant to the 1995 Act in the judicial separation proceedings continue in force.

117. On 7 March 2023, the Judge refused the Husband's application for a stay on certain of the orders made on 3 March 2023.

The appeals

118. Two notices of appeal were duly filed by the Husband, one relating to certain of the orders made in the judicial separation proceedings and the other appealing against the failure of the Judge to make a blocking order under s.18(10) of the 1996 Act in circumstances where the Judge was satisfied to make mutual blocking orders under the 1995 Act.

119. In summary, in respect of the judicial separation proceedings and the orders made thereunder, the Husband's grounds of appeal are as follows:

- Grounds 1 and 6: The €191,688 pension equalisation sum directed to be paid to the Wife was excessive in light of all the evidence and further by directing that the said sum would be a net figure.
- Ground 2: The order directing that the Wife would retain half of the Joint Keytrade account was excessive, unfair and disproportionate in light of previous provision made for the Wife.
- Ground 3: The €77,500 sum directed to be paid to the Wife to equalise the amounts held by the parties in their different bank accounts was disproportionate.
- Ground 4: The order directing each party to pay €35,000 into an account for the purposes of litigation in France was unnecessary having regard to the evidence that such an amount was unnecessary.
- Ground 5: The order granting the Wife maintenance of €10,000 per month net from 1 April 2026 was made in the full knowledge that the Husband will be retired from full-time employment by then (despite whether he obtains consultancy work or not) and in the context where pension adjustment orders were made in the Wife's favour which are substantial. Hence, the maintenance order was excessive and disproportionate where the resources in the case were ample, and where the Wife was properly provided for under other orders in both asset and income form.
- Ground 7: Having invited further evidence and submissions on the issue of the fall in value of the Husband's shares, the Judge allowed the Wife's legal team to run arguments to change his entire judgment which had no basis in law or fact. The Judge's intention to consider the value of the shares and pensions was entirely usurped by the issues sought to be canvassed by the Wife. In any event, the Judge made no change to his order save to take the greater value of the Husband's Isle of Man Pension Scheme (achieved through contributions made after the trial) in order

to raise the amount which the Husband should pay to equalise the pension positions. This, however, was not appropriate, nor the purpose of the additional hearing.

- The Judge's refusal of a stay on part of the order and the costs ordered against the Husband in respect of the stay application was unjust and without reason or justification.

120. In his notice of appeal pursuant to the 1996 Act, the Husband asserted that the Judge erred in fact and in law in failing to make mutual s.18(10) orders.

121. By her respondent notices, the Wife opposed both appeals. There was no cross-appeal in respect of either appeal.

122. By notice of motion filed 17 July 2023 in this Court, the Husband sought a stay on the orders made by the Judge in respect of the Joint Keytrade account, together with a stay on the equalisation payment made in respect of the pension funds.

123. On 28 July 2023, this Court, by consent, made an order that there be no stay in relation to the Joint Keytrade account, and that a stay be granted in respect of the pension equalisation payment.

124. At the time she filed her respondent notices in the appeals, the Wife continued to be represented by the solicitors who had come on record for her in October 2022. By Notice of Change of Solicitor filed 9 November 2023, her solicitors changed. However, at the hearing of the appeals, the Wife was unrepresented, her newly appointed solicitors having come off record in early December 2023.

Discussion and Decision

125. In essence, the issues in these appeals concern proper provision in the context of divorce proceedings. The jurisdiction of the court in divorce proceedings is ultimately derived from Article 41.2.3 of the Constitution which sets out what a court has to be satisfied of before a decree of divorce may be granted. Part of the duty on the court is to ensure that

proper provision is made for the parties. The obligation of the court and the obligation to make proper provision was articulated by Hogan J. in *C.C. v. N.C.* [2016] IECA 410 in the following terms:

> *"23. The jurisdiction of the Court is ultimately derived from Article 41.3.2 of the Constitution. This constitutional provision requires the Court to be satisfied in respect of four particular pre-conditions before a decree of divorce can be granted. The first two pre-conditions - namely, that the spouses have lived apart for at least four years and there is no prospect of reconciliation - are plainly satisfied. The dispute in the present case concerns the third and fourth pre-conditions prescribed by Article 41.3.2:*
>
> > *"(iii) such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them, and any other person prescribed by law, and*
> >
> > *(iv) any further conditions prescribed by law are complied with."*

126. As noted by Hogan J. at para. 24 of *C.C. v. N.C*, s.20 the 1996 Act may be said to give statutory effect to the constitutional requirement for proper provision. Section 20 provides:

> *"(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 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."

127. Looking at s.20(1), in particular the reference to *"all the circumstances"*, it is immediately clear that the language of subs. (1) vests a wide discretion in the trial judge as to the ambit and extent of the factors determined as relevant in a given case. In that regard, I endorse the view of Whelan J. in *N.O. v. P.Q.* [2021] IECA 177 that *"implicitly"* the checklist in s.20(2) is not to be treated as exhaustive. Albeit Whelan J. in *N.O. v. P.Q.* was speaking of s.16 of the 1995 Act and not s.20 of the 1996 Act in this context, there is no

distinction to be made between the two statutory provisions, as is made clear by Irvine J. in *Q.R. v. S.T.* [2016] IECA 421.

128. In essence, here, the Husband appeals against the exercise of discretion by the trial judge in determining what constituted proper provision in the context of the divorce proceedings that were before the court. In *D.T. v. C.T.*, [2002] 3 I.R. 334 in addressing how that discretion is to be exercised, Murphy J. had regard to the earlier decision of McGuinness J. in *M.K. v. J.P. (otherwise S.K.) (Divorce: ancillary relief)* [2001] 3 I.R. 371 who opined:

> *"The provisions of the 1996 Act, 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. In giving the decision of the court, a judge should give reasons for the way in which his or her discretion has been exercised in the light of the statutory guidelines."*

129. Keane C.J. too, in *D.T. v. C.T.*, agreed that a trial judge enjoys a relatively broad discretion when it comes to making an order for proper provision. He stated:

> *"While s. 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…, 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 of that discretion.*

Some principles which are to be applied in the exercise of the discretion are beyond dispute. As Hoffmann L.J. said of the corresponding English legislation in Piglowska v. Piglowska 1999 1 W.L.R. it establishes no hierarchy of factors. In what is probably still the typical Irish case, where one or both parties are in receipt of income, but their joint assets are not of such significant value as is the case here, the first task of the court will almost certainly be to consider what the financial needs of the spouses and the dependent children are." (p. 365)

130. The observations of Murray J. (as he then was) in *D.T. v. C.T.* as to the remit of judicial discretion in the context of proper provision are also apposite:

"The Oireachtas studiously avoided giving any prescriptive guidelines as to how the court should deal with the income and assets of the parties in making proper provision for the spouses. I draw attention to the particularly broad discretion conferred on a court in order to emphasise that while this court may decide on principles which should guide a court when exercising its jurisdiction under the Act of 1996, the very broad discretion conferred on a judge hearing a case of this nature will still remain to be exercised having regard to the circumstances of any particular case. Furthermore, it must be borne in mind that this is a case which the Chief Justice has aptly described as an 'ample resources case', which has the effect of giving full reign to the discretion which a court exercises in such cases. Normally, even in cases where the parties might be considered to enjoy a substantial decree of financial comfort, the finite resources of the parties will be an underlying prescriptive factor in the exercise of a discretion as to how those resources can be applied in making proper or fair provision for both spouses." (pp. 401 to 402)

One of the issues in this appeal is whether the Judge properly exercised his discretion in making the orders he made.

