[2020] IEHC 205

THE HIGH COURT
FAMILY LAW

[2019/47 CAF]

IN THE MATTER OF THE FAMILY LAW ACT, 1995
IN THE MATTER OF THE FAMILY LAW (DIVORCE) ACT, 1996

BETWEEN:

B.R.

APPELLANT

-AND-

P.T.

RESPONDENT

JUDGMENT of Mr. Justice Jordan delivered on the 21st day of February 2020.

Introduction

1. This matter comes before the Court on foot of an appeal brought by Mr. R., (hereafter the 'appellant'), arising from an Order of the Circuit Court (Judge Ryan) who prepared a detailed written judgment which this Court has considered. A decree of Judicial Separation was granted on of 30th November 2011 in proceedings pursuant to the Judicial Separation and Family Law Reform Act, 1989 and the Family Law Act, 1995. The appellant commenced divorce proceedings by way of a Family Law Civil Bill dated 16th June 2017 and issued on 29th June 2017.

2. The appeal was heard before this Court over the course of four days, in two tranches, on 24th and 25th October 2019 and 21st and 22nd January 2020.

3. The appellant is a litigant in person and P.T. (hereafter the 'respondent') was represented in October by her solicitor, Ms. Hayes, and at the resumed hearing of the matter in January by counsel, Mr. Shields, B.L. instructed by Ms. Hayes. Both the appellant and the respondent gave evidence to this Court, and both were cross examined.

Background

4. The appellant and the respondent were married in 2002 and they have two dependent children, M. born in 2005 and D. born in 2006. M. has some additional needs but is doing well. The appellant and the respondent are professional people. The marriage was of approximately 8 years duration before it ran into difficulty and the parties separated; it was not therefore of a very long duration. Judge McDonnell granted the Decree of Judicial Separation, in proceedings brought by the respondent, pursuant to the provisions of s. 3 of the Judicial Separation and Family Law Act 1989 in respect of the parties on 30th November 2011 and this was done on the grounds as set out in s. 2 1 (f) of the Judicial Separation and Family Law Act 1989. Ancillary orders were made and these were:-

1. An Order

That the respective shares that the parties herein would be entitled to in the estate of the other as a legal right or on intestacy under the Succession Act, 1965 be and are hereby extinguished pursuant to Section 14 of the Family Law Act, 1995

2. An Order

That the Parties be and are hereby further precluded from making application for provision under Section 15 (A) (10) of the Family Law Act 1995 as inserted by Section 52 (g) of the Family Law (Divorce) Act 1996.

3. *An Order that the parties will each pay 50% of all school fees. [sic] books, uniforms, and agreed medical and dental expenses in respect of child.*

4. *An Order that the Respondent will discharge all fees in respect of Riverwood.*

5. *An Order that the [sic] discharge VHI premiums.*

6. *An order that the Respondent will continue to attend with the Lucena Clinic subject to verification.*

7. *An Order that the Standard Life shares will be transferred to the Respondent and any costs in respect of the transfer will be borne by the Respondent.*

8. *An Order that if any school fees have been paid by the Respondent the Applicant to refund 50% of same to the [Respondent] within 3 weeks.*

9. An Order that any tax refund will be refunded to the Applicant.

10. *An Order that all assets as set out in the parties Affidavits of means remain the sole assets of that party.*

11. *An Order that access take place in accordance with the recommendations of Professor Jim Sheehan.*

12. *The Court notes the Respondent will collect children from school and commits to deal with pencil holding and other exercises with M. [redacted].*

5. Judge Ryan commented on this provision in her judgment, saying that: *'No further provision was deemed necessary in the circumstances having regard to their respective assets as disclosed at the time'.*

6. Paragraph 9 of the Endorsement of Claim of the Family Law Civil Bill which was issued on 29th June 2017 by the appellant's then solicitors and which was drafted by counsel pleaded: -

> *"Further, the applicant believes that the provision made in the orders of Judge McDonnell in the context of the judicial separation of the parties on the 30th day of November, 2011, constitutes proper provision for both parties."*

7. In view of the case being advanced by the appellant on the opening day of this appeal hearing the Court of its own motion amended para. 9 of the Endorsement of Claim of the Family Law Civil Bill to read: -

"Further, the applicant believes that the provision made in the orders of Judge McDonnell in the context of the judicial separation of the parties on the 30th day of November, 2011, does not constitute proper provision for both parties. Proper provision requires to be made for the applicant."

8. And by the insertion of an additional paragraph in the prayer of the Endorsement of Claim after sub-paragraph (a) namely: -

"(a)(i) An order making proper provision for the applicant."

9. This amendment was made by the Court to enable the appellant argue the case which he wished to make and in order that his pleadings reflected that case.

10. Notwithstanding the assertions and submissions of the appellant it is worth emphasising that the case being made by him that proper provision was not made for him at the time of the judicial separation and that financial provision ought to be made for him by this Court and that a maintenance order ought to be made in his favour runs contrary to the express pleading in the originating proceedings – the Family Law Civil Bill (prior to amendment). In addition, it is worth quoting from the following letter sent by the appellant's solicitors to the respondent's solicitors dated 22nd December 2017: -

"We would suggest that our client's vouching is more than adequate in circumstances where the parties had a fully contested judicial separation in 2011 and both parties have moved on with their lives."

