THE HIGH COURT

FAMILY LAW

[2022] IEHC 528

[2018/38M]

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989 AND IN THE MATTER OF THE FAMILY LAW ACT, 1995 AND IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964 (AS AMENDED)

BETWEEN:

A.N.

APPLICANT

-AND-

K.N.

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered on the 20th day of July 2022

1. These are proceedings for a decree of judicial separation and ancillary relief pursuant to the Judicial Separation and Family Law Reform Act, 1989 (as amended).

2. The applicant was married to the respondent in August, 2000 in London. There are three dependent children of the marriage namely; -

(a) X - who was born in August, 2007.

(b) Y - who was born in September, 2009.

(c) Z - who was born in April, 2013.

3. Both the applicant and the respondent are Irish citizens, as are the three children.

4. The applicant resides in the family home which is situated in the south of the country. The respondent is a businessman and is resident and working in Australia.

5. The applicant and the respondent are also Australian citizens and they met there. They commenced a relationship in 1997 and subsequently moved to London in 1999 as the respondent was hoping to expand the family business in Europe.

6. The family home is in the joint names of the parties. However, the mortgage of approximately €600,000 remains outstanding as the repayments are on an interest only basis.

7. The significant event leading to the breakdown of the marriage was the respondent's involvement in an extra-marital affair, which he admitted to in May 2017. Subsequent marriage counselling failed and the respondent left the family home in April 2018. He has returned to Australia where he lives with his current partner in rented accommodation and continues to work in the family business in a CEO capacity.

8. The three children are doing well and are all attending fee-paying schools in the south of the country. The applicant works as a dental nurse at present.

9. The court is satisfied that, although house prices were a factor, the main influence insofar as the move from London to Ireland was concerned was the fact that the European arm of the family business was being run out of Ireland and it was necessary for the respondent to have a presence in Ireland to validate the fact that the business was being run out of Ireland. The court is also satisfied that the applicant had misgivings about the move to Ireland as she had good friends in London and she had no Irish connections. However, she went with the decision and saw it as an adventure at the time. The house in Ireland was bought before the move and the three children were born in Ireland. The

applicant was the primary carer for the children and the respondent was travelling abroad a lot in relation to his work.

10. Amongst the concerns the applicant has is the fact that the mortgage on the family home will have to be paid at the end of term in about 18 years from now – and it is almost €600,000. When this aspect of the financing of the house was discussed between the applicant and the respondent he indicated, and the court is satisfied of this, that the money in question would be relatively small at the end of the term.

11. Some lands were bought near the family home in 2017 at the instigation of the applicant. These lands were purchased with money provided by the applicant's father - €35,000.

12. The applicant also brought one property into the marriage. This was sold in 2007-2008 and the profit realised was invested in the family home (approximately €80,000 according to the applicant, which figure the court considers more reliable than the respondent's lesser estimate). The couple owned four properties in Australia. Another apartment was sold, leaving two properties in Australia. One of those properties is in the sole name of the respondent (Property X), another is in joint names (Property Y).

13. The respondent is one of five siblings. Three brothers are involved in the family business with him. His sister is not.

14. The family business in which the respondent is involved is a successful and profitable company. It does appear that the respondent's father remains at the helm of the family business and its assets are tied up in a complex discretionary trust arrangement.

15. Much to do with the respondent's business affairs lacks transparency and the court is entirely satisfied that it is without the full picture of the respondent's assets, worth or income.

16. The respondent has bank accounts in Ireland, England and Australia which are to be expected given the respondent's business dealings and presence in these jurisdictions. He also has a bank account in _____ (redacted) Malaysia which the court will return to later in this judgment.

17. The respondent owned an Irish company which was limited by shares and which went into voluntary liquidation. The liquidation concluded in mid-2022. It does appear that the revenue debt and trade creditors were approximately €18,000 and that the liquidation will not yield anything for creditors. The Irish company was the vehicle through which the respondent was paid in Ireland and it does appear that its liquidation came about following his return to Australia to work there.

18. The respondent also owns a company which is registered in Malaysia. He says he owns it along with a business partner on a 50/50 basis. It appears that this company came into existence with a view to marketing a product. According to the applicant the company is a worthwhile venture but the respondent says it is not.

19. The applicant gave evidence that she does not believe that the respondent's affidavit of means is correct. Her view is that it failed to fully disclose his salary, expenses and other money (bonuses). The applicant gave evidence of the lifestyle which she and the respondent led whilst together in Ireland. There was no problem with money. The respondent was in charge of the bank finances and money was available when it was needed.

20. According to the applicant, things changed after the separation. For example, household utility bills have been paid through the family company. However, the applicant has in recent years received disconnection notices because bills have not been paid. Listening to her evidence, it did seem clear that the applicant regarded the arrival of these disconnection notices as a reminder of the control exercised by the respondent

and which control he wished to maintain. The disconnection notices clearly stressed the applicant.

21. At present the three children are attending fee-paying schools and the paternal grandparents pay the school fees. Shortly prior to the commencement of these proceedings, the applicant had reason to believe that the continued payment of these fees could be in jeopardy because of her proceedings. On taking this up with the respondent, he told her that she had only herself to blame. The respondent was in the south of Ireland at this time and visiting the children in the family home. As a result of his discussion concerning the school fees with the applicant and her insistence that he be the one to tell the children if they were going to be pulled out of their schools, he told them that because of what their mother had done they would not be going back to their schools. As a result of the obvious distress caused to the children, which was evident from their reaction, the respondent relented and said that he would sell the apartment in Australia in order to pay the fees.

22. This Court accepts the substance of the applicant's account of what transpired in relation to the school fees. By any yardstick, the behaviour of the respondent in this regard and the manner in which he caused distress to the children is reprehensible.

23. Furthermore, as happens, settlement negotiations were set up between the legal team some days prior to the commencement of the hearing. The applicant travelled to the meeting by train. She received a phone call from the respondent while on her way and was advised by him "*don't be swayed by your meeting with the lawyers*". The court accepts as credible the applicant's account in this regard.

24. This snapshot in time portrays a respondent intent on dictating the outcome of these proceedings.

25. In cross-examination, the applicant said that she believed that the respondent's salary would be bigger when she was "*sorted out*". She also made the point that, when together, he used to say that they were in the top 2-5% in the country (in terms of wealth).

26. When challenged in relation to her own expectation of inheriting wealth, the applicant pointed out that she was one of two children and that her mother had sold the family home in Australia for 2m Australian dollars. She said that she had no knowledge of her mother's financial affairs and that her father left everything to her mother. She pointed out that her mother is 79 years of age. She said that her own brother had paid some of her legal fees.

27. The respondent says that his father is very much in charge of the family business. His father is 78 years of age and his mother is 74. The applicant and the respondent are in their early 50's.

28. In terms of the move to Ireland, he confirmed that the business advisers did suggest that there would be an advantage if residing in Ireland and that it was advisable to do so. He thought that the applicant's contribution to the family home was in the region of €50,000 following the sale of her apartment in Australia. The family company had helped out with the purchase of the property but that loan was repaid (and hence the mortgage). He confirmed that the rental from the two properties in Australia is paid into a joint account and that the mortgages on both properties are paid out of the joint account. He proposed selling Property X in order to provide a lumpsum for the payment of the school fees and window repairs on the family home.

29. The respondent also explained that he found it very difficult to be so far away from the children. He said that he would like them to visit him in Australia and he would visit them in Ireland. He explained that he had a good relationship with the children even though there had been some changes in that regard since the separation.

30. The respondent confirmed that he did hope that he would have an interest in the family business in the future although his father is very controlling and is there every day.

31. The respondent explained that he had never seen the family business trust documents and that he was a potential beneficiary with many others but that was at the sole discretion of his father. His father was and is the ultimate controller of the trust. He said that he was surprised that the trust was set up. He explained that he did hope to get recompensed with something at some stage – he did hope that he would benefit in some way. However, he was one of five siblings with the same expectation. When his parents die, he expects that there will be a division and he expects that it will be an equal division between everyone.

32. The respondent also explained that he expected the applicant would benefit from an inheritance. He could not speak with one hundred percent certainty, but he believed that the family home was sold for 2.2m Australian dollars and he said that his father-in-law had also spoken of a superannuation fund. He thought that the father's estate was large and there were just the two children (and the mother).