131. A further principle which can be derived from the case law is that the requirement is to make proper provision: it is not a requirement for the redistribution of wealth (as per Hogan J. in *C.C. v. N.C.*).

132. As observed by Keane C.J. in *D.T. v. C.T.*, in cases where the joint assets of the parties are not of particular significant value, the task of the court will be to consider the financial needs of the spouses and any dependent children and how those needs might be met. On the other hand, in cases where there are "ample resources" it is the standard of living before the break-up of the marriage that should guide the courts having regard to the available assets, income and property. The observations of Murray J. in *D.T. v. C.T.* in this latter regard merit mentioning:

> *"Proper provision for a spouse who falls into the category of a financially dependent 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."*

133. A further principle which derives from the case law is the assessment of the value of assets must be as of the date of the trial.

134. It is also the case that Irish law does not establish a right to a "clean break". This is, however, a legitimate aspiration. As put by Keane J. in *D.T. v. C.T.*:

"It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the "clean break" approach which are clearly beneficial. As Denham J. observed in F. v. F. [1995] 2 I.R. 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do not believe that the Oireachtas, in declining to adopt the "clean break" approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties."

135. In that case, Murray J. stated at p.411:

"I also agree that when making proper provision for the spouses, a court may, in the appropriate circumstances, seek to achieve certainty and finality in the continuing obligations of the divorced spouses to one another. This is not to say that legal finality can be achieved in all cases and any provision made may be subject to review pursuant to s. 22 of the Act of 1996, where that provision applies. However, the objective of seeking to achieve certainty and stability in the obligations between the parties is a desirable one where the circumstances of the case permit."

The issues in the appeals

136. The principal issues on appeal may be condensed as follows:

- The maintenance order to commence on 1 April 2026 in favour of the Wife.
- The Joint Keytrade account.
- The equalisation payments.
- The failure to make mutual s.18(10) orders.

137. I have earlier referred to the salient findings of the Judge on the question of proper provision. The Husband does not gainsay that the Judge, in arriving at what he considered to be proper provision for the parties, had regard (*in seriatim*) to the various factors set out at (a)-(l) of s.20(2) of the 1996 Act. Nor does he take issue with the relevant principles cited by the Judge as deriving from the jurisprudence to which I have referred above.

138. Rather, the complaints which the Husband advances are premised on two bases. Firstly, and fundamentally, he asserts that whilst the Judge correctly cited the principles established in the case law as regards how "proper provision" is to be achieved he failed to apply those principles in this case. It is contended that the Judge misapplied the law to the facts before him by over emphasising certain of the factors in s.20(2) of the 1996 Act and ignoring other factors which, it is said, has resulted in unfairness to the Husband in terms of the provision made for him in the judicial separation/divorce proceedings. It is also submitted that at no stage was there an acknowledgment by the Judge that most of the orders ultimately made by the court arose from open offers made by the Husband in the course of the trial. Furthermore, at no time was the Wife obliged to make a counteroffer, nor did she make a counteroffer.

139. Secondly, he asserts that the "clean break" principle (recognised by Denham C.J. in *Y.G. v. N.G.* [2011] 3 I.R. 717 as *"a legitimate aspiration"*) applied in this case. It is said that the clean break principle has been applied in many cases in the High Court. Whilst the present case was not a large ample resources case, there were and are, it is said, sufficient assets to finalise matters in a conclusive way between the parties without the need for further litigation and particularly without the need for the court to have made a post 1 April 2026 periodic payments order. It is contended that the post-1 April 2026 maintenance aspect of the High Court Order will inevitably lead to further unnecessary litigation. As the High Court transcript demonstrates, the emphasis of the Husband throughout the trial was in achieving

a clean break, in circumstances where, it was contended, the resources of the parties and, more particularly, the open offer being made by the Husband, allowed for such "clean break".

140. The wife's overarching submission, as set out in the written submissions filed on her behalf, is that the orders made constitute proper provision for herself and the Husband as explained in the judgments of 2 June 2022 and 25 January 2023 and 3 March 2023.

141. Bearing in mind the principles derived from the applicable case law, and the parties' respective submissions, I turn therefore to the Husband's overarching contention that the manner in which the Judge exercised his discretion in making certain ancillary orders was unfair and unjust in all the circumstances of the case.

The requirement to pay ongoing maintenance of €10,000 net per month post 1 April 2026

142. The Husband says that imposing a periodical maintenance obligation on him is both unreasonable and unjust in circumstances where the High Court made substantial capital and pension provision for the Wife. The capital provision, it is said, comprised most of the parties' real assets being transferred to the Wife and, indeed, was in line with the Husband's open offer to the Wife.

143. It will be recalled that the open offer made by the Husband included that the family home, Property 1 and the French property would be transferred to the Wife. The Husband asserts that the family home (a six-bedroom, four-bathroom property with a modest mortgage) is a property from which the Wife can downsize in the future thereby giving her additional liquid cash. Moreover, Property 1, also offered to the Wife pursuant to the open offer, is a secure rental property and which, the Husband contended, will supplement the Wife's income once the mortgage on it is paid off. Additionally, the French property (also offered in the open offer) produces a rental income during the Summer months. Over and above the real property on offer, the Wife was offered the Husband's Irish Pension in its

entirety (which, it was said, at a value of three quarters of a million euros comprises a substantial pot) and a division of the parties' cash resources. On top of this the Husband had made a final maintenance offer of €60,000 per annum net payable over the four remaining years of his employment. All of this, it was said, was designed to afford the Wife security going forward.

144. It is common case that the Husband's offer as regards the transfer to the Wife of the family home, Property 1, the French property, the Husband's Irish Pension and certain cash deposits were implicitly accepted by the High Court as going some way towards proper provision albeit proper provision, in the view of the Judge, could only be achieved by also providing for the two equalisation payments he directed together with an increase in the lump sum maintenance offered by the Husband and an order for periodic maintenance post 1 April 2026.