11. Lest there be any doubt, it is quite clear that the pleadings and the above correspondence was at that time fully in accordance with the appellant's instructions. This is clear as he expressed similar sentiments in a letter which he wrote to the respondent's solicitors on 12th June 2018 at which time he had dispensed with the services of his solicitors and was representing himself. In a letter to the respondent's solicitors dated 12th June 2018 the appellant wrote: -

"Dear Ms. Hayes:

In connection with the divorce matter, I wish to advise you of the following:

(1) I am representing myself as a lay-litigant and my contact details appear in top right corner.

(2) Please note that the Family Law Civil Bill with affidavits of means and welfare were lodged with Dublin Circuit Court back on 29th June, 2017 and vouching provided.

(3) Respondent's defence and counterclaim and affidavits of means and welfare were lodged with the Dublin Circuit Court on 17th of May, 2018 without any vouching, following motion coming before the Dublin Circuit Court on 4th of May, 2018.

(4) I repeat the offer of continuation of the same terms ordered by the Circuit Court Family Court by way of judicial separation on 11th November, 2011 and access schedule as per High Court Orders 20th March, 2013 as the terms for a consent divorce. (Copy both orders attached).

(5) I advise that this letter is a 14-day warning letter to you confirming that in the event your client continues to refuse to consent to divorce that I will apply to the County Registrar for a case progression on Wednesday 27th June, 2018."

12. Subsequently in the case progression questionnaire completed by the appellant and stamped by the Dublin Circuit Court Office on 1st August 2018, the appellant was clearly of a different view as the answer to the first question indicated that the appellant intended to contest other issues. For example, the reply to question no. 13 of that questionnaire indicated that pension adjustment orders were being sought (by him).

13. Thus, and particularly in so far as the claims for financial relief are concerned, this case has moved from a case in which the Endorsement of Claim, the prayer for relief and correspondence as late as June 2018 indicated that there was very little between the parties and that this was essentially a case where a decree of divorce was being sought for finality at some remove from a decree of judicial separation having been granted, to an action in which the applicant/appellant has sought very significant financial provision to be made in his favour in addition to the issues surrounding access. In addition to seeking periodical maintenance of €1000 - €3000 per month the appellant is seeking significant financial relief with pension adjustment orders in his favour. In closing submissions, he submitted that a proper rebalancing in order to make proper provision for him could require pension adjustment orders in the order of 38% of the respondent's pension entitlements – although 48% and 25% were also floated earlier by him. The appellant points out that he does not now have any pension provided for.

14. In the course of his case the appellant has pointed to alleged deliberate short-comings on the part of the respondent insofar as her affidavits are concerned. He has gone as far as to allege perjury and has been vitriolic in these assertions although scrutiny of his points reveals no more than simple errors. The Court is satisfied that the respondent has been transparent in relation to her assets, liabilities, income and expenditure throughout. Furthermore, the Court is satisfied that the appellant was provided with full details in relation to the pension plans of the respondent The option of claiming retirement benefits early from age 50 on any one or more of the plans is of no consequence or relevance in light of the evidence and this Court's findings of fact.

15. When one looks at the appellant's affidavit of means it is difficult to reconcile them. In May 2017 the appellant swore an affidavit of means in which he gave the value of his home as €1,065,000.00 That was the price paid for it. In his affidavit of means sworn in October 2018 he values the same property at the same figure. In an affidavit of means sworn in May 2019 he values the same property at €700,000. In the affidavit of means sworn by him in September 2019 he values the same property at €382,500. In his affidavit entitled "*Affidavit of Change in Financial Provision*" sworn in October 2019 the

appellant again gives the value of his assets (essentially his family home) at €384,332.00. This notwithstanding the fact that the appellant's valuer and the respondent's valuer agree that the value of the house as it currently stands is in or about €1m. It is clear on the evidence before the Court that the appellant has sought to understate the value of his assets. In addition, it is clear to the Court that he is not prepared to acknowledge his earning potential although he is well capable of working and generating an income. At present he appears to be occupied with this case and working on his re-development project at his family home. The Court is also satisfied that the appellant has endeavoured to persuade this Court that the respondent's earnings are and have been in excess of the true state of affairs. It is true that the respondent had something of a windfall as a result of stock options which she received with a previous employer but this was back in 2007 and before the decree of judicial separation. It is something both parties were completely familiar with before the judicial separation. In evidence the respondent said that her pre-tax average earnings between 2002 and 2019 was approximately €132,000.00 per annum. She also had the benefit of pension rights/payments. These earnings are far removed from those contended for by the appellant insofar as the respondent's income and earnings are concerned. The appellants estimation of the value of the respondents assets at approximately €2.6 million in his affidavit dated 8th October 2019 appears correct and is not far removed from her own valuation.

Chronology of Events

16. Judge Ryan's written judgment outlines the extensive procedural history of this case and it is appropriate to outline the general chronology as it appears from the papers :-

2002	Appellant and the respondent were married.
2005	Their first child, M. was born.
2006	Their second child, D. was born.
30th November 2011	A Decree of Judicial Separation was granted by Judge McDonnell in the Circuit Court.
23rd July 2012	The matter came back before the Circuit Court in respect of access issues – Order made.
20th March 2013	Order of the Circuit Court appealed to the High Court (Abbott J.) and this appeal was allowed.
2013	Respondent purchased a house in Dublin
2014	Respondent moved into the house purchased in Dublin.
29th June 2017	The appellant issued divorce proceedings.