33. The respondent said that the payment of the utility bills by the company arose because the home office was in the family home. It no longer is and the payment of these bills was, he said, causing some friction in the company as his brother is aware of this happening – and does not like it.

34. In answering questions in relation to Z Limited, the respondent had some difficulty with the valuation of €240,000 ascribed to it in the company accounts as he felt that the company was worth little and is making losses. He explained that it is involved in the sale of a patented snoring ring but that this product has been copied, is

not a repeat product, has regulatory issues, is impossible to advertise, was hit by Covid – and generally is not a success.

35. The respondent explained that he had no idea that he was a director of a company called B Limited and he said that he had no control over the company. He said that he had no investment in the company. He said that his father and mother hold the shares in B Limited and that he doesn't know much about it.

36. In relation to another company involved in skateboards and electrical vehicles, the respondent explained that he had no interest in it. It appears that B Limited has a one-third share in this skateboard company (IK Limited) and that his two younger brothers own one-third each.

37. The respondent explained that he gets paid expenses but that these are on a reimbursing of invoices basis. When he was referred to an automated credit payment into the Natwest account on 7th June, 2021 in the sum of £5,476.54 which amount was paid into the account twice on the same day, the respondent said that he thought it was a double payment which happened by error. However, he could not explain how it was that the error did not appear to be corrected.

38. When referred to the non-payment notices in relation to a utility bill, the respondent denied that this was spiteful bullying. He acknowledged that he may have got them and went on to say that the bill was paid and that there was no disconnection.

39. In his evidence, the respondent appeared to have some difficulty explaining the situation in relation to the finances and financial dealings of the family business - although he holds a CEO role.

40. It did appear from his evidence that the respondent felt that his brother P. and himself would be in control of the family business after his father's time but he said that this might change and that his parents might want to sell the business or restructure it or

take himself and P. out of the business. He did say that he had a lot invested in the business and loved the products. However, nothing was guaranteed, and he did not know what the future held.

41. In responding to questions on cross-examination concerning the school fees issue and the phone call whilst the applicant was travelling by train to settlement negotiations, the respondent said that he had not bullied the applicant at all but he had tried to find a solution for both of them.

42. In this latter respect, this Court has no doubt but that the respondent has exerted strategic and premeditated pressure on the applicant with a view to having a compromise acceptable to him brokered and with a view to that settlement finalising all financial issues between both sides. The respondent issued divorce proceedings by way of special summons on 23rd May, 2022 and he sought the consent of the applicant to the divorce proceedings being determined by this Court in conjunction with these judicial separation proceedings. He did so notwithstanding what appears to the court to be an impenetrable jungle which he has presented in relation to his financial affairs.

43. The respondent's most recent affidavit of means sworn in these proceedings was sworn on 14th May, 2021. The court is satisfied, having heard the evidence in the proceedings, that it is neither complete nor reliable. When the court enquired as to the turnover of the family business, the respondent indicated a turnover for 2022 of approximately 12-13m Australian dollars although the turnover in 2021 had been 18m Australian dollars (it appeared that the company enjoyed a higher-than-normal turnover during Covid). The respondent indicated a healthy net profit margin on turnover but the court was without any substantial or reliable information in relation to the actual accounts of the company. The respondent was anything but forthcoming in this regard.

This situation is completely unsatisfactory in circumstances where it is a family business involving salary, expenses and bonuses paid to or accruing to the respondent.

44. A result of a request for discovery in relation to the family business, the Australian lawyers acting for the father and family business (S Lawyers) have corresponded with the respondent's solicitors concerning the discovery sought and that correspondence has been copied to the applicant's solicitors. A copy of a letter in that regard dated 5th October, 2018 is informative. This letter indicates the complex trust arrangements in being in relation to the family business. The final paragraph of the letter from the Australian lawyer states that the respondent (or his estranged wife); -

(a) has no ownership in the family business or its assets;

(b) has no control (as a director, shareholder, trustee, or appointer or otherwise) over the entities that own and control the family business or the related business assets;

(c) has no ownership (or control) over any of the income generated by the family business or the related business assets;

(d) has no fixed right to any income or capital of the discretionary trust concerning the family business;

(e) has no fixed interest in the discretionary trust as one of the secondary beneficiaries of the trust or otherwise;

(f) has at its highest a mere expectation to be considered for a potential allocation of income and/or capital as a discretionary secondary beneficiary of the discretionary trust but otherwise no entitlement or interest.

45. In the absence of any reliable evidence to the contrary, the court must accept that the position is essentially as set out in the preceding paragraph. It does appear that the respondent's father did take advice and did set up discretionary trusts in relation to the

family business and family business's assets. It does appear that the discretionary trusts have been carefully set up. The primary beneficiaries are the respondent's father and mother. The secondary beneficiaries include the respondent and his siblings and his children. They also include any spouse of any of the secondary beneficiaries – which does apparently mean that the applicant will no longer be a secondary beneficiary if a decree of divorce is granted.

46. The ultimate controller of the family business in Australia and its assets is the father of the respondent.

47. Against that, and from a practical point of view, the respondent (with other siblings) is heavily involved in the family business and clearly has an expectation that his involvement and interest will in due course be acknowledged on the death of his father and/or mother – or both. The respondent acknowledged his expectation in this regard and his investment in the family business when giving evidence.

48. The evidence concerning some matters of interest;

It is perhaps worthwhile referring in more detail to some of the evidence concerning issues which were in controversy and which are touched upon elsewhere in this judgment.

49. The reminders concerning the **Bord Gais utility bills** were;

- An urgent reminder for electricity payment on 17th May, 2021.
- A final reminder on 29th June, 2021.
- A final notice of disconnection on 14th September, 2021.
- Dealing with these notices the respondent said - "*I can only apologise if fear was generated but I can assure you that there has been no disconnection.*"

50. Z Limited Incorporated in Federal Territory of ______, Malaysia; (redacted)

This is the company set up by the respondent and which is involved in the sale of an anti-snoring device. According to the respondent, it was set up along with a business partner and he says that it is not trading very well at the moment. The audited financial statements dated 30th June, 2018 handed into court show a related party transaction on p.17 as follows; -

> "*During the year, there was the following significant transaction between the company and a director:*
>
> *Consultancy fee paid to K. S. N.* ***2018*** *US$49,815* ***2017*** *US$41,416*
>
> *The related party transaction was entered into upon terms and conditions mutually agreed between both parties*".

According to the same accounts on p.7 the retained profits as at 1st July, 2016 amounted to US$170,974 , retained profits as at 30th June 2017 US$240,840 and retained profits as at 30th June, 2018 of US$195,435. At note 8 on p.15 of the same accounts – which deals with retained profits – it is stated that "*Under …… Business Activity Tax Act, 1990, the retained profits of the company are available for distribution by way of dividends without incurring additional tax liability*."

The evidence of the respondent is that the business is owned jointly with his business partner. However, the accounts referred to above list the directors as follows:

> K. S. N.
>
> Asia – Pacific Niche SDN. BHD.

The share capital in the company appears to be referred to throughout the accounts as "*one*".

In the same accounts, the total assets in 2017 are stated to be US $256,961 and in 2018 US $206,315.

The audited financial statements of Z Limited dated 30th June, 2020 were also produced to the court.

While these accounts refer to a loss before tax in 2019 of US$29,683 and a loss before tax of US$5,425 in 2020 it is notable that the revenue and miscellaneous income amounts to US$182,877 for 2019 - and US$115,955 for 2020.

Administrative expenses for 2019 are stated to be US$107,862 and for 2020 are stated to be US$68,097. There is no breakdown of the administrative expenses. It is not apparent what if any of this money was paid to the respondent.

The total assets of Z Limited as of 30th June, 2019 were US$184,090 and as of 30th June, 2020 were US$180,305 - according to the audited financial statements dated 30th June, 2020.

When asked about the figure mentioned in the audited accounts of 30th June, 2020 as retained profits as of 30th June, 2020 in the sum of US$160,327 the respondent answered "*I believe that is an accounting thing, there is no profits in the company actually*".

The respondent went on to say that "…… *in real money, there is nothing in there*".