145. Prior to the 2 June 2022 judgment, what was in contemplation by the Husband in terms of maintenance for the Wife was a lump sum payment of €240,000 payable in annual tranches of €60,000 over four years until the Husband's retirement. In terms of the Husband's offer of lump sum maintenance offer, however, as just referred to the court made different provision. The Judge did not consider the offer of €60,000 per annum to be sufficient for the Wife's needs. Accordingly, in the 2 June 2022 judgment he increased the annual lump sum maintenance payments to €120,000 per annum with the intention that this sum would be payable over a period of four years. As is clear from para. 17, in setting the annual maintenance lump sum at €120,000 payable for four years, the Judge's thinking was that this would assist the Wife in paying off the mortgages on the family home and Property 1 sooner rather than later, as well as assisting in the discharge of costs incurred in connection with the within proceedings.

146. Ultimately, when the court came to make its Order on 3 March 2023 (some nine months or so after the 2 June 2022 judgment and when most of the first contemplated year of maintenance at €120,000 per annum had passed) the provision actually made was for a €360,000 lump sum to be paid to the Wife in instalments of €120,000 over three years, with the first instalment to be payable on 31 March 2023, the second on 31 March 2024 and the third on 31 March 2025.

147. As already referred to, pursuant to the High Court Order of 3 March 2023, the Wife is also the beneficiary of fifty percent of the parties' cash resources, achieved by means of the allocation to each of the parties a specified number of their various bank accounts and other accounts holding monies on their behalf and supplemented, in the case of the Wife, by a balancing payment of €77,500 to be paid to her by the Husband so as to achieve a 50:50 split of the parties' cash assets. Furthermore, the Wife was granted a further equalisation payment to top up the Husband's Irish Pension, which was being transferred to her, again, to achieve parity with the Husband's Isle of Man Pension fund, which he was retaining. As of 2 June 2022, the pension equalisation payment which was being provided for was €167,000 (being the rounded-up differential in value as between the Isle of Man Pension and the Irish Pension).

148. Following the hearings in December 2022/January 2023 the pension equalisation of €167,000 was varied upwards by the court to €191,668. The circumstances by which this increase came about are described earlier in this judgment.

149. The aforementioned provision for the Wife as made by the Court pursuant to the 3 March Order left the Husband with ownership of his share portfolio (save that he received only fifty percent of the Joint Keytrade account-a matter to which I will return), his Isle of Man Pension and Property 2 (which has a substantial mortgage, and which was valued by the Wife's accountant after costs of sale at €7000 net).

150. To return again to the issue of maintenance, as we know, in the 2 June 2022 judgment, the Judge went on to make further provision for the Wife by way of monthly maintenance payments of €10,000 net, to commence on 1 April 2026. These payments are to commence at a time when the Husband will be retired from his employment with the Company. This is the principal issue in the appeal.

151. The Husband contends that the order requiring him to pay monthly maintenance of €10,000 net from 1 April 2026 was unfair and unjust in all the circumstances of this case. In the first instance, he points out that the issue of periodic maintenance after his retirement from the Company was never really canvased by the Wife in the course of her evidence: rather, it is said, the claim for lifelong maintenance is largely found in the Wife's written submissions in the High Court, and later repeated in the course of her then counsel's oral submissions on 13 May 2022. I should say that the issue was also canvassed during the trial on 5 November 2021. It was also the subject of exchanges between the Judge and respective counsel on 6 April 2022, as follows:

> *"Judge: Can I just ask an entirely unrelated question, … there's a division in the submissions about … maintenance into the future.*
>
> *[Counsel for the Wife]: Yes*
>
> *Judge: And then [the Husband] saying it should be maintenance to the retirement date.*
>
> *[Counsel for the Wife]: Yes*
>
> *Judge: Is it open to a judge in any case to sort of kick matters to touch a little bit and say "well, I'm going to make an order to this point and then we'll come back to it at a future stage? Or do I have to make the order now and then if a party wants to revisit it at a future stage they come back?*

[Counsel for the Wife]: My understanding, My lord, and I thought I might have canvassed this in submissions…. The Court has the option of saying that the maintenance situation could be reviewed depending on any change in circumstances in the future, or words to that effect.

Judge: But you can't kick it touch, can you, and just say: well, I'm happy up to 2024 to say this and then it would have to be looked at?

[Counsel for the Wife]: No, you could… I mean it's open to the Court to adjourn it to 2024 or to be able to apply in 2024 if the parties can't organise, or whatever the date the Court deems to be relevant. That is certainly a matter that the Court can direct, my lord, and then the parties can either sort it out themselves or come back in.

Judge: Alright, that's great…

[Counsel for the Wife]: That would be my submission, my lord.

[Counsel for the Husband]: I'd like to address that point first, Judge. I'm slightly concerned by the question from the Court, to be honest with you, Judge. This is an ample resources case. It's not a major ample resources case but it is an ample resources case. Both sides have put forward proposals where there would be a substantial transfer of assets to [the Wife]. The point of that transfer is not for any – not for the fun of it so to speak. It is to give her security and income into the future. Recognising that the pension doesn't commence until a certain age, my client offered to pay maintenance that was varied to lump sum maintenance due to [the Wife] not wishing to pay tax. But it is at all times was my client's desire that this would be a clean break and to some extent that was [the Wife's] position during the case. It was only in the submissions that this idea of periodical maintenance into the future forever was really raised and heavily canvassed. It had not been canvassed in that

way during the case. I would urge the Court not to leave ends untied. This should – the parties should end this litigation for once and for all."

It is, I think, fair to say that as counsel for the Husband pointed out, the heart of the Husband's appeal stems from these exchanges.

152. Although on 13 May 2022, in the wake of receipt of the parties' respective written submissions, the Judge had flagged the idea of requiring evidence on the issue of maintenance for the Wife continuing after the block maintenance payments ended, ultimately the Judge had or took no evidence as to how the maintenance payment of €10,000 net per month, payable from 1 April 2026, would be funded by the Husband after he retired from the Company in 2025. The height of the Judge's reasoning was that if that sum did not work out for the Husband, he could apply to court for it to be looked at.

153. Counsel for the Husband says that there was no evidence before the High Court to justify a lifelong maintenance order and that there was no discussion as to how this sum would be sourced. He submits that there was no proper engagement by the Judge with the question of what the Husband's position would be post his retirement from his employment. More egregiously, counsel says, there was no engagement by the Judge as to the probable source from which the Husband would derive an income post-retirement sufficient to pay the Wife €10,000 net per month by way of maintenance. Nor, he says, was there any engagement as to how the Husband would be in a position to maintain himself, post-retirement, in the face of a €10,000 net monthly maintenance obligation to his wife.