17th May 2018	The respondent delivered a Defence and Counterclaim.
14th June 2018	The appellant discharged his legal representatives.
3rd October 2018	The appellant issued a motion seeking a s. 47 Report pursuant to the provisions of the Family Law Act, 1995.
12th October 2018	The appellant issued a further motion seeking an interim order restoring his access in the terms of the Composite ACCESS Schedule until the s. 47 report was completed.
24th October 2018	The respondent, through her legal representatives, issued a motion directing the appellant show cause as to why he should not be attached and committed for failure to comply with the Order of 30th November 2011 and for not meeting the balance of his half share of school fees.
2nd November 2018	Judge Berkeley interviewed M. and D.
12th November 2018	Emergency access restoration application and Section 47 Report [Order not produced].
19th November 2018	The appellant issued a motion seeking an Order directing the respondent to show cause as to why she should not be attached and committed for failure to comply with an Order made on 23rd July 2012, viz. for not paying her share of the costs of supervision.
20th November 2018	The appellant issued a motion seeking to re-enter the Judicial Separation proceedings and seeking a number of Orders including a variation of the terms of the Order of 30th November 2011 in respect of financial matters, school fees, maintenance and spousal maintenance; the extant motions were adjourned to 28th January 2019 and then to the substantive hearing.
3rd December 2018	The case was listed before the High Court (Faherty J.) apparently concerning an Appeal by the Appellant in respect of the Order of 12/11/18. The matter was struck out following submissions by both sides.
28th January 2019	The appellant did not appear and a medical certificate was furnished to the Circuit Court.
31st January 2019	The Judge hearing the case management list assigned both 23rd and 24th May 2019 for hearing, with a date for mention on 7th March 2019. The appellant did not appear and a medical certificate was furnished to the Court.

7th March 2019	The matter came before the Circuit Court and the appellant did not appear and a medical certificate was furnished to the Court.
3rd April 2019	The appellant sought to vacate the hearing dates, citing a pending application for Legal Aid and ill health. A medical certificate dated 20th March 2019 was furnished to the Court and it covered the period from 20th March 2019 and 22nd April 2019. He was not successful.
23rd May 2019	Judge Susan Ryan commenced the substantive hearing of the matter.

Legal Issues
Proper Provision

17. As in a variety of different types of proceedings, but especially in the area of family law, it is desirable to have both certainty and finality. Denham J. in *Y.G. v. N.G.* [2011] 3. I.R. 717 set out principles, which were later quoted with approval by Hogan J. in the Court of Appeal in *C.C. v. N.C.* [2016] IECA 410. While not all of the principles apply to these proceedings, some have substantial relevance. Denham J. outlines these at p. 729 of her judgment. They are :-

> *'In light of the law and the Constitution, there are a few general principles which may be applied where there has been a prior separation agreement followed by a subsequent application by a party to court. These principles are drawn up in light of the circumstances of this case, but they are general principles:-*
>
> *(i) A separation agreement is an extant legal document, entered into with consent by both parties, and it should be given significant weight. This is so especially if the separation agreement, as here, provides that it was agreed between the parties that the agreement was intended to be a full and final settlement of all matters arising between the parties; and, in the event of either party being granted a court decree, the terms of the agreement should be incorporated into the court order.*
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> *(ii) Irish law does not establish a right to a "clean break". However, it is a legitimate aspiration. As Keane C.J. said in D.T. v. C.T.(Divorce: Ample resources) [2002] 3 I.R. 334, at p. 364:-*
>
> > *"It seems to me, that, unless the courts are precluded from so holding by the express terms of the Constitution and the relevant statutes, Irish law should be capable of accommodating those aspects of the 'clean break' approach which are clearly beneficial. As Denham J. observed in F. v. F. (Judicial separation) [1995] 2 I.R. 354, certainty and finality can be as important in this as in other areas of the law. Undoubtedly, in some cases finality is not possible and thus the legislation expressly provides for the variation of custody and access orders and of the level of maintenance payments. I do*

not believe that the Oireachtas, in declining to adopt the 'clean break' approach to the extent favoured in England, intended that the courts should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties."

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

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

(ii) The constitutional and legislative scheme gives to the court a specific jurisdiction and duty under the Act of 1996.

(iii) Under s. 20(1) of the Act of 1996, "the court shall ensure that such provision as the court considers proper having regard to the circumstances exists" or will be made for the spouses and any dependent children. Thus this duty requires the court to make proper provision, having regard to all the circumstances. A deed of separation stated to be in full and final settlement is a significant factor.

(v) If the circumstances are the same as when the separation agreement was signed then prima facie the provision made by the court would be the same, as long as it was considered to be proper provision.

(vi) If the circumstances of the spouses, one or both, have changed significantly then the court is required to consider all the circumstances carefully. However, the requirement is to make proper provision and it is not a requirement for the redistribution of wealth.

(vii) Relevant changed circumstances may include the changed needs of a spouse. If there is a new or different need, that may be a relevant factor. Such a need may be an illness.

(viii) The changed circumstances which may be relevant include the bursting of a property bubble which has altered the value of the assets so as to render an earlier provision unjust. These are two example illustrations and are not intended to be a conclusive list of relevant changed circumstances.

(ix) If a spouse acquires wealth after a separation, and the wealth is unconnected to any joint project by spouses during their married life, then that is not a factor of itself to vest in the other spouse a right to further monies or assets.

(x) If, in the period subsequent to the conclusion of a separation agreement, one spouse becomes very wealthy, there is no right to an automatic increase in money or other assets for the other spouse.