When asked about the fact that only he was named as a director of the company and that his business partner was not, the respondent answered "*no, he is not there. We have an agreement to share 50/50 on the activities of the company but he is not on there …it is kind of a gentleman's agreement.*"

The respondent was asked about …… and about it being a tax haven. He was asked if that was why the family company "O" went there. The respondent replied that it was for commercial reasons and when pressed that "*paying less tax is one of them*", he replied again "*commercial reasons*".

51. Expenses;

It is clear that the respondent is paid expenses by the family business. The respondent says in effect that the expenses are paid on a vouched basis. A payment credit advice dated 24th July, 2018 showing a payment of GBP£3,682.23 (the figure is difficult to decipher) is recorded on a copy of a payment credit advice produced to the court. It shows the payment was made by order of O Limited with an address at ______ (redacted) in Malaysia (on the instructions of Malayan Banking) (Maybank) of Kuala Lumpur in Malaysia to the respondent's Natwest account with an address at _________, _______, ________, Co. Cork (redacted). The payment details on the copy statement are "*partial payment of credit card*".

The respondent's position in reply to questions about this payment is that they were recovered expenses.

Insofar as the expenses are concerned, the court is without any adequate details of the expenses received by the respondent monthly or annually. However, given the manner in which the respondent conducts his business, his tax affairs and the existence of bank accounts in various locations around the world the court is satisfied, as a matter of probability, that the respondent derives part of his income from the payment of expenses. Furthermore, the court is satisfied that his income from that source is likely to be significant. In the context of these proceedings, it is income which is undisclosed income.

When pressed for more detail in relation to the financial affairs of the family business, the respondent said that he was not saying that he did not have access to the accounts but rather *"I am familiar with what goes through but I don't have financial control."*

This in itself is a curious statement to be made by a CEO (or joint CEO) of a company.

52. K Limited;

The respondent was asked about this company and was handed a copy of the written resolution of the directors of K Limited to comment on. This resolution is dated 25th August, 2014 and is signed by N.H. as a director, N.N. as a director and K.S.N. (the respondent) as a director. When asked about this company, the respondent was asked did he have any part in it and why was he named as a director to which he replied;-

> "*I am listed as one of the directors as required by the laws – they asked me so I agreed. It doesn't mean I own anything or have particular authority. It is just to assist with the running*."

This is another answer from the respondent in relation to his financial affairs which is, as a matter of probability, not a truthful account. It is probable that the respondent did have and does have some interest in the assets and business of K Limited. However, nothing more is known about that company or its business or assets.

53. B Limited;

The respondent was handed a printout of contact information concerning B Limited. That contact information named L.N. as a director, R.N. as a director, K.S.N. as a director and S.N. as a director.

Although named as a director of B Limited on this advertisement printed from a website the respondent replied that he had no idea what it was, had never received any call from anyone wishing to make contact with B Limited and did not know where the document/advertisement had come from.

54. F Limited;

The respondent was asked about this company and another printout was handed to him which indicated that it is involved in the manufacturing business and that its main products were medical face masks, PPE, electrical vehicles……

The printout indicated that it was established in 2012 and had total annual revenue of US$10m to US$50 and had an address at _____________, _________, Malaysia (redacted). Its key products were, according to the printout, medical face masks and transportation. The respondent explained that F Limited is a company that his brothers and his father had for a business related to electric recreational purpose vehicles. He said that it was a standalone company and that he had no interest in it. He said that it was involved in PPE materials. He explained that his brother lived in China and he reacted

very quickly to find an opportunity for masks and PPE and he sent masks to companies in America and IK Limited and O Limited. He said that it had a relationship to IK Limited and that they were linked but separate companies. He said that he was not involved in IK Limited and that he had no salary or dividends or shares. He said that he had from time to time assisted IK Limited with making international contacts.

The respondent was presented with a photograph of him at a stand in what appeared to be an international trade fair. It was not entirely clear whether the company exhibiting was F Limited or IK Limited or indeed another family business. He said that he helped them from time to time. He explained that it is a family business and that he is helping them to do things and that he had a link with it – the golfing aspect. He acknowledged that he was at a fair recently.

Yet again, the court is driven to the conclusion that the respondent has business interests and income which he has failed to disclose to the court.

55. Bonuses;

When asked about bonuses the respondent said that he didn't receive any bonuses anymore and that they had not been received since 2016. He was then handed a document which was on a letterhead giving the address as the family home in the south of Ireland and which was in fact an invoice claiming a bonus from February 2017 to June 2017 in the sum of €11,310.35 (a five-month period). The respondent was asked if this invoice claiming the bonus was paid and he said that he didn't know that was one hundred percent correct – that period at least. He said he didn't believe it was correct and then went on to say that was the last time they did make a payment to me. When it was put to

him that it looked like he could claim a bonus every five months the respondent said that prior to this a bonus was paid on sales but his circumstances had changed.

56. Letter of 11th August, 2017;

The respondent was presented with a copy of a letter addressed to his father and dated 11th August, 2017 which it was put to him was in his possession and was left in the family home. It is a letter from the Australian Government Australian Taxation Office. The copy letter was incomplete as not all pages were copied. This letter appears to list thirteen separate companies and the suggestion to the respondent was that these were the family business or subsidiaries. The respondent's response to this document was that he didn't know how it got there.

Nothing much turns on this document and its evidential value is weak. However, it does support the view, if support was required, that the corporate structure of the business in which the respondent is intimately involved is as complex as it is international.

57. It was at this point of cross-examination that the respondent was questioned about his position in O Limited. When it was put to him that he was an important financial figure of the company he pointed out that he was not the only CEO. When it was put to him that the applicant's side had not seen any record of his brother P. being named as CEO the respondent replied that "*you may not have any document but he is joint CEO*". He went on to explain that it was a fact and that his father put him in as joint CEO. He was asked if this was a recent thing arising from his estrangement from his wife and he said that it was not – that he came back from Australia and in order for equality his father decided that he and his brother would be joint CEOs.

58. Money;

When the respondent was pressed about money being plentiful when he and his wife were together, he explained;-

> "*The circumstances have changed significantly. I am back in Australia, and I am the joint CEO with my brother. And it is not…my position is completely different. I was here looking after the international business, those businesses have suffered recently and if you are asking about financial money and that it is always available, that is not true. There were additional revenues availed of when there were better times, that filled some gaps. I also due to my position was able to do more travelling and more things were on expenses. I don't have that same ability as I used to when I was here*."

The sentiment expressed about the businesses having suffered recently is somewhat at odds with the respondent's evidence elsewhere to the effect that the businesses had done extremely well during Covid, in Australia at least.

59. On the evidence, the court is prepared to accept that the respondent's parents (and his father S. in particular) are in ultimate control of the family businesses. The actual control is exercised through the trusts which the father set up and controls. However, the court does not accept that the respondent is merely an employee of O Limited. The respondent is a very significant and influential person in the family business. On the evidence, it is clear that he is a successful businessman within the family companies and also has business interests in his own right. The court is satisfied that the respondent is well remunerated for his work in the family business and the full extent of his remuneration and income has not been disclosed by him.

60. Although he pointed out that nothing was guaranteed, the respondent did say that he supposed the natural people who would continue to run the family business after his

parents' time would be his brother P. and himself. They are in the position at the moment of looking after production and sales and marketing. He did say that he had a lot invested in the company and loved the company and its products and that he had been there from around 1997. He would be hopeful that he would end up running the company but nothing was guaranteed. He pointed out that one never knows how siblings will react after the event of the passing of a father – and any number of scenarios could play out.

61. The Revenue;

The Irish company with the Revenue debt was a vehicle through which payments from the family business to the respondent were channelled.

It is yet another poor reflection on the respondent that he has failed to see to it that taxes due to the Collector General are paid - in circumstances where the court is entirely satisfied that he has the means to discharge the revenue debt due in respect of his company which he benefitted significantly from over the years.

62. When dealing with the monies returned in his tax returns in Ireland the respondent said that anything which was remitted to Ireland was included and that this would include expenses. When he was asked were his bonuses included he replied "*no*".

This answer does beg the question - if the respondent was making his tax returns in Ireland and was including anything which was remitted to Ireland including expenses why is it that his bonuses were not included in the tax returns. This issue was not developed in re-examination when the question was asked and the answer was given. All that can be said in this regard is that it is yet another *"unknown"* in the rather obscure financial picture presented in evidence by the respondent.