154. It is claimed that the Husband would have to earn €240,000 gross per annum post 1 April 2026 just to provide the Wife with €10,000 net per month maintenance and that, in effect, the order requires the Husband to have an income of €20,000 gross per month just to fund the monthly maintenance payment. This is even before even considering his own needs. That, counsel for the Husband says, is unfair in circumstances where after he retires the

Husband will have to provide accommodation for himself, together with health insurance and a car. Counsel points to the fact that the Husband's only real asset is Property 2 which is heavily mortgaged. The other significant asset retained by the Husband is his share portfolio. It is submitted, however, that these shareholdings are subject to fluctuation on the open market and to currency fluctuations. All of this, it is said, underscores the fact that following the divorce, the Husband was left with the more-risky assets.

155. It is also, counsel says, unfair to impose on the Husband the obligation to have to re-enters matters in the manner suggested by the Judge at para. 19 of his 2 June 2022 judgment. It is claimed that the life-long maintenance order ensures and guarantees further litigation between the parties. Counsel asserts that as is clear from the history of the within proceedings, any attempt by him to vacate or vary maintenance (which the Judge at para. 19 anticipated would be made) will be litigated in full by the Wife.

156. It is further submitted that if the court was going to impose lifelong maintenance, then the Husband should have been left with Property 1 in circumstances where he had only offered the Wife his interest in this property in order to give her further income security over and above the substantial pension provision already being offered to her and the security being afforded her by the transfer to her of the Husband's interest in the family home and the French property.

157. Counsel further points to the submission he made to the Judge on 13 May 2022 that the Husband did not want an ongoing maintenance obligation and that a "clean break", to include a capital maintenance lump sum for the Wife until the Husband's retirement, was the best way forward. This capital maintenance lump sum was in addition to the Husband's offer that the family home and two other properties, as well as his Irish Pension, would be transferred to the Wife (all of which were duly directed by the court together with the direction that the Wife would be the beneficiary of half of the parties' cash resources). It is

submitted that the purpose of such transfers, from the Husband's perspective, was that the Wife would have assets from which she could derive an income in the future.

158. In her written submissions to this Court, by way of counter argument to the Husband's complaint regarding the issue of ongoing maintenance, the Wife points to the fact that when he retires the Husband will have a significant income from his share options so that his overall wealth will be very significant. The written submissions refer to the vested shares at the time of the trial having a value of approximately €1,400,000. It is also pointed out that the Husband had admitted in evidence that there was scope for him to continue in his employment although it is acknowledged that this was not his preference. The written submissions also point out that post the Husband's retirement, the Wife will have liabilities outstanding on both the family home and Property 1 of approximately €180,000 with a pension of less than €2000 per month from the Irish Pension and a net rental income from Property 1 of €1350 per month. This, it is said, is to be contrasted with the Husband's substantial share portfolio which he can encash over several years to supplement his pension. Moreover, all of that is over and above his current share options.

159. In her oral response to the arguments canvassed on behalf of the Husband, and this Court's observation that there appeared to have been no evidence before the High Court from which the Judge could derive that the Husband would be in a position post his retirement to pay her net maintenance of €10,000 per month, the Wife points to the fact that she had previously been receiving €10,000 per month from the Husband until September 2019 when he unilaterally reduced it to €8,500 per month.

160. It seems to me that whilst it may well have been the case that the Wife was receiving €10,000 per month maintenance prior to September 2019 (and indeed in receipt of a sum of €8,500 per month thereafter until different provision was made for her in the judgments and 3 March Order), the major difficulty, that presents here, to my mind, is the absence of any

real rationale set out by the Judge, either in the 2 June 2022 judgment or the 25 January 2023 judgment, as to how, post 1 April 2026, a net monthly payment of €10,000 by the Husband to the Wife is likely to be funded post his retirement. As the High Court transcript indicates (and as the Judge himself acknowledged), the Husband's evidence was to the effect that he will be retiring from his present employment in 2025. This is adverted to by the Judge at para. 11 of the 2 June 2022 judgment. Albeit he considered it *"conceivable"* that the Husband might take up some other form of employment post-retirement, as also noted by the Judge, the Husband's evidence was that he was not sure about this or even if he wanted it. On 5 November 2021, he testified as follows: *"…I have…no intention of working after 65 and I don't know what the situation will be after 2023*." (The reference to *"the situation after 2023"* was as to whether in 2023 when his present contract ended the Husband would secure a contract similar to his existing contract. There was no great suggestion that he would not.) Regarding the situation post his retirement, however, ultimately, the Judge considered it sufficient that the Husband *"will likely enjoy some income-generating potential past his mandatory retirement age"* to order him to pay ongoing monthly maintenance of €10,000 per month post his retirement.

161. To my mind, the Judge's direction that the Husband is obliged to pay €10,000 per month post 1 April 2026 was arrived at without his having before him the requisite evidential basis from which he was satisfied that there would be *employment* income from which the Husband could pay the Wife €10,000 net per month post his retirement from the Company. As I have already indicated, the Judge himself regarded the question of the Husband working post-retirement *"as a big 'if'"*, noting that he *"did not seem entirely enthused by the prospect"* (para. 18). He opined in similar terms in respect of the Wife's contention that the Husband *"will continue to work and make money"* when he stated *"As to the 'he will continue to work and make money argument', Mr A has only a few years of employment left*

with his present employer and, as already mentioned, it did not seem to me that he was entirely enthusiastic about the prospect of his doing post-retirement work" (2 June 2022 judgment, para. 33).

162. In my view, and as the Judge's own observations bear out, there was little concrete evidence in the court below that the Husband was likely, from 2026 onwards, to be in gainful employment of such nature as would enable him to pay the Wife net monthly sum of €10,000 without the Husband having to dip into his retained capital assets.

163. In her oral submission to this Court, the Wife repeated her contention that the Husband could work up to age 70, and that in any event, even if he retired at age 65, his stock options last up to age 72. She submitted that the Husbands' share options and shareholdings are very lucrative and that his share portfolio has increased in value since January 2023. On the other hand, her standard of living had decreased, and her funds have been drained because of legal fees.

164. In response to the Wife's submission counsel for the Husband reiterated that the Husband is retiring from his employment at age 65. Furthermore, he submitted that the share options which the Husband has retained as per the High Court Order of 3 March 2023 ought not to be considered the probable resource from which ongoing maintenance could be paid and that, in any event, the shareholdings had already taken into account by the Judge in determining the proper provision for each party.