(xi) If a party seeks additional funds, the court has to look at all the circumstances and its duty is to make proper provision, not to enter into a redistribution of wealth.

(xii) The facts and circumstances to be considered will include the length of time since the separation agreement was entered into. The greater the length of time which has passed, barring catastrophic circumstances, the less likely a court will be to alter arrangements.

(xiii) The standard of living of a dependent spouse should be commensurate with that enjoyed when the marriage ended. The Act of 1996 specifically refers to matters to which the court shall have regard and these include the standard of living enjoyed by the family before the proceedings were instituted or before the spouses commenced to live apart, as the case may be.

(xiv) However, if a party has new needs, for example a debilitating illness, that will be a factor to be considered by a court in all the circumstances of the case.

(xv) Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of separation or divorce will all depend on the circumstances. In one case, where a couple had worked a farm together, which the husband had inherited, the wife on separation sought 50%, however, the order given by a court was 75% to the husband and 25% to the wife. This is a precedent to illustrate an approach, but the circumstances of each case should be considered specifically.

(xvi) A party should not be compensated for their own incompetence or indiscretions to the detriment of the other party.

(xvii) If there has been an exceptional change in the value of assets, which was unforeseen at the time of the judicial separation or High Court hearing, it is a relevant factor, as not to take account of such a factor would result in an injustice: see M.D. v. N.D. [2011] IESC 18, (Unreported, Supreme Court, 7th June, 2011).'

18. The decision of the Court of Appeal in *C.C. v. N.C.* [2016] IECA 410 (referred to above) concerned an appeal against a decision of the High Court in divorce proceedings. The appeal was heard before Hogan, Birmingham, Irvine JJ. This arose from an appeal by the wife against a decision of Abbott J. in the High Court in divorce proceedings with her husband. She contended that the High Court had erred in respect of the way in which proper provision for her was assessed. Essentially, her appeal raised three issues upon which the Court had to decide: had adequate provision been made in the judicial

separation proceedings that preceded the divorce proceedings; the appropriate level or amount of magnificence and finally, was the High Court entitled to make an order for divorce subject to the husband discharging an earlier order for costs. For present purposes, the first of these is most relevant. Hogan J., giving judgment for the Court, said as follows, at para. 33 onwards:-

"33. The unpalatable fact, however, is that all of that money paid over on foot of the order of O'Higgins J. has now disappeared. The wife certainly did purchase a noted country house, but she ran into considerable financial difficulties because the initial purchase price of €5.1m. significantly exceeded the capital sum she had received from her husband. She further was required to expend considerable sums in respect of the repair of the property, which sums were – apparently – inadequate for this purpose and exposed the house to frost and water damage. One way or another, the property was sold in 2012 by the Bank of Ireland for a fraction of the initial purchase costs.

34. This aspect of the appeal certainly presents an unhappy and unfortunate tale. It is impossible not to have very considerable sympathy for the wife who, in many respects, appears to be yet another victim of the property crash. It is nonetheless clear from YG that the other spouse should not be visited with the consequences of poor and improvident investment decisions made by the other spouse in the aftermath of the marriage break-up. Looking at this another way, if the capital provision made by the High Court in 2005 was, viewed objectively, proper capital provision for the wife and children, the fact that the wife has subsequently misspent this capital sum is not in itself a reason why further provision should now be made in the course of the divorce proceedings. As Hardiman J. said in W.A. v. M.A. (divorce) [2004] IEHC 387, [2005] 1 I.R. 1, 19:

> *"….the conduct of a party in himself (or, of course, herself) bringing about the circumstances giving rise to the alleged need for (further) provision is itself of relevance to considering whether such provision should be made, and in what amount."*

35. As, however, I have already indicated, I cannot say that - measured by reference to the YG principles - the initial capital provision made by O'Higgins J. was inadequate in view of the totality of the orders for capital sums and maintenance made by him. If that is so, the fact that the wife needs a further capital injection of cash to compensate her for the improvident investment decisions which she took after the initial High Court order took effect is not in itself a reason why the High Court in 2012 (or this Court in 2016) should now make an order for further provision.

36. For these reasons, therefore, I would dismiss the wife's appeal against this part of the order of Abbott J. as made no further capital provision for her."

Custody & Access

19. Considerable time was devoted by the appellant in attempting to re-litigate and agitate matters in respect of a referral made by a General Practitioner to the Child and Family Agency regarding an allegation of sexual impropriety by the appellant in respect of one of his sons which was found on investigation to be unfounded.

20. In this regard, the Court has been referred by the appellant to a case from the Court of Appeal in the U.K., *In the Matter of W (A Child*) [2014] EWCA Civ. 772. That decision is really of no relevance to this case given the issues and the evidence here. The Court will return to these issues later.

Position of the Appellant

21. The notice of appeal filed by the appellant on the 25th June 2019, is an appeal from the whole of the judgment of the Circuit Court. In evidence and in submissions the appellant has stated a number of grounds in support of his appeal. He says in effect that the provision set out in the order of the 30th November 2011 at the time the decree of judicial separation was granted should be disregarded in circumstances where he asserts that the respondent made serious false allegations against him and that these false allegations were vigorously pursued by her subsequent to the decree of judicial separation being granted.

22. In this regard, he refers to what he describes as false allegations of criminal assault culminating in he having to defend himself and retain a legal team in order to do so in March 2012 and in July 2012.