It appears from the respondent's answers that the bonuses were not returned in his Irish tax returns because they were not "*remitted here*".

On questioning from the court, it appeared that the bonuses were remitted to the account in Malaysia and possibly in the name of the respondent's own company. The bank account in question was HSBC.

63. Turnover and profits in the Family Business;

When questioned in relation to the turnover of the family business the respondent indicated a turnover of AU$12-13m with a very good year in 2021 when the turnover was AU$18m. The respondent went on to say that the turnover was moving back to AU$13m this year and he indicated a net profit margin of between eight and nineteen percent. The evidence was:-

> *"Judge: In relation to O Limited, you are the CEO or joint CEO of the company involved in financial affairs on day-to-day basis?*
>
> *Mr N: I am not really involved in the day to day as I don't get involved but I have a good overview of the position.*
>
> *Judge: As a CEO would want to have.*
>
> *Mr N: I am aware of it.*
>
> *Judge: I'm saying its part of the job. What is the profit margin?*
>
> *Mr N: It varies year by year, fluctuating from as low as I think 8 – 19%...that seems to be the recent…every year can be different.*
>
> *Judge: But it's a reasonable profit margin?*
>
> *Mr N: If I look back at the last five years, there was a year of loss actually, but the other years profits can vary from a few hundred thousand to a million or so?*
>
> *Judge: What is the turnover?*

Mr N: It varies on average, sitting at around about 12 to 13 million Australian dollars, multiplied by .63 in euro.

Judge: What was it in 2021?

Mr N: After covid? I think it reached 18 and has come back to 13. Prior to that it was 12, 10, 8.

Judge: I understood you to say figures are better post covid?

Mr N: Yes, we introduced products usually not there.

Judge: Can you give me a profit margin?

Mr N: Net profit margin after everything is somewhere between 8 – 19%.

Judge: Where does the net profit go?

Mr N: Its determined by T. He will divide it between his trust, and like I said, in the last five years there was one year where there was a loss. It will be determined on what happens on the year…"

64. On any view the business of which the respondent is CEO or a joint CEO is a highly profitable company.

65. The explanation of the respondent in relation to bonuses did appear to be that more difficult trading circumstances had impacted or perhaps eliminated bonuses in recent years. If that is so one does wonder as to what the position is in relation to bonuses for the bumper year of 2021 when the company apparently turned over AU$18m.

66. The audited financial statements of Z Limited for the year ended 30th June, 2018 are dated 23rd September, 2019 below the signature of Mr. S (on p.1). As stated above para.13 (on p.17) refers to a consultancy fee paid to K.S.N. of US$41,416 in 2017 and US$49,815 in 2018. It is true that these financial statements of the company according to para. 14 were authorised for issue by the "Board of Directors" on 23rd September, 2019. At para. 21 of his replying affidavit which was sworn on 20th December, 2018 the respondent refers in para. 21 to his income from O Limited of approximately €8,700

which is paid *via* a limited liability company known as R Limited. He goes on to say at para. 22;-

> *"I say that the only other entity in which your deponent has a legal or beneficial interest is the company known as Z Limited, which is a Malaysian registered company in the name of your deponent and Mr. H on an equal basis. I say that the said company was established for the purposes of marketing a snoring ring developed by your deponent and Mr. H and I say that the said company was established in or about the year 2000. I say that at present, your deponent does not make any profit, dividend or income from the said company other than by way of expenses, including but not limited to travelling expenses."*

It is really impossible to reconcile the above sworn averment of the respondent with the audited financial statements for the year ended 30th June, 2018 and which were authorised for issue on 23rd September, 2019.

67. The affidavit of means of the respondent sworn on 14th May, 2021 reveals very little assets apart from the property in the south of Ireland (the family home and the land which was purchased) and the two rental properties in Australia (one of which is in the sole name of the respondent and another which is in joint names). R Limited is also disclosed in the first schedule. In addition, Z Limited is disclosed in the first schedule. The four bank accounts disclosed indicate very modest credit balances. The second schedule refers to the respondent's annual income and monthly net income. There is no reference to expenses. There is no reference to bonuses although the respondent's position in relation to same appears to be that such bonuses have not been paid for some years now.

68. The rental income from the two properties in Australia is not properly detailed nor indeed are the monthly repayments in respect of the mortgages on the Australian properties.

69. It is true that the applicant has not detailed the rental income either in her affidavit of means – in respect of the property which she jointly owns with the respondent. It appears that the rental income is paid into a joint account (_____ _____) (redacted) and it appears also that the rental income is used to service the mortgages.

70. The necessary detail and information in relation to the rental income and Australian mortgages are not properly set out in the affidavits of means. Of the two, the respondent is more at fault in this regard. He has been and remains in charge of the finances and one of the properties in Australia is in his sole name.

71. This Court believes it likely that things will visibly change greatly for the respondent in terms of his place and stake in the family business and family business assets once he has sorted out the financial issues which arise with his wife after the separation which occurred in 2018 - following the significant difficulties which arose in mid-2017 in the marriage.

72. These judicial separation proceedings (and the divorce proceedings) are being closely monitored by the respondent's family in Australia and by the lawyers advising the family business. S Lawyers wrote directly to the court on 13th May, 2022 in relation to the applicant's Motion concerning service of notice of the proceedings on the Trustees of the Family Trusts. They pointed out that their clients (essentially the father of the respondent and the Trust entities) did not consent to the jurisdiction of the court nor did they consent to the application by the applicant for relief in the terms of the Motion which was served on the respondents' solicitors and copied to them. The court declined to grant the relief sought in the Motion. The author of the letter signs off as L.L. Director,

Accredited Specialist Family Law, S Lawyers. It would be very naive and wrong of this Court to ignore the overall family dynamic when looking at the financial picture and having regard to the unsatisfactory presentation by the respondent of the information and evidence concerning his means. This Court is entirely satisfied that the respondent has sought to minimise and misrepresent his income, his assets and his true prospects insofar as the family business and family business assets are concerned.

73. The Law

In the case of *Q.R. -v- S.T.* [2016] IECA 421, the wife appealed an order made by White J. in the High Court in a case of ample resources. The issues were different to here as the wife relied on gross and obvious misconduct including personal and financial misconduct. In particular, the wife relied on the husband's litigation misconduct and his failure to make disclosure as to his means. She relied on the fact that he omitted in his first affidavit of means a number of assets to the approximate value of €30 million and further that he had sought to procure his wife's agreement to his affidavit of means without the need for him to vouch the value of his assets. His updated affidavit of means showed his connection to two valuable properties. Although the case dealt with litigation misconduct the views expressed in the Court of Appeal concerning the need for full and honest disclosure and the making of proper provision are relevant to this case.

74. In the case, the trial judge said that he was satisfied at the time it came to make proper provision for the wife that there had been full disclosure of all the husband's assets. It is noteworthy that in that case the trial judge had made an order for costs in favour of the wife. The Court of Appeal deals with this in para. 99:-

> *"It is also perhaps worth noting that the consequences of the husband's failure to comply with his statutory obligation in terms of disclosure was that many days of the trial were spent canvassing the extent and possible continuation of*

that default. That being so the proceedings took significantly longer than would otherwise have been the case. It would have been unjust if such circumstances had been permitted to have an adverse effect on the wife's finances. However, she was ultimately awarded her costs of the substantive proceedings and also the costs of section 35 proceedings such that it cannot be said that it was unjust for the trial judge to have failed to impose some type of financial penalty to reflect the husband's litigation misconduct relating to the making of proper provision."

75. Irvine J. under the heading "Litigation Misconduct" at paras. 61 – 64 states the following:-

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

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

> *'There is a public interest in spouses making proper provision for one another, both during and after their marriage, in particular when there are children to be cared for and educated, but also for all the other reasons explored in cases such as McFarlane v McFarlane [2006] 2 AC 618. This means that the court's role is an inquisitorial one. It also means the parties have a duty, not only to one another, but also to the court, to make full and frank disclosure of all the material*

> *facts which are relevant to the exercise of the court's powers, including of course their resources: see Livesy (formerly Jenkins) v Jenkins [1985] AC 424. If they do not do so, the court is entitled to draw such inferences as can properly be drawn from all the available material, including what has been disclosed, judicial experience of what is likely to be being concealed and the inherent probabilities, in deciding what the facts are.'*

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

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

[64.] This helpful passage from the decision of Ryan J. would suggest that when determining the manner and amount of the provision to be made for the parties it would

be unjust to rely upon litigation misconduct, unless, having considered carefully all of the evidence which might favour a finding of mistake or innocence, the court was convinced that the party concerned had deliberately told lies, had sought to mislead the court and/or had still not made full disclosure."