165. Clearly, the Wife's argument as to the Husband's capacity to pay her €10,000 per month by way of maintenance post 1 April 2026 is premised, in part at least, on the Husband having recourse to income from his primary capital asset (his shareholdings) in order to do so. Two things follow from this, in my view. First, the Judge did not indicate that the Husband would be obliged to fund the monthly payments of €10,000 net from his shareholdings. Indeed, as is evident from both the 2 June 2022 judgment and the 25 January

2023 judgment, the Judge's rationale for the payments he was ordering post 1 April 2026 was premised on the Husband being in some sort of gainful employment similar to his current employment albeit, as I have said, there was no real evidence before the High Court that the Husband was likely to be in receipt of a gross salary of €20,000 per month post 1 April 2026 as would be required to fund an obligation to pay the Wife €10,000 per month net.

166. Secondly, as regards the Wife's argument that even if he retires age 65 the Husband's stock options will last up to age 72, as I have said the Judge did not base his conclusion that the Husband should pay €10,000 per month to the Wife from income derived from the Husband's retained shareholdings. Indeed, as is evident from para. 33 of the 2 June 2022 judgment, the Judge was not convinced of the Wife's argument that the Husband will have future earnings from his shareholdings. As noted by the Judge, *"experience shows that shares can rise and fall significantly in value"*.

167. Thirdly and more fundamentally, from the tenor of the judgments of 2 June 2022 and 25 January 2025, the Husband's shareholdings were clearly not considered by the Judge in the context of a likely income well from which maintenance payments post 1 April 2026 could be drawn.

168. It is the case that neither the 2 June 2022 judgment nor the 25 January 2023 judgment advert to the exact value of the Husband's shareholdings as of the date of trial (November 2021-28 January 2022), which, as the case law has directed (and as the Judge acknowledged at para. 6 of his 25 January 2023 judgment), is the requisite date for the purpose of asset valuation. In her oral submissions to this Court (and in aid of her contention that the Husband's shareholdings are a source from which continuing maintenance could be derived), the Wife was at pains to emphasise that the likely values the Judge put on the Husband's shareholdings were those contained in Ms. McShane's updated report of 27

January 2022 and not those contained in the *D v. D* schedule. Be that as it may (and indeed even accepting that to be the case), I do not think that it is controversial to say that overall the parties' respective experts were largely in agreement as to the value of the Husband's shareholding in the Company, save as to the value of his participation shares and the question as to whether the Husband continued to retain [certain named shares]. Ultimately, these two issues were resolved by the Judge in the terms outlined at paras. 25 and 26 of the 2 June 2022 judgment.

169. The underlying premise of the judgments in issue here (the issue ongoing maintenance from 1 April 2026 apart) is that the Judge considered proper provision for the parties required a roughly 50:50 division of the marital assets (together with a lump sum maintenance payment of €360,000 in order to equalise the parties' respective monthly income until such time as the Husband retires). On any logic, the assets in the contemplation of the Judge comprised the Husband's shares portfolio, the parties' real property, their cash deposits and the Husband's two pension funds. As we see, the parties' assets were divided in such manner as to leave the Husband with Property 2, his Isle of Man Pension, half the cash deposits and his (sole) shareholdings. The €360,000 maintenance lump sum was clearly envisaged by the Judge as money for the Wife's ongoing day to day needs until April 2026, as well as assisting her to pay off existing debt (including mortgage debt and the costs of the proceedings) thereby leaving the Wife with *"unencumbered title to property that has earning potential in the years ahead"* (para. 17).

170. I note that the Husband takes issue with the emphasis placed by the Judge on securing a 50:50 division of the parties' assets, counsel arguing that the requirement as per the relevant legislation and the case law is for proper provision to be made having regard to the provisions of s.16(2)of the 1995 Act/s.20(2) of the 1996 Act, and that it is not a requirement for the redistribution of wealth or a 50:50 division of assets. Counsel also submits that even if the

Judge was correct in approaching the issue of proper provision on a 50/50 basis, there should in any event have been no order for maintenance post April 2026 in favour of the Wife, having regard to the division of the parties' assets as made by the Judge, and having regard to the lump sum capital maintenance payment made in her favour.

171. Whilst it is the case (as indeed the Judge acknowledged) that proper provision does not require that assets are required to be split equally between the parties to a marriage, in my view that does not mean that there are not cases where proper provision can only be achieved by a 50:50 division of the parties' assets. The view of the Judge was that this was one such case. Albeit that, for the reasons set out below, I part company with the approach taken by the Judge to the issue of ongoing maintenance post 1 April 2026, I am satisfied that, otherwise, the Judge was well within the parameters of his discretion in concluding that a roughly 50:50 split of the parties' assets constituted proper or *"fair"* provision for each of the parties having regard to the factors the Judge took into account, not least the fact that the parties' assets were built up during the marriage, as outlined by the Judge in the 2 June 2022 judgment.

172. Accordingly, the Judge's rationale for his conclusion that proper provision required an equal division of the assets cannot be criticised, in my view. Ultimately (save for the issue of the Joint Keytrade account and certain aspects of the pension equalisation payment made on 3 March 2023, both of which I address below), the Husband does not seriously seek to challenge the manner in which the marital assets were divided. Nor does he challenge the €360,000 lump sum maintenance arrived at by the Judge. As we see, however, he asserts that the Judge fell into error in providing for ongoing maintenance post 1 April 2026 in the manner he did.

173. I agree. Whilst I accept entirely that the future earning potential of the parties must be factored into the equation and whilst ever mindful of the factors pursuant to s.16(2) of the

1995 Act/s.20(2) of the 1996 Act to which regard must be had before a judicial separation/divorce is granted, in my view by directing ongoing maintenance of €10,000 net per month post 1 April 2026 in the manner he did the Judge failed to have regard to the state of the evidence then before him as to the likelihood, post his retirement, of the Husband continuing in gainful employment of a nature equal to or similar that of his current employment. The preponderance of evidence pointed to the Husband not re-entering the jobs market post-retirement, as indeed the Judge seemed to recognise at certain points in his judgment. Certainly, there was no evidence before the court to suggest that the Husband would likely be earning, post-retirement, a salary of €240,000 per year, which is the sum that would be required to fund monthly maintenance net payments of €10,000 to the Wife, without even considering the Husband's own day-to-day needs.

174. I also consider that the absence of any real evidence at the time of the trial that the Husband was likely to be in receipt of *employmen*t-related income of €20,000 gross per month post-retirement (which is approximately what he would need to earn just to fund the monthly maintenance) cannot be compensated for by the Judge pointing to the Wife's indisputable contribution to the accumulation of the marital assets and the undoubted loss she sustained to her earning potential going forward by virtue of her long-time primary commitment as a homemaker, or indeed the Judge pointing out that there would be a *"a fundamental unfairness (want of proper provision) at play in the notion that Mr A could continue to 'cash in' fully on the continuing proceeds of a career that he was freed in part to enjoy by Ms a's action, retaining 100% of the profits from a career in which his wife had also invested"* (para. 18). In my view, something more concrete was required upon which to fasten an ongoing maintenance obligation of €10,000 per month.