23. Insofar as these assertions and the description of 'false allegation of criminal assault' are concerned, this court does not accept the evidence of the appellant. The court heard the clear evidence of the respondent in relation to what transpired on her return to the family home on the occasion in February 2011 which resulted in the charges in question being proffered against the appellant. I have heard also the respondent's description of the circumstances in which that criminal prosecution ultimately fizzled out. What occurred was a prosecution because of the Gardaí attending the family home and processing a complaint from the respondent as a result of what happened that night in the normal way. The appellant was not convicted of an assault although prosecuted. The respondent gave evidence in the prosecution before the matter was adjourned and later apparently struck out albeit the respondent was not requested to attend on the second date.

24. The appellant refers also to 'false allegations' made by the respondent against him in the summer of 2012. The actual allegation concerned a report by Dr. K., a General Practitioner, to the HSE concerning an incident alleged to have occurred between the appellant and one of the children. However, the information in relation to this report was, as the respondent explained in evidence to this Court, provided by her to Dr. K. after the child in question had spoken to her about the alleged incident. The respondent explained in evidence that she was in a very difficult situation when the information was imparted to her by her son and she ultimately felt that she had no alternative but to attend the G.P. and he took it from there. She says that she did not circulate the information. Despite asserting otherwise, the appellant provided no evidence whatsoever to this Court to

indicate a broader circulation concerning this issue than was necessary. There is no evidence before this Court that the respondent acted with mala fides insofar as the report is concerned. Moreover, and while acknowledging the unfortunate and painful consequences for the appellant insofar as his access to the children is concerned until such time as the allegation was determined to be unfounded, the issue was ventilated and addressed in considerable detail in earlier proceedings and in particular in the appeal hearing before Abbott J. which culminated in his order dated 20th March 2013 and in which order the Court noted;-

"(a) that the principles of safety first were applied in this matter; and

(b) that the allegation made…was determined to be unfounded by the Health Service Executive."

25. The Court is satisfied on the evidence that the appellant has not proven the misbehaviour which he has alleged against the respondent.

26. The appellant cites his current state of ill-health as a reason why the financial provision made at the time of the judicial separation is inadequate and ought to be revised. Physical or mental disability is an issue which must be considered. The ill-health complained of is detailed graphically in the judgment under appeal. The appellant has also handed into court a folder of medical records and certificates with details of; -

(a) vision loss – chronic open-angle glaucoma (2019);

(b) hearing loss – severe loss left ear (2019);

(c) a hiatus hernia problem (gastroscopy report dated 2nd May 2012);

(d) syncope, collapse, loss of consciousness (2018/2019);

(e) Cardiology referrals.

(f) Osteoporosis and Osteopenia investigations – Osteopenia conclusion with a calculated 10 year risk of a major osteoporotic fracture at less than 5% (Radiology Report dated 4th January 2011).

(g) Cervical and Lumbar spine issues – herniated disc complaints requiring investigation.

27. The respondent is now aged fifty nine and has some health issues but they appear from the limited evidence available to the Court to be age related complaints of no great severity. It appears from his evidence and submissions that his vision loss means that he has about a 10% chance risk of developing significant vision loss in his lifetime. The advice he has is that because of his chronic open-angle glaucoma he would benefit from having right and left selective laser trabeculoplasty. The total cost for this procedure including surgeon's fees, hospital costs and post procedure follow-up is approximately

€5,000 to have both eyes done (as of 6th September 2019). Insofar as the hearing loss in the left ear is concerned, it appears that the cost of a hearing aid as of 14th May 2019 is €2,950. The audiologist has recommended the hearing aid for his left ear in circumstances where the hearing in the right ear is normal. It should be added that the appellant did not appear to suffer from any disability in terms of his vision or his hearing during the course of the appeal in this Court. In fact he did not appear to suffer from any physical disability. He has not contended that he suffers from any mental disability and clearly does not.

28. The physical complaints are illustrated by medical certificates contained in the booklet handed in by the appellant. For example, a medical certificate of Dr. K.E. dated 27th July 2019 certifies that the appellant is unfit to attend work and family court from 27th July 2019 to 27th October 2019 (fit on: 27th October 2019):

> *"Due to: Recurrent collapse, blackout, loss of consciousness, hypertension, angina, dizziness, vertigo, chest pain. He is under intensive cardiac and neurological evaluation. He is awaiting to be seen by Dr. M. (Consultant Cardiologist) and Dr. C. (Neurocardio-Vascular Consultant). I advised him to avoid stress and not to attend family court for the next three months."*

29. An earlier certificate from St. Vincent's Private Hospital dated 22nd May 2019 confirms that the appellant was a patient in the hospital and was admitted on 21st May 2019 and discharged on 22nd May 2019 and would be unfit for work until 5th June 2019.

30. No medical evidence was called by the appellant. There is nothing remarkable in the medical documentation submitted by him. He presented in court as a competent and extremely able individual.