76. In the case of *A.A. v. B.A*. [2014] IESC 49 Irvine J. found that it was highly likely that even at that stage that the full extent of the husband's assets at the time of the judicial separation/divorce were not known. Irvine J. distinguished the situation in the *Q.R.* case. Clarke J. in the Supreme Court upheld the decision of Irvine J. on *"substantial and material non-disclosure"*. This was in the context of a set-aside case. In her judgment in the High Court decision, Irvine J. referred to the duty of disclosure and emphasized that there is a statutory and constitutional obligation on the Court to consider what constitutes proper provision for the parties and their dependants at the time when it is asked to grant a decree of divorce and in the context of judicial separation there is a statutory obligation on the Court to consider what constitutes proper provision. This a Court can do only when it is fully familiar with the true financial position of the parties. Without the full financial circumstances being brought to the attention of the Court, it cannot fulfil its obligations. The disclosure obligations continue to apply to the parties to notify each other and the Court of any change in their circumstances at any date up to and including the point at which the proceedings are finally disposed of.

77. A useful statement concerning what is meant by "proper provision" is the dicta of Murray J. in *D.T. v. C.T.* [2002] 3 I.R. 334 at p. 408;-

> "*Proper provision should seek to reflect the equal partnership of the spouses. 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 obligation, 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 dependant on receiving periodic payments for the rest of her life from her former husband."

78. In the recent Court of Appeal case of *N.O. -v- P.Q.* [2021] IECA 177, the farm at issue was one hundred acres (plus the family home valued at €1.1 million) and was farmed by the husband with his father through a company, the father having transferred the farm to the husband.

79. At paras. 47 and 48 Whelan J. states:-

"[47]*....The role of the court under each statutory framework is the same; namely, to endeavour to ensure that the couple together with their dependants are properly provided for having due regard to the non-exhaustive statutory checklist of factors adumbrated and "all the circumstances of the case" as s. 16(1) mandates.*

[48.] *The extensive jurisprudence in regard to "proper provision", in the context of the granting of decrees of divorce, is therefore relevant and of assistance in carrying out the statutory exercise, particularly having regard to the factors specified in s. 16(2) which are to be taken into account by the court in carrying out that exercise. The said factors and matters are not in any sense exhaustive as the words "in particular" in s. 16(2) make clear.*"

80. Whelan J. goes on to state:-

"In Q. R. v. S.T. Irvine J. (as she then was) had characterised the approach to the exercise of discretion by the trial judge in accordance with the statutory provision thus:-

> *"106. The onus on the trial judge in the present case was to consider all of the assets potentially available and then to fashion orders for ancillary relief that would likely secure for the parties and for their lifetime the lifestyle which they enjoyed prior to the marriage breakdown…""*

81. The recent case of *M. v S.* [2020] IEHC 562 contains a clear summary of applicable principles from para. 58 on. Dealing with "Non-Discrimination" at p.43, Barrett J. states:-

"[20] The work of a spouse in the home cannot be a basis for discriminating against her by reason only of the fact that the husband was the major earner or the breadwinner during the course of the marriage (D.T. v. C.T., Murray J., at p. 427).

[21] Lord Nicholls, in White v White [2001] 1 A.C. 596 emphasised that the whole tenor of English divorce legislation was the avoidance of a discriminatory approach: the fact that, as often happened, the wife had devoted the greater part of her time to looking after the children and caring for the home generally, was no ground for confining her share of the family assets, in the event of a breakdown of the marriage, to so much of the assets as met her 'reasonable requirements'. That is also the law in Ireland (D.T. v. C.T., Keane C.J., at p. 389).

[22] In Cowan v Cowan [2002] Fam. 97, a so-called 'ample resources' case, Thorpe U, at pp. 118-19, summarised his understanding of White v White [2001] 1 A.C. 596 as follows, 'Disapproved is any discriminatory

appraisal of the traditional role of the woman as home maker and of the man as breadwinner and arbiter of the destination of family assets amongst the next generation. A calculation of what would be the result of equal division is a necessary cross check against such discrimination…Disapproved is any evaluation of outcome solely or even largely by reference to reasonable requirements.' Provided that it is always borne in mind that in 'ample resources' cases an equal division of assets is emphatically not mandated by the legislation, Keane C.J. considered that there should be no difficulty in adopting a broadly similar approach in this jurisdiction. (D.T. v. C.T., Keane C.J., at pp. 389-90).

[23] When a court is exercising its discretion in making provision for spouses on an application for divorce, the following should be considered: (i) in making such provision a spouse who has worked principally in the home during the course of the marriage should not be disadvantaged in the making of such provision by reason of that fact; (ii) both spouses are entitled, in principle, to seek that the provision made for them provides them with a measure of independence and security in their lives and there is no reason why, in principle, a non-earning spouse should be confined to periodic payments. The extent to which this can be achieved in practice will depend on the circumstances of the case, the resources available and the exercise of the judicial discretion in taking into account all the factors referred to in s.20; (iii) a court has power to direct the payment of lump sum payments where this is considered an appropriate means of making proper provision for one or other of the

spouses; (iv) all the resources, assets and income of the applicant and the respondent should be taken into account (D.T. v. C.T., Murray J., at pp. 431-32).”

82. The authorities do make clear that -

i) the appropriate date for assessment of assets is the date of the trial;

ii) discrimination based on the particular role of a spouse in a marriage - for example, the wife as homemaker - is not permissible;

iii) each case must turn on and be decided on its own circumstances and proper provision must be assessed having regard to those circumstances;

iv) there is no rule requiring an equal division of assets (i.e. provision not division).

v) the manner in which assets are held is not to be a significant focus of the court (i.e. jointly or solely).

vi) In *D.T. v C.T* [2002] 3 I.R. 334 the Supreme Court considered that a yardstick of one-third was a useful benchmark at the lower end of the scale - in terms of fairness when looking at the specific circumstances and the factors in s. 20 (or 16).

83. The need for transparency and honesty when swearing an affidavit of means and when giving and presenting evidence in cases where proper provision is being considered is obvious. A court is effectively obstructed in so far as deciding on what is proper provision where it is not provided with reliable or complete evidence concerning the means of either one or both of the parties.

In this case the court is satisfied that the applicant has presented complete and reliable evidence to the court concerning her means – but the respondent has not.

The court has pondered whether this failure on the part of the respondent is innocent or inadvertent or in some way unintentional. The court has considered whether or not the failure can be excused in some way.

Regrettably, the court is driven to the conclusion that the respondent has deliberately failed to disclose his true means. He has presented unreliable, misleading and incomplete evidence to the court concerning his means and the true financial picture. He has done so in order to prevent the court making proper provision for the applicant out of the available assets and means.

84. The task of the court is effectively frustrated by the behaviour of the respondent. The international dimension in so far as the respondent's assets/means are concerned coupled with the fact that he is resident in Australia compounds the difficulties for the court.

85. In these circumstances the court can only do its best in light of the evidence available and in view of the unavoidable inference from the evidence that the respondent is wealthier and better positioned financially than he has admitted in evidence. It is impossible to be in any way specific as to the probable value of undisclosed assets and means. However, the court is entirely satisfied that the respondent is much wealthier than he pretends and that money is at least as abundant as it was during the marriage when, as the applicant made clear, it was never a problem. The court is satisfied that the respondent has or is entitled to draw income from "*expenses*", "*bonuses*" and his own separate snoring ring business (and perhaps

other business interests) which he is concealing. The court is satisfied also that the respondent is quite expert at such concealment and is aided in this by his international business interests and banking arrangements.

86. Section 16 provides as follows: -

16.—(1) In deciding whether to make an order under section 7, 8 , 9 , 10 (1) (a), 11, 12, 13,14,18 or 25 and in determining the provisions of such an order, the court shall endeavour to ensure that such provision exists or will be made for each spouse concerned and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case.