175. Furthermore, it must be borne in mind that the Judge had quite properly already taken account (as indeed he was statutorily required to do) of the Wife's substantial contribution

throughout the marriage to the accumulation of the marital assets when making property transfer orders and a pension adjustment order in her favour, directing payment to her of an increased maintenance lump sum of €360,000 and making provision for her to receive an equal division of the parties' cash resources. As the Judge himself emphasised, these orders were being made, *inter alia,* to provide the Wife with the financial resources for her future including affording her the means to pay off the mortgages on the family home and Property 1 and discharge her legal fees. As the Judge opined, the purpose of transferring Property 1 (a rental property) to her was on the basis that it would be *"a good source of income when the mortgage is cleared".* (para. 33)

176. Whilst I do not accept the Husband's contention that the Wife's contributions to the home and family life were prioritised to the exclusion of the Husband's contribution to the family's finances and accumulation of assets, clearly, as I have said, by the provision being made for the Wife by the transfer to her of the family home, Property 1, the French property, the Husband's Irish Pension, the pension equalisation payment and the division of the parties' bank accounts (with provision of an equalisation payment by the Husband to equalise the cash resources available to each party), the Wife was not only being compensated for her substantial contribution over the years to the accumulation of the marital assets and the fact that she had lost out on employment opportunities that otherwise would have been available to her but she was also, by the extent of the assets she was to receive, being provided with a means of income going forward, to wit, the rental income from Property 1 (which would be available to her once the mortgage on that property is discharged, as envisaged by the Judge in the 2 June 2022 judgment) together with the income that will be available to her from the Husband's Irish Pension (now hers) once he retires from the Company. Until that pension income becomes available, she has the benefit of the €360,000 maintenance lump sum (i.e. €10,000 net maintenance a month payable in annual

tranches of €120,000 i.e. on 31 March 2023, 31 March 2024 and 31 March 2025) the lump sum maintenance order fashioned as it was so as not to impose a tax burden on her. The entirety of the aforesaid provision undoubtedly was made in the knowledge that the Wife's future earning capacity was significantly impaired by virtue the Wife "having relinquished or foregone the opportunity of remunerative activity in order to look after the home or care for the family", as recognised in s.20(2)(g) of the 1996 Act.

177. It also seems to me that *"the finite resources of the parties"* (to borrow from Murray J. in *D.T. v. C.T.*) as suggested from the evidence before the court, comprised the parties' real property, their cash resources, the Husband's remuneration from his employment with the Company (ongoing until he reached 65) and the Husband's two pension pots. In other words, those were the resources available to the Judge for the purposes of making proper provision.

178. Whilst, as I have already intimated, the Judge was also required to consider each of the parties' future earning potential (per s.20(2)(a) of the 1996 Act), and accepting, of course, that the Husband by dint of his career has future earning potential, as I have said, I do not consider that there was a sufficient evidential basis established for the Judge to conclude that the Husband was likely to be in receipt of *employment* related income of €240,000 gross per year which is the sum he would need just to fund monthly maintenance of €10,000 net.

179. I note that in arriving at the decision he did, the Judge drew on the observations of Whelan J. in *N.O. v. P.Q.* [2021] IECA 177. I agree entirely that the Judge was entitled when evaluating the future earning capacity of the Wife to have regard to the factors addressed by Whelan J. at paras. 73-76, 90, 95 and 99, and I find no fault with the Judge's ultimate assessment of the Wife's future earning capacity. However, as I have endeavoured to explain, the difficulty here is that the Judge has fixed a future maintenance sum payable by

the Husband without a sufficient evidential basis for same and without sufficient regard to the substantial provision already made for the Wife.

180. It seems to me that having divided a relatively ample pot as evenly as he could in terms of the provision he made for both parties out of the parties' assets, and making provision for the Wife by way of the maintenance lump sum payments until the Husband's retirement, thereafter, the Judge lost sight of the fact that by virtue of such provision the parties would be more or less in the same comfortable circumstances as and when the Husband reached retirement age. However, the effect of the further order for ongoing maintenance post the Husband's retirement was to require the Husband to continue working beyond his retirement age, or otherwise force him to come back to court in order to seek to vacate the maintenance order, and all against a backdrop where substantial provision had already been made for the Wife.

181. In all the circumstances, therefore, for the reasons set out above, I consider the order directing the Husband to pay maintenance of €10,000 net per month post 1 April 2026 to be disproportionate in the absence of any concrete evidence that the Husband was likely to be in receipt of *employment* related income post 1 April 2026, and in circumstances where the other provision made by the Judge (as reflected in the Order of 3 March 2023) was fashioned, at least in part, so as to ensure that the Wife was the recipient of future income generating assets such as Property 1 and the Husband's Irish Pension. It is also the case that as the now owner of the parties' family home, there is also the option for the Wife (should she wish to do so) at some point in the future to release the equity in that property (which would have no tax liability) by trading down to a smaller dwelling, thereby leaving her with a further cash resource.

The Joint Keytrade account

182. I turn now to the issue of the Joint Keytrade account. It will be recalled that in his 3 March 2023 ruling the Judge's rationale for dividing this account equally between the parties was that it was a *joint* account. The Husband, however, takes issue with the rationale employed by the Judge and asserts that it is inconsistent with what was said at para. 42 of the 2 June 2022 judgment.

183. It is the case that the Husband had testified that he wished to retain the Joint Keytrade Account with his other shareholdings in exchange for the offers he was making to the Wife in respect of three of the parties' four properties, his Irish Pension, the cash deposits held by the parties and his offer of a lump sum capital maintenance which was to be paid in yearly instalments until his retirement. It is also the case that in his judgment of 2 June 2022, the Judge was of the view that the Husband should *"retain his shares portfolio"* (para. 42).

184. It is thus argued that the Judge's subsequent ruling and order of 3 March 2023 in respect of the Joint Keytrade account is inconsistent with para. 42 of the 2 June 2022 judgment given that, it is said, the import of para. 42 was to leave the Joint Keytrade account to the Husband as part of his shareholdings. Counsel also points out that the Joint Keytrade account stems from the shares the Husband receives arising from his employment and that albeit the account was held in the joint names of the parties, it was used by the Husband to trade shares.

185. The key point which the Wife emphasises in her submissions to the Court is that the disputed Keytrade account is one that is held by the parties jointly. She submits that this was acknowledged by the Husband's accountant, Mr. Hyland, in his report dated 7 December 2022 produced for the High Court. She also says that that the Husband holds his shares from his employment in the sole Keytrade account and that the Joint Keytrade account has nothing to do with the Husband's shareholdings arising from his employment. She emphasises that

all she received in respect of the Joint Keytrade account is 50% thereof and she says she should retain this as the Judge directed on 3 March 2023.