The Financial Affairs of the Parties

31. A significant, if not the significant, issue in dispute between the parties is what the appellant obviously considers to be an inequality of wealth between them both – and one which he believes ought to be corrected by this Court. In this regard, the fact of the matter is that both parties were well provided for at the time of the Judicial Separation. The respondent has worked hard since then and has accumulated more assets and invested what she had more wisely than the appellant. The appellant has, he says, invested all his capital and savings in a home – a property which the Court is satisfied is a desirable house in a desirable location in Dublin. The house cost €1,065,000 and is unencumbered. The appellant's current partner (Ms. B.) contributed, according to the appellant, €11,000 in respect of the stamp duty and €10,000 of the purchase price. The house was purchased in October 2016. As mentioned earlier it appears that the house is presently worth approximately €1m. and the appellant is renovating/re-developing the house. He provided a folder of photographs of its current state to the Court. It is a house which has been completely gutted. Indeed, one would wonder at the extent of destruction within the dwelling house – and why it was necessary – particularly given the resources available to the appellant according to his evidence. Despite very concise and well prepared folders concerning for example the health issues and the legal costs

incurred by him to date, the appellant's documentation and information concerning the renovations, the expenditure incurred to date and by whom and the likely cost of completing the renovation is dismal. He has produced to the Court a copy of an estimate from a contractor which is submitted as evidence, as I understand the appellant's position, of the total cost of renovations. The total is €423,595.00 and this quotation addressed to the appellant and his current partner is dated 15th January 2020. In a letter from the appellant's former solicitors dated 24th November 2017 to the respondent's solicitors, it was indicated that the preliminary refurbishment costs were in the sum of €157,356.00.

32. On 21st January 2020 the appellant referred to a folder of invoices concerning the works done and he was requested to prepare a spreadsheet of these for the other side and to make them available for inspection to the other side before the commencement of the hearing on 22nd January 2020. A copy of the spreadsheet or list of expenditure was submitted to the Court by the appellant on 22nd January 2020. It is a list of names with sums opposite and it comes to a grand total of €298,277.64. The appellant did not give evidence in relation to the invoices nor did he produce them while giving evidence although the issue of the expenditure on the house was explored in some detail. It appears that some of the invoices were made out to one company and more were made out to a different company. It appears that there was a Permanent TSB account involved in the payment of the invoices and four separate Visa Debit cards. On these points being raised by the other side, the appellant indicated that the companies were involved so that he could get a trade discount. It is impossible to accept on the evidence before the court, including the appellant's photographs, that approximately €298,000 has been expended on the house to date. In his own evidence earlier, the appellant indicated a figure of €200,000.00 had been spent on repairs. When Asked to break down the expenditure for the Court he did but the total of the breakdown came to something less than €140,000.00. The financing of the expenditure was obscure - with reference in his evidence to the appellants partner having been approved for a €100,000.00 renovation loan which had been drawn down. In an affidavit of welfare sworn on 20/9/2019 the appellant swore that he the *"appellant has house renovation loan 100,000"*. The appellant is an Accountant by profession with experience working as a Forensic Accountant. Yet his evidence on these and other financial issues is most unclear and is unsupported by the paperwork one would expect to see and have produced in evidence and beforehand by him. *If* the court was satisfied that the appellant had expended €200,000.00 or €298,000.00 on renovation or refurbishment costs to date (including the purchase of goods and materials for the house – whether used yet or not) it would go on to hold that it was exceedingly foolish expenditure on the part of the appellant because the photographs and the appellant's evidence concerning the current state of the house would have proven that to be mismanaged and very largely wasted expenditure. But the Court does not accept that such expenditure has been proved by the appellant. No good reason for the absence of proper and timely vouching in this regard or for the absence of some clear evidence of expenditure has been forthcoming. The fact that the appellant is a lay litigant is not an excuse - particularly given his profession, his experience and his presentation of other evidence. Evidence on issues he wished to highlight was prepared

and presented in a meticulous way. Yet he has shied away from producing the appropriate evidence and vouching documentation on significant aspects of his own finances. His evidence in relation to his financial position is deliberately incomplete on important issues and this undermines his credibility in many respects.

33. At the time of the Circuit Court hearing and at the current time the appellant says that he is unemployed and without an income. His income and earning capacity is an issue. The Court has considerable difficulty in understanding how or why it is that the appellant is unemployed, if that is so. He is professionally qualified. He is and demonstrated by his presentation of his appeal in this Court quite capable of holding down gainful employment even if he has decided not to pursue a career in his profession. In the Circuit Court, the Judge referred to the appellant's assertion that he was a stay-at-home father for 12 years while the respondent built up her career – and that this should be taken into account in the divorce proceedings. The overriding factor referred to by the Circuit Court Judge was the Decree of Judicial Separation dated 30th November 2011. The Circuit Court Judge pointed out that according to the appellant's affidavit of means filed in those proceedings his self-employed income as a professional was estimated at €60,000.00 per annum. He had income from interest and dividends amounting to €28,000.00, plus shares and liquid assets of €1.3m. He had a pension with Schwab valued at €146,916.00. According to the respondent's affidavit of means at that time she was on a short-term 12-week temporary contract earning €1,200 gross per day, she had investments valued at €699,280.00. She had funds of €325,416.00 and shares valued at €417,144.00. Her pension policies were valued at €348,435.00. No financial adjustment was deemed necessary at that time.

34. The appellant had the same opportunity to invest his assets post decree of judicial separation as did the respondent. He had, in the view of the Court, every opportunity to work and earn a good income post decree of judicial separation. It seems clear from the evidence that he did not invest as wisely as did the respondent. It is also clear to the Court that any failure by him to generate a good income from his professional qualifications and experience was as a result of a lifestyle choice he made and cannot be attributed to he being a stay-at-home father for 12 years or 14 years now as he suggests. Even if he was at home more than the respondent – and the court is far from satisfied that he has proven this to the extent he asserts to be the case – that would not prevent him generating a substantial income given the nature of his professional qualifications if he had decided to work. He remains capable of earning a good income. He was keen to present himself to the Court as being " in his sixtieth year " and in a manner which despite the accuracy of that depiction was nonetheless redolent of his flair for embellishment throughout the hearing.