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

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

On this, the applicant does have prospects of earning in the future and she is holding down employment at present while also looking after the home and the children. Compared to the respondent, her earning potential is much more modest. The applicant's property and financial resources are also modest when compared to those of the respondent. His true income and his earning capacity are concealed by him from the court and are those commensurate with a CEO of a successful and profitable family business and separate business interests of his own. The respondent's true property and financial resources are kept hidden by him from the court - and are and may continue to be kept out of reach of the court by him.

(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).

The applicant has significant financial needs with three children entering an expensive stage of their young lives. The respondent has a responsibility to provide for them in accordance with his means and to assist the applicant financially. The respondent is in a new relationship, but little evidence was forthcoming in this regard. It appears that the children of his current partner are young adults and that she has modest employment at present.

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

The court is satisfied that the family did enjoy a very comfortable lifestyle before the separation and that the wife's evidence in that regard is true.

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

The parties were together for almost 20 years and were married for some 17/18 years before they separated. They married in 2000. It was a long marriage and they are both middle aged people now – in their early 50's.

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

Both are in good health although the separation and the proceedings have taken a toll on them both.

(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.

Actual financial contributions are mentioned elsewhere in this judgment.

The proceeds of the applicant's apartment went into the family home and the site was paid for in the main by her parents. Those actual financial contributions to the matrimonial assets are more definite than those of the respondent but it is he who generated the income on which the family lived.

A very significant contribution to the respondent's career was the decision of the applicant to travel with him to London and then to Ireland for the sake of his career and for the benefit of the O Limited family business. She is now in Ireland and a long way from her home, family and friends because she set down roots with the respondent in Ireland - and their three children were born here and are settled here. The applicant's life has been moulded around a joint decision which was made having regard to his career and business interests. The respondent returned to Australia after the separation, but the applicant could not easily do so. She chose to stay in Ireland for the sake of the three children. The sacrifice made by the applicant in moving to Ireland and staying here is significant. Her sacrifice in looking after the three children as a stay at home mother and putting their welfare to the fore is significant. Her current employment is work she can organize around the children. The applicant has enabled the respondent to be a successful businessman and her care of the home and family has been and is to the detriment of her own earning potential. She is interested in business and is clearly a motivated and hard-working person. However, her life today is that

of a busy mother looking after a home and the three children on her own. She is a long way from Australia. It may be that she will be able to increase her earning as the children grow independent but her career options have been adversely impacted by the fact that she is and has been the primary carer for the children.

The respondent has been a good provider and has had the freedom to generate success in business and reap the rewards thanks to the applicant's unstinting dedication to the home and family. The applicant is entitled to a fair and proper share of the business success and wealth of the respondent. But the means and wealth of the respondent is not known to the court because he is concealing it.

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

This is referred to above. The marital responsibilities of the applicant have placed her at a disadvantage. The respondent is at no similar disadvantage.

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

This has not been a contentious issue but the applicant is in receipt of and entitled to the children's allowances – and that is to continue.

(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.

A gross and obvious case is not being pursued by the applicant. The court could hold the respondent to account for gross and obvious misconduct in not disclosing his means. However, the court is not in a position to quantify what is being concealed and will not approach the case as one of gross and obvious misconduct as such. The court will instead make proper provision in light of its finding that the respondent is much wealthier than he pretends.

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

The applicant and the respondent are both entitled to proper accommodation and the family home is to remain available to the applicant and the children. The respondent gave evidence that he is in rental accommodation with his current partner and her grown children. Little else is known of the accommodation but the impression given by the respondent is that it is modest accommodation. Having regard to the respondent's evidence or lack of it concerning his means, the court believes that it does not have a full picture of the respondent's future plans for accommodation and his ability to finance it. It is probable that the respondent has plans for better accommodation. The retarding effect of the ongoing family law litigation on the behaviour, visible expenditure and mindset of the respondent is palpable.

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

Pensions do not feature as an asset of value of either spouse. The applicant has a small pension pot. The respondent maintains that his pension pot is even smaller.

If the respondent is divorced from the applicant, then the applicant's at least theoretical position as a secondary beneficiary of the family trusts will be over - but the court is not dealing with divorce proceedings and they are discretionary trusts. The court is in no position to speculate on any loss under the trusts heading in these proceedings.

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

The respondent did not make an issue of this but the court is alert to the fact that he is in a new relationship.

And sub-section (5) provides that "*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*".

87. <u>The applicant's submissions</u>

The applicant is seeking a decree of judicial separation and ancillary relief and wishes to have proper provision made for herself and the three children of the marriage. She is opposed to a divorce being granted prior to proper provision being made in full for herself and the children as she says that a divorce will put her outside the trust set up by

the respondent's father. She is also anxious that any provision awarded by the court would be complied with before any decree of divorce comes into effect.

88. Two Australian properties and the family trust are outside the jurisdiction of the court and the applicant accepts that the court cannot make any orders affecting the trust. However, the applicant says that both parties have consented (as is the case), during the proceedings, to the Australian properties being dealt with by this Court. The applicant submits that any orders made in the applicant's favour should be made directly against the respondent and should be orders made *in personam* so as to be enforceable. For example, the applicant says that orders made pursuant to s.13 for periodical or lump sum orders would be an efficient way to protect the applicant and the children. The court is in agreement with this submission.

89. In terms of the applicant's submissions in relation to the facts;-

(a) It is accepted that the parties came to Ireland primarily because of the respondent's work and the applicant had no connections with Ireland at the time.

(b) The children have only known Ireland as their home and they do regard themselves as Irish. In these circumstances the applicant correctly considers herself tied to Ireland for their sake.

(c) While it does appear that the marriage broke down by reason of the respondent's infidelity, the court does not consider it appropriate to lay emphasis on this failing by granting a decree of judicial separation pursuant to s.2(1)(a) of the 1989 Act as opposed to s.2(1)(f). While it is suggested that granting the decree pursuant to s.2(1)(a) might be of significance in any future enforcement proceedings the basis for this assertion is not set out and it is difficult to see how it would be of any real significance. The factual

situation leading to the breakdown of the marriage is not a matter of controversy between the parties.

(d) The court does accept that finances were not an issue during the marriage – or at least were not an issue to the extent that they have become post separation.

(e) It is true that there is little evidence to support the respondent's assertion that he is now a joint CEO of the family company along with his brother – apart from the respondent's oral evidence. It is not possible for the court to decide whether the *"joint CEO*" situation is a strategic move in the context of these proceedings or is the truth of the situation. However, and although the court will proceed on the basis that the respondent is in fact a joint CEO of the family business along with his brother, it is necessary to observe that the lack of supporting evidence in this regard is yet one further illustration of the respondent's failings in terms of presenting this Court with clear evidence in relation to his financial situation.

(f) The court does accept that the applicant did make career sacrifices when moving to Ireland in support of her husband's career and business interests. These sacrifices have continued in the sense that the applicant has been the primary carer for the children since their birth and in circumstances where the respondent has been involved in extensive international travel for business reasons. The court is also satisfied that the applicant is doing her best in terms of generating an income whilst now having to look after the children in Ireland on her own in circumstances where the respondent lives in Australia.

(g) The court does accept that it is unwise to have any of the children travelling to Australia unaccompanied by an adult whilst they are minors. The court accepts that the applicant has legitimate concerns in this regard as would any prudent parent planning travel for a minor child to Australia. In this regard, the court will direct that the respondent pay for the applicant – or another adult of her choice – to accompany the children to Australia (whilst they are minors).

(h) The applicant seeks a sole custody order in light of the fact that the respondent does not live in Ireland. The court is satisfied that the respondent is very attached to his children and they have a good relationship with him. However, he is resident in Australia and the court has held that he has not been truthful with the court in so far as his means are concerned. He has eroded the trust the court would ordinarily have in an otherwise good and loving parent. In these circumstances, the court has considered awarding sole custody to the mother who is ordinarily resident in Ireland along with the three children. It has decided not to take this step as it might impact negatively on their relationship with their father and the extended family in Australia. The paternal grandparents are and have been good to the three children. Awarding sole custody to the mother might well tip a delicate balance in the wrong direction and impact negatively on the children. The court will therefore, for the sake of the three children's relationship with their father and his family in Australia, award the parents joint custody although physical custody as such will be with the mother in Ireland. The court does not believe that the father will abuse his position by wrongfully trying to keep

the children or any of them in Australia but it is a signatory to the Hague Convention and the mother will have a remedy should he seek to do so.