186. Overall, I see no basis upon which to disturb the Judge's ultimate ruling as regards the Joint Keytrade account. Firstly, I do not necessarily accept the inconsistency claimed by the Husband as between para. 42 of the 2 June 2022 judgment and the Judge's later ruling on 3 March 2023 in circumstances where the account in question is unquestionably a *joint* account held by the parties. The import of para. 42 of the 2 June judgment is that the Husband would retain *"his shares portfolio"* (my emphasis). Secondly, I do not think it is in dispute that the Joint Keytrade account is akin to a bank account. It holds the fruits of the parties' dealings regarding their respective personal shareholdings albeit, undoubtedly, the fruits of the Husband's dealings regarding his non-employment shareholdings comprise the larger portion of the account. As can be seen from the 2 June 2022 judgment, the contents of the other bank accounts held by the parties (be it jointly or separately) were effectively divided equally between them. This equal division was achieved by ascribing certain named accounts to each of the Husband and the Wife, with the Wife also receiving a top-up payment of €77, 500 so as to achieve parity with the amounts in the bank accounts being retained by the Husband.

187. Thus, when one considers how the Judge approached the division of the parties' cash resources (i.e. a division on a roughly 50:50 basis), his conclusion as regards the Joint Keytrade account appear to me to be entirely within the scope of his discretion in the context of making proper provision for the parties. Accordingly, this appeal ground is not made out, in my view.

The equalisation payments

188. I turn next to the equalisation payments directed by the Judge. Whilst the Husband's notice of appeal takes issue with both the €77,500 and the €191,668 equalisation payments

as provided for in the 3 March 2023 Order, his written submissions concentrate largely on the €191,668 sum which the Judge directed is to be paid to the Wife by way of a pension equalisation payment.

189. It will be recalled that in the 2 June 2022 judgment, the earlier pension equalisation €167,000 payment was explained by the Judge as a top-up to the Husband's Irish Pension (which was being transferred to the Wife) so as to achieve parity with the value ascribed to Isle of Man Pension which was being retained by the Husband.

190. By December 2022/January 2023 when matters were once again back before the Judge, the value of the Isle of Man Pension was in fact higher than that attributed to it at the time of the trial (something the Husband conceded during the December 2022/January 2023 hearings). Indeed, by and large, at the hearing of 20 January 2023, it was agreed that the differential between the Isle of Man Pension and the Irish Pension was €191,500. As we see, in the Order ultimately made by the Judge on 3 March 2023, the Wife got the benefit of the increased value of this pension pot by dint of the increase in the pension equalisation payment from €167,000 to €191,668 directed by the Judge.

191. In his written submissions, albeit conceding that the Husband had consented in January 2023 to the High Court considering the pension equalisation figure in light of the increased value of the Isle of Man Pension as of January 2023, counsel for the Husband contended that that concession was made in the context that the Husband had understood from the 2 June 2022 judgment that he was to receive all the shares. Counsel thus asserted that the €191,668 pension equalisation sum was unjust in light of the High Court having altered (by directing on 3 March 2023 that the Wife to retain half of the Joint Keytrade account) the provision the Husband believed was being made for him in respect of the shares portfolio. Furthermore, it was argued that the €191,668 sum was excessive when taken in conjunction with the order providing for maintenance for the Wife post the Husband's retirement.

192. In his oral submissions, counsel clarified that the increased pension equalisation payment was not in fact the principal concern of the Husband, and that rather it is the ongoing maintenance obligation post-1 April 2026 and the division of the Joint Keytrade account with which he takes issue. Counsel also intimated that there would have been no appeal (including as to the Joint Keytrade account) had the Judge not made the order he made regarding maintenance post April 2026.

193. In her submissions, the Wife points out that the €191,668 figure was consented to by the Husband in the High Court without any condition that he would receive the share portfolio.

194. The issue now for this Court is whether, the Court having found no fault with the manner in which the Judge addressed the Joint Keytrade account, and having proposed that the order for monthly maintenance post 1 April 2026 should be vacated, the Husband has established any other basis upon which this Court should disturb the pension equalisation amount ordered by the Judge on 3 March 2023.

195. I am satisfied that no such basis has been established by the Husband, not least having regard to counsel for the Husband's concession, in his oral submissions to the Court, that the adjustment made in the pension equalisation figure was not the main focus of the appeal, and that had the Judge not made an order for ongoing maintenance post 1 April 2026, it is unlikely that the Husband would have appealed against the orders made on 3 March 2023 in respect of the pension equalisation or indeed the Joint Keytrade account. Accordingly, I am satisfied that the €191,668 pension equalisation figure should stand.

The failure to make mutual s.18(10) orders

196. In respect of the Husband's appeal in the divorce proceedings, it is submitted on behalf of the Husband that the Judge should have made mutual orders under s.18(10) of the 1996 Act, corresponding to the mutual orders which were made pursuant to ss. 14 and 15A(10) of

the 1995 Act. It is submitted that given that the Judge was satisfied to make the latter orders in the knowledge of the Husband's undertaking to the court that the Wife would receive 50% of the Husband's death-in-service benefit should he die whilst in the employ of his current employer, it followed that mutual s.18(10) orders should also have been made.

197. It is also submitted that, as a matter of fact, mutual blocking orders pursuant to s.18(10) were part of the draft order which counsel for the Husband put before the High Court on 3 March 2023, in respect of which no objection was made by counsel for the Wife. Counsel also points to the fact that the respondent notice to the Husband's appeal in the divorce proceedings points only to the fact that the Husband's first port of call on the issue should have been the High Court. In other words, all that is said in the respondent notice is that the Husband's appeal on the issue is premature in circumstances where he did not avail of an opportunity to ask the High Court to re-visit the issue for the purpose of making the necessary orders.

198. In response to a question from the Court as to why the Husband did not go back to the High Court, counsel advised that the issue had only become clear upon the perfection of the High Court Order and, so, it was considered it appropriate to address the matter in the appeal.

199. In her oral submissions, the Wife fairly indicated to the Court that she did not really object to the Husband's appeal as regards the s.18(10) issue.

200. In circumstances where the draft order which counsel for the Husband handed in to the Judge in December 2022 contained mutual s.18(10) blocking orders and where it was said to the Judge in the presence of the wife's then counsel that mutual s.18(10) orders could be made (all without objection from the Wife's then counsel), I am satisfied to direct that the Order of 3 March 2023 made pursuant to the 1996 Act be amended to provide for mutual blocking orders pursuant to s.18(10) of the 1996 Act. Whilst the optimal solution would have been for the oversight in making such orders to have been brought to the attention of the

Judge, that does not preclude this Court from directing that the Order of 3 March be varied to include the requisite mutual blocking orders.