35. Even if the position is as contended for by the appellant and if he has ploughed his savings into the house which he purchased in 2016 this is a choice which he made and he cannot expect the respondent to make up any deficit that exists by reason of a foolish investment on his part or by reason of he having overstretched himself.

36. It is the position that the respondent's finances are in sound condition. The respondent purchased her home, again in a desirable location in Dublin, in 2013. She paid €1,070,000.00 for the house and she spent approximately €189,000 on renovations leaving the total cost of the house including the renovations at approximately €1.27m. The house is in reasonable proximity to the house purchased later by the appellant.

37. The house was a wise investment and has appreciated significantly in value. The respondent has generated a good income post separation. Although she is presently unemployed since August 2019 she does hope to be back in employment in the near future and she is actively pursuing opportunities. She hopes to be able to earn in the region of €80,000.00 net per annum going forward and has been frank and honest in this regard. She does have the option of retiring part of her pension early (from age 50). She is now 51 and that option does not appear on the evidence to be a live consideration although it is her choice. It is fortunate that this is her financial position as she is providing for the needs of the children at significant expense. They are in private school and their education and other needs will remain costly into the foreseeable future. The appellant did in the past make some contributions in accordance with the court order but fell into arrears of late and he will not be contributing to these costs going forward. The Court is also satisfied that the respondent was not impeded in his career by his parental obligations nor did his efforts contribute to the respondent's career achievements in any significant way. The respondent did take time off work after the children were born and has been very involved as a mother throughout even if she did have to travel at times during her work and did then leave the appellant minding the children - and for a not insignificant period of time on one occasion at least. But the appellant was also abroad at times even if to a lesser extent. The Court does not accept as correct the appellant's picture of being a stay at home dad with a consequent adverse impact on his career and portraying the respondent as a mother who was not there for her children. The respondent has been devoted to her children while managing a demanding career simultaneously - which career has and continues to provide for them.

38. In the Circuit Court the judgment states that the appellant made allegations of gender bias and discrimination. These assertions have been raised by him again at length in this Court. Essentially, he says that if the roles were reversed there would be no question but that the 'wife' would receive substantial provision out of the husband's assets. This assertion is something of a hackneyed notion. Yet, it may be, as is no doubt the position with some of the other assertions made by the appellant, that he has come to believe that this is so. Whatever his view in this regard, it is incorrect. The explanation for the decision of the Circuit Court Judge is clearly set out in the judgment and is devoid of any gender bias or discrimination. Unfortunately, and whatever his beliefs may be, the appellant is wrong in equating the concept of proper provision with the notion of an equal division of assets. Proper provision is not a charter for the redistribution of wealth.

39. Proper provision clearly existed in respect of both spouses at the time of the granting of the Decree of Judicial Separation and nothing of note has occurred in the intervening period apart from the passage of time and the fact that the respondent has worked

harder and invested more wisely than the appellant. As things presently stand the appellant's known assets are essentially an unencumbered desirable house in a desirable location in Dublin and with a value at present of approximately €1m. Although there is no mortgage there may be some money due to be repaid for a house renovation loan if there is one. Although gutted, the house does represent something of a blank canvas for a purchaser who can afford to finish it to his or her liking. In addition, the appellant in the Court's view can generate a sufficient income to live comfortably and provide for himself should he decide to do so. He is very far from destitute and with some thought, effort and re-organisation of his affairs he already has enough to live comfortably and particularly so given his potential to earn.

40. In a nutshell , the Court has not been persuaded by the appellant's arguments or evidence at this appeal hearing. It finds no reason to differ in any material way from the judgment and order appealed from the Circuit Court. In the view of this Court, the Circuit Court Judge was entirely correct and this appeal will be dismissed.

41. In the course of his submissions at the end of the appeal hearing, the appellant reiterated his assertions concerning false allegations having been made by the respondent. He expressed a desire that the Court lift the in camera rule in order that he could go to the Gardaí and to the Garda Síochána Ombudsman Commission in relation to the false allegations made. He was critical of the respondent's solicitor in this regard, and gratuitously so in the Court's view. He referred to a need to stop practitioners inciting false allegations. Insofar as the 'submissions' made in this regard are concerned, the Court rejects them entirely. The evidence before the Court satisfies it that the respondent's legal team have acted properly and professionally in representing their client's interests in what is and has been a protracted and extremely difficult case. Insofar as the appellant has requested that the in camera rule be lifted, this application is refused.

42. The appellant also sought to revisit and appeal the refusal that a fresh s.47 report be obtained. He asserted that there should be one as there were vulnerable children involved who were being abused by their mother. Again, this Court rejects this assertion on the part of the appellant. There is absolutely no evidence that the children are being neglected or abused in any way by their mother. In fact, the evidence satisfies the Court that the children are being very well cared for and looked after by their mother. The children's relationship with their father would be much better if his interaction with them and with their mother was more consistent, rational and reasonable. The Court did consider meeting with the children with a view to hearing what they might have to say. On balance, however, it decided against doing so. Being satisfied with the evidence as to the position it decided that arranging a meeting with them is not necessary and is not in their best interests. Insofar as it can be achieved it seems to the Court that every effort should be made to insulate the children from the rancour and bitterness of this litigation which has emerged again in recent years – insofar as that can be done. The Court declines to Order another section 47 Report.