(i) It is the position that there is and has been no difficulty with access and this has been demonstrated by the mother welcoming the father into her home – even during the hearing of these proceedings – for the sake of the children.

90. The applicant's submissions in relation to the issues, the law and s.16 of the 1995 Act are taken into account elsewhere in this judgment where those issues are dealt with.

91. <u>The respondent's submissions</u>

Having referred to the judicial separation proceedings, the respondent points out that divorce proceedings were issued on his behalf by way of special summons on 23rd May, 2022 and that the consent of the applicant was sought to have those divorce proceedings determined by the court along with these judicial separation proceedings. As that consent was not forthcoming, the divorce proceedings "*are not being prosecuted at this juncture*".

92. Insofar as the divorce proceedings are concerned, the court must observe that the applicant would be rather foolhardy to allow the divorce proceedings be rushed having regard to the state of the respondent's financial disclosure in these proceedings.

93. Insofar as the move to Ireland is concerned, the respondent points out that the applicant supported this move as it would enable a purchase of a family home – something that was beyond their means in London. The court does accept that the cost of acquiring a family home in Ireland as opposed to the cost in London was a consideration in the minds of both parties. However, it was very much a secondary consideration and the main reason was the respondent's business interests and those of his family. Furthermore, the couple were in London because of the family business.

94. The respondent acknowledges that the very good and close relationship which he had with his children prior to the separation has been more difficult since. He does accept the decision of the applicant to remain in Ireland with the children although his preference would be that they would return to reside in Australia. He would like to have joint custody of the children with their primary place of residence to be with the applicant and he wants the children to be permitted to visit Australia periodically.

95. The respondent rejects the assertion by the applicant that the children are not safe with him in light of the incident in France when he became intoxicated while the children were in his care. The respondent accepts that the incident was not appropriate and was upsetting for the children and says that same was not characteristic of his parenting in general nor reflective of his relationship with the children over the years. The court is satisfied that the incident in France was out of character for the respondent. It was irresponsible of him to become so intoxicated whilst the children were in his care but there is no evidence that such reckless behaviour on the part of the respondent was a frequent or regular occurrence. It does not give rise to ongoing welfare concerns in the eyes of the court.

96. The respondent's submissions in relation to the breakdown of the marriage, the nature of the family business, the family trust, maintenance post separation and related matters are dealt with elsewhere in this judgment where those issues are addressed.

97. Insofar as the respondent's submission concerning the inheritance to which the applicant may ultimately be entitled upon the passing of both parents is concerned, being in the region of €4m Australian dollars, this issue is also dealt with elsewhere in the judgment. It is worth reiterating that the applicant's mother is alive and well and living independently – although a senior citizen. Furthermore, there is a very significant

difference between such assets as the applicant's mother may own – and which may form part of her estate on her demise – and the assets, wealth and income being generated by the family business which the respondent is working in as a key player.

98. The respondent makes submissions in relation to the issues which are not in dispute between the parties and the issues which are in dispute between the parties (as does the applicant in her submissions). The submissions made in relation to these matters are taken into account where the particular issues are addressed in this judgment.

99. In his submission concerning his interest in the family business/trust the respondent makes the following submission;-

> *"The applicant asks this Court to regard the respondent's possibility of a future benefit pursuant to the terms of the said trust as being … a financial resource. The respondent submits that it would cause a significant injustice to him to consider him as being entitled to such a benefit as a matter of certainty or probability."*

It is submitted that the Court should have regard to the decision of Keane CJ in the case of **T v T [2002]** wherein he considered arguments pertaining to the approach to be taken to the valuation of assets by the Court. He stated:-

> "*The next question that arises is as to the time at which the assets should be valued. That is of considerable importance in the present case, given that the office block, which constitutes so significant a proportion of the applicant's assets, was acquired after the breakdown of the marriage. The language of s.20(2)(a), and, in*

particular, the reference to "property... which each of the spouses concerned has or is likely to have in the foreseeable future" seems to me to be more consistent with an assessment by the court of the value of those assets as of the date of the hearing. Any other construction, moreover, would seem to give rise to the possibility of injustice to either party. Thus, if the office block had been acquired by the applicant immediately before the breakdown of the marriage and the property market had collapsed between its acquisition and the date of the hearing in the High Court, it would seem singularly unfair to him that the value of his assets should be ascertained by reference to the position as of the date of the breakdown.

That was also the view taken by the Court of Appeal in Cowan -v- Cowan. Thorpe LJ said: "[the submission] that much of the husband's fortune was generated in the 6 years post separation, receives no reflection because in my opinion it is inherently fallacious. The assessment of assets must be at the date of trial or appeal. The language of the statute requires that. Exceptions to that

rule are rare and probably confined to cases where one party had deliberately or recklessly wasted assets in anticipation of trial. In this case the reality is that the husband traded his wife's unascertained share as well as his own between separation and trial, particularly committing those undivided shares to the investment in Baco. The wife's share went on risk and she is plainly entitled to what in the event has proved to be a substantial profit. If this factor had any relevance, it is within the evaluation of the husband's exceptional contribution."

I would adopt that as a correct statement of the law in this jurisdiction."

It is contended by the respondent that for the purposes of determining the within application, this Honourable Court should disregard any possible future entitlement either party may have on the death of their surviving parent or parents given the complete lack of certainty surrounding when such benefit might be paid, the amount of any such future benefit or indeed the likelihood of it being made at all given the vicissitudes of life.

100. Insofar as this submission is concerned, the court considers that it ought not to engage in speculation as to what actual assets the parties may or may not inherit or acquire at some future date whether by reason of the death of a parent, the restructuring of a family business (in the case of the respondent) – or otherwise.

101. However, the position in this case is that the court is completely satisfied that it has not been presented with a full and accurate disclosure by the respondent of his assets, income and worth ('his means'). The respondent is a businessman who is, and has for many years been, involved in business internationally. The respondent has achieved success in business and this success continues. Yet, the respondent's evidence in relation to his business dealings and in relation to his worth was throughout the hearing evasive, uncertain, incomplete and singularly unimpressive.

102. Although the applicant did call an accountant to give evidence in the case, it was apparent that the accountant came onboard to assist the applicant in putting or endeavouring to put some shape on the finances and with a view to offering some coherent evidence to the court in that regard. While the accountant did his best it was apparent that he was retained at short notice and the service and evidence which he was in a position to provide was very far removed from that of a forensic accountant whom one would expect to be giving evidence in a case of this nature. Such expert witnesses give evidence after having devoted considerable time to preparing a report, raising queries and gathering documentation – in the run up to the hearing. Essentially, the applicant in this case has been at a very distinct disadvantage because she has not had the means to engage a forensic accountant and because the respondent has not been forthcoming in relation to his means

103. The respondent's side did mention the volume of material discovered by him. Whatever was discovered did not translate into coherent or clear evidence in court from the respondent concerning his means.

104. Ultimately, this Court is in the position that it does not know the true worth of the respondent. While it cannot speculate in that regard the court is entirely satisfied that it is proper, and indeed necessary, to draw the reasonable if not inevitable inference from the behaviour and conduct of the respondent in these proceedings in terms of the financial disclosure. The only proper inference which this Court can draw in that regard is that the respondent has deliberately failed to disclose his means in order to minimise the provision made for the applicant.

105. In many if not most cases the provision made by a court in judicial separation proceedings will impact significantly on the orders made in divorce proceedings. Indeed, where divorce proceedings come on for hearing within a short period of time after the

hearing and orders made in judicial separation proceedings, it will usually be difficult to persuade a court that further or other or different provision ought to be made in the divorce proceedings unless there has been a radical change in the evidence and/or in the circumstances of either one or both of the parties. If there is a long interval the original order or the terms of a judicial separation will still be of great significance. Even if a change in circumstances takes place the reason for it will be relevant.

106. Under Section 20(3) of the Family Law (Divorce) Act, 1996 "*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*". A Court Judgment and Order granting a Decree of Judicial Separation and making proper provision at the time is clearly a matter to be considered at a divorce hearing - but it reflects that court's findings and decision in light of the evidence then available to it.