The costs order made against the Husband in respect of the stay application of 7 March 2023

201. On 7 March 2023 the Judge made an order for costs against the Husband in respect of his failed application on the same date for a stay in respect of the orders made as regards the pension equalisation payment to be made to the Wife and the division of the Joint Keytrade account between the parties. At ground 5 of his notice of appeal, the Husband asserts that the costs order was excessive in light of what he describes as the *"fair open offers"* he made to the Wife, and in light of the *"extreme delays"* in the completion of the case from its commencement of trial on 5 November 2021 to the perfection of the Orders on 8 June 2023, which delays, it is said, were brought about by the Wife in pursuing a matter later abandoned by her and in discharging her solicitors. Save a reference that the Husband unsuccessfully applied for a stay on 7 March 2023 and that costs of that application were awarded against him, the Husband's written submissions do not further address the alleged excessiveness or unfairness of the costs order. Nor was the alleged unfairness elaborated on in the Husband's oral submissions.

202. As appears from his ruling on 7 March 2023, the Judge declined to grant a stay in respect of the order for pension equalisation on the ground that the Husband had agreed to pay this sum and, thus, in those circumstances he did not understand how the case could be made for a stay in respect of the payment. As regards the Joint Keytrade account, his view was that a stay would be inconsistent with the judgment he had given.

203. Whilst the Husband asserts, in the context of his appeal of the costs order made on 7 March 2023, that the Judge failed to take account of actions on the part of the Wife's that led to the delay in the finalisation of the proceedings, I note that the issue of the Wife's delay

in progressing matters was in fact addressed by the Judge in his 3 March 2023 ruling, in the context of the Wife's then counsel's application for an order for costs in her favour in respect of the period 14 June 2022 to March 2023. As already referred to earlier in this judgment, the case advanced on behalf of the Wife on 3 March 2023 was that the delay in the case progressing was caused by the application made by the Husband on 14 June 2022 to have the court revisit the valuation of his share portfolio. As is clear from his 3 March 2023 ruling, however, the Judge found that both parties had contributed to the delay in the case being finalised. On that basis, he declined to make the costs order sought by the Wife and, ultimately, made no order for costs in the proceedings. There is no appeal from that no costs order.

204. There is, however, as we see, the Husband's appeal against the costs order of 7 March 2023 following the unsuccessful stay application. Insofar as the Husband's appeal against that order remains a "live" issue in this appeal, in my view, no reasonable basis has been advanced upon which this Court should interfere with the order made by the Judge on 7 March 2023. The Husband's application for a stay was a discrete issue in respect of which he was unsuccessful for the reasons stated by the Judge. To my mind, the Judge's ruling on this discrete issue was well within the limits of his discretion as regards the award of costs, without his having to resurrect issues he had already taken account of for the purposes of his earlier costs ruling.

Residual issues raised by the Wife

205. In the course of her oral submissions to this Court, one of the Wife's complaints was that contrary to what was said in the judgments, provision for her did not in fact amount to a 50:50 division of the parties' assets. The salient observation to be made in this regard is that the Wife did not appeal against any aspect of the judgments of 2 June 2022 and 25 January 2023 or the Orders of 3 March 2023. Accordingly, in my view, she cannot now seek

to impugn the approach adopted by the Judge, or his conclusion that the asset provision made by him for her amounted roughly to fifty percent of the parties' combined assets both real and personal.

206. The Wife also persisted in a claim previously advanced on her behalf in the High Court post the delivery of the 2 June 2022 judgment, namely that the Husband had not made full disclosure of his shareholdings. This, she says, is clear from the report of Ms. McShane of 27 January 2022. She also says that such disclosure should have been made in Mr. Hyland's report of 7 December 2022. In response to questions from the Court as to why this issue was not addressed by the Wife's legal team in July-December 2022 (in circumstances where the Wife had her own experts including Ms. McShane), the Wife's response was that she had issues with her legal team. The Wife further submitted that all that was put before the Judge in January-March 2023 in respect of the updated value of the Husband's Isle of Man Pension was merely a screenshot of the pension.

207. As regards the latter issue, I note that the Judge both in his 25 January 2023 judgment and in his ruling of 3 March 2023 addressed the alleged paucity of detail regarding the Isle of Man Pension. He directed that that the Wife was to receive a more expansive document to give her *"comfort"* in respect of the Isle of Man Pension. However, there is nothing in the Judge's 25 January 2023 judgment or his 3 March 2023 ruling to suggest that he was dissatisfied with the information that was actually before the court concerning the value of the Isle of Man Pension. Indeed, as we see, he was satisfied from the information before him to increase the pension equalisation sum that was to be paid to the Wife so that at the time of the making of the court order the Husband's Irish Pension (of which the Wife was the beneficiary) would be at a par with the value attributed in January 2023 to the Isle of Man Pension.

208. Furthermore, I note that the issue of the Husband's alleged inadequate disclosure was in fact raised by the Wife's then counsel in December 2022 when she sought to re-open a number of matters before the court. That application was addressed by the Judge in his 25 January 2023 judgment in terms which I have set out earlier in this judgment. As I have said, there was no appeal by the Wife from the 25 January 2023 judgment. Accordingly, she cannot now seek to relaunch a matter which has been disposed of in the High Court and from which there was no appeal.

209. The Wife also referred to a number of matters which she said amount to a breach by the Husband of the orders made by the High Court on 3 March 2023. In particular, she stated that payments directed by the Judge had not made in accordance with the timeframe set out in the High Court Order and that she did not receive the policy document in respect of the Isle of Man Pension. If this is indeed the case, then that is a matter to be pursued in the court below and not in this Court.

Summary

210. For the reasons set out above, I would allow the Husband's ground of appeal in relation to the ongoing maintenance issue and, accordingly, I would vacate the order directing the Husband to pay net monthly maintenance of €10,000 from 1 April 2026. I also propose that the 3 March 2023 Order made pursuant to the 1996 Act be amended to provide for mutual blocking orders pursuant to s.18(10) of the 1996 Act.

Costs

211. I would propose no order as to costs given the nature of these proceedings and in circumstances where, in any event, the Husband was successful only in relation to one of the three principal issues in respect of which this appeal was brought. If, however, any party wishes to seek some different costs order to that proposed they should so indicate to the Court of Appeal Office within 28 days of the receipt of the electronic delivery of this

judgment, and a short costs hearing will be scheduled, if necessary. If no indication is received within the 28-day period, the order of the Court, including the proposed costs order, will be drawn and perfected.

212. As this judgment is being delivered electronically, Binchy J. and Meenan J. have indicated their agreement therewith and with the orders I have proposed.