107. A court will look afresh at the evidence at a divorce hearing or indeed in a set aside case. The courts will not tolerate a litigant holding on to the fruits of the poisoned tree of non-disclosure. The decision of the Supreme Court in S.N. v P.O'D. is an authority on point in this regard [2009 IESC 61, unreported, Supreme Court, July 28, 2009].

108. In this regard, it is appropriate to say expressly in this judgment that this Court does expect that the evidence in relation to the finances – and in particular the evidence in relation to the means of the respondent – will be much more comprehensive and clear if and when divorce proceedings come before the court for hearing. In that regard, the court deciding on the application for a decree of divorce will do so in light of the evidence then available to it and in light of such clarity as may then exist in relation to the means of the parties. This court is at a disadvantage in making proper provision because the respondent has not disclosed his true means. The court hearing the divorce

proceedings if and when they come on for hearing may not be. If it is not, it will be better placed to decide what proper provision ought to be made before granting a Decree of Divorce. If it too finds that the respondent has not disclosed his true means then it may draw inferences from the repeated failure. It cannot in the circumstances be fettered by the court order made in these proceedings as that would not be just nor in accordance with law.

109. This case is perhaps in a small minority of cases where such an issue will so obviously be apparent at this stage of the proceedings - but the evidence and information deficit here concerning the respondent's means is truly grotesque.

110. **Decision**

The court will grant a Decree of Judicial Separation under Section 2(1)(f) of the Judicial Separation and Family Law Reform Act, 1989 (as amended).

111. The court will declare that the children's habitual residence is in Ireland and will direct that the principal place of residence of the children will be with the applicant in Ireland.

112. The court will award joint custody of the children to the applicant and the respondent but expressly on the basis that their home/habitual residence is physically in Ireland with the applicant.

113. The court will direct that liberal access be agreed between the parties and will grant liberty to apply in the event of disagreement in that regard.

114. The court will direct that the respondent pay the children's costs of travel to see him in Australia together with the costs of the applicant - or an adult of her choosing – travelling with them whilst they or any of them are under 18. The court recommends that this requirement to be accompanied by the applicant or an adult of her choosing be

relaxed and/or reviewed in default of agreement when one of the children travelling is over 18.

115. Insofar as the "*matrimonial assets*" known to the court are concerned, the court considers that the applicant ought to have the following provision made for her; -

(1) The family home at _________, ________, Co. Cork (redacted). The applicant values this house at €690,000 and the respondent values it at €900,000. The actual value is likely to be somewhere between both figures and is probably closer to the applicant's estimate. The mortgage on the property is approximately €593,000. The mortgage is being paid on an interest only basis. This leaves the mortgage repayments per month small but postpones repayment of the principal sum to the end of the term. This Court will declare that the applicant is entitled to the entire beneficial interest in the property and is entitled to exclusive use and occupation. The court will make the appropriate property adjustment order in this regard. It remains to be seen whether or not the respondent's release from the mortgage can be arranged but the court will direct that the applicant use her best endeavours to secure his release.

(2) The "investment" lands at _________ (redacted) in the south of Ireland. These lands are valued at €35,000 by the applicant. Until recently, the respondent did not appear to differ from this valuation but now puts a valuation of €150,000 on the lands. The court does accept that there is likely to be some hope value in terms of the investment and it is likely that the lands are worth something in excess of €35,000. However, the respondent's contribution to the acquisition of these lands was small and the court will

declare that the applicant is entitled to sole ownership of these lands and will make the appropriate property adjustment order in that regard.

(3) The apartment at Property X – which is in the respondent's sole name. This property is valued at €280,500 by the applicant and at €240,000 by the respondent. The true value is likely to be somewhere between both. The mortgage is €80,400. The court will direct that this property be sold and that the net proceeds of sale after payment of the mortgage, (any capital gains tax or similar tax payable and the costs of sale) be paid by the respondent to the applicant as a lumpsum payment.

(4) Property Y which is in the joint names of the parties. The applicant values this house at €561,000 and the respondent values it at €500,000. The mortgage on this property is €172,000. Insofar as this property is concerned, the court will declare that the respondent is entitled to the entire beneficial interest in the property and is entitled to exclusive use and occupation of it. It will make the property adjustment order transferring it into his sole name and the order declaring his right to exclusive use and occupation of it conditional upon (a) he first indemnifying the applicant in respect of the mortgage and securing her release from same and (b) a stay until such time as the applicant is paid the net proceeds of sale of the apartment and the property adjustment orders in respect of the family home and the __________ (redacted) lands are completed (but with the respondent responsible for the mortgage and entitled to the rent of Property Y in the interim).

(5) Z Limited. The respondent's position is that there is no money in the company and that may well be so at this stage. The copy audited financial statements produced in court suggest otherwise. However, the court will not

make an order concerning this company in the absence of concrete evidence as to what it is worth as of the date of hearing. Such an order would be too speculative.

(6) Insofar as the small balances in the bank accounts referred to in the DVD schedule are concerned, the court will direct that the parties are to retain the balances held in their sole accounts as disclosed and divide equally the balance in any joint account. In addition, the applicant owns a Rav 4 car (2021) and it is subject to a car loan/PCP agreement. It seems likely that there is little equity as such in this vehicle. However, for the avoidance of doubt the applicant is hereby declared sole owner of the car.

Maintenance

116. This Court is satisfied that the respondent's income is substantially in excess of his disclosed income. The court is satisfied that the respondent has not made full or proper disclosure of his means/assets. Insofar as maintenance is concerned and having regard to the evidence and the affidavits of means the court considers that the appropriate figure for maintenance is €4,200 per month - being €1,000 per child and €1,200 for the applicant – and will so order. The first maintenance payment is to be paid into the applicant's bank account on the second Friday in August and thereafter on the second Friday of each month. Meanwhile, the current arrangement is to continue.

117. In addition; -

(a) The respondent is to discharge all utility bills up until 12th August, 2022. Thereafter, the applicant is responsible for the utility bills in the family home, the LPT, house insurance, the mortgage repayment and the mortgage protection policy premium. The respondent is to arrange the transfer of the utility bills to the applicant without delay (and paid up to 12th August, 2022).

(b) The respondent is to discharge the cost of Laya health/medical insurance cover for the children whilst they are dependent.

(c) The respondent is to continue to pay the premiums on the Irish Life Policy (insuring the joint lives of the parties) while any of the children remains dependent such that either parent will be entitled to the benefit of the policy in the event of the death of the other. The respondent is to continue to pay the premiums in respect of any other current insurances while the children are dependents in order to provide extra security in the event of the untimely death of either parent [except for the mortgage protection policy premium].

(d) The respondent is to pay 50% of the children's medical and dental bills which are not covered by health insurance and is to forward payment to the applicant's bank account within 21 days of request being made (and the bills or receipts in respect of the expenses are to be provided with the request for payment).

(e) The respondent is responsible for and is to discharge the school fees in respect of the children's education whilst they are dependents. The applicant is responsible for the other costs such as the children's uniforms, school books and extracurricular activity costs [music, sports, school tours and such like]. In default of agreement university/third level costs including accommodation costs are to be the subject of a variation application when the time comes and the court will give liberty to apply in that regard.

118. The proceeds of the sale of the apartment at Property X which are to be paid to the applicant as a lumpsum payment are to be used in part to fix or replace the windows in the family home and thereafter can be used as the applicant herself shall decide.

119. The court will not make extinguishment or blocking orders in respect of the parties' succession rights, or otherwise. The court considers that it is not appropriate to do so now because the respondent has not been truthful in relation to his means and the court does not know what his income or worth is in fact. The court will not make such orders in favour of the applicant when not making cross-orders in favour of the respondent as there may be a fundamental unfairness in doing so even if the respondent has failed to disclose his true means.

120. The court is not satisfied to now direct that the respondent discharge the mortgage principal sum on the family home over a period of time because it does not have true or complete evidence before it as to the full extent of the respondent's means. The court will not engage in speculation as to his worth.

121. The Court will list this matter for 10.30 a.m. on Wednesday 27th July next to hear from the parties in relation to the form of the order, the issue of costs and any other matters arising. The parties should endeavour to agree the form of the order prior to then and the court will deal with all matters outstanding.

Note – Following submissions the court subsequently awarded the costs of the proceedings to the applicant.