43. Insofar as access is concerned, the current position is that, in addition to the appellant's failure to behave reasonably, a significant impediment to access between the two children and their father is the current state of the home in which he is residing. This is something which he ought to have considered before completely gutting the dwelling house. Any sensible and reasonable and considerate parent would do so. As things currently stand it is self-evident from his photographs and from the description of the current state of the house given in evidence by the appellant himself that it is not capable of accommodating the children overnight and that it is unsuitable for any meaningful access.

44. Quite apart from anything else the house is not suited to school-going teenagers doing their homework or having their friends around in its current state. In fact, it is probably correct to say that these two teenagers cannot but be embarrassed at the state of the home in which their father is currently choosing to reside. It is difficult to understand how these issues did not occur to the appellant at the time he set about the 'redevelopment'. The current state of the dwelling house coupled with the current state of his finances on his evidence, and given the access issues, is but one indicator as to why the appellant ought to reconsider the redevelopment project. To provide for his accommodation needs and to have a suitable home to facilitate access a sensible option would appear to be to sell the dwelling house and purchase a smaller ready to walk-in property with a portion of the proceeds. Then his children would have a comfortable house or apartment to visit their father in, to do their homework, to have their friends over and to do all of the normal things teenagers do when at home. A sale of the property would also generate enough money to allow the appellant attend to his medical needs in terms of optional treatment and which do not involve major cost - and to enjoy a comfortable quality of life going forward - with some employment built in. He is fifty nine years of age with many productive years ahead of him and he ought to release his mind from this litigation he has locked himself into. He needs now to move on with his life again.

45. The appellant's evidence in relation to the input of his current partner in terms of her small contribution to the purchase price of their current home is clear and is already dealt with above. The position in relation to any contribution by her towards the expenditure on the redevelopment is not at all clear. If the appellant's current partner has in fact paid money for work done on the house since it was purchased, then that may give her some equity in the house and in any sale proceeds. There may also be a renovation loan to be repaid. Whether or which the house remains a very valuable asset in the appellants hands.

46. Insofar as access is concerned, I am satisfied that the respondent is willing to facilitate access between the children and their father and has been throughout. Her efforts in this regard have at times been frustrated by his actions - and by his unreasonable and all too frequently oppressive behaviour.

47. The following is my order in relation to custody and access: -

(1) The Circuit Court Order is affirmed and both parties are to have joint custody of the dependent children M. and D.

(2) Primary care of both children is to remain with the respondent as set out in the Circuit Court order made on 24th June 2019.

(3) Access arrangements in accordance with the interim order made before this Court on the 25th October 2019 are to continue pending the completion of the renovations of the appellant's home or until he secures suitable alternative accommodation in reasonable proximity to the respondent's home.

[For the avoidance of doubt reasonable proximity means 2km measured by the shortest route along the public highway. The appellant is of course free to live where he chooses but the access regime will require review in default of agreement if he is not living in reasonable proximity to the respondents home and that is the reason for the inclusion of this proximity clause].

(4) When the renovations to the appellant's home are completed or a suitable alternative property in reasonable proximity to the respondents home is procured by the appellant then the access is to be resumed in accordance with the order of the Circuit Court of 24th June 2019.

(5) Maintenance for the children; -

(a) the respondent , with normal parental discretion, is to discharge all of the children's secondary education costs to include continuing to discharge the fees to the Secondary College.

(b) The respondent will also, with normal parental discretion, discharge any third level educational costs while the children are dependents – inclusive of their reasonable subsistence costs.

(c) The respondent will also, with normal parental discretion, discharge all reasonable extra-curricular expenses such as summer camps, birthdays, Christmas expenses, mobile phones, pocket money, travel costs, clothing, and holiday expenses while the children are dependents [save that the appellant is responsible for all holiday costs of the children and himself if he takes them away on holidays or short breaks].

(d) The respondent will , again with normal parental discretion, also discharge the children's reasonable and necessary medical expenses while the children are dependents.

48. The words normal parental discretion are included above in order to avoid the appellant seeking to dictate or orchestrate such expenditure. He is not entitled to do so.

49. The appellant's request for financial relief in terms of maintenance, lump sum payments, pension adjustment orders and all claims for financial relief are refused. In this regard, the Court has considered carefully all of the evidence and submissions in respect of the income/potential income and assets/liabilities on both sides – including that concerning

the value of the respondents pensions/the option of early draw down and distribution. These pension plans have been a focus of the appellants attention and submissions. The Court considers it necessary to make a final order regarding the pensions. Going forward and given her financial obligations in respect of the children the respondent needs the security of knowing that her pensions are secure and in that regard the Court will make an Order under Section 17 (26) of the Family Law (Divorce) Act 1996 excluding the application of section 22 of that Act in so far as the nominal pension order the court is making is concerned.

50. The Court is dismissing the appeal and affirming the Circuit Court order with the variations mentioned which are necessary in light of the evidence and the Court's findings.

See Appendices attached hereto.

Appendix 1 - Order

1. Whereupon and on reading the pleadings and documents filed herein and on hearing the evidence adduced and what was offered by the appellant in person and solicitor and counsel for the respondent and the court having heard the sworn evidence of both parties and being satisfied that the provisions of s.5(1) of the Family Law (Divorce) Act 1996 have been complied with, namely: -

    (a) At the date of the institution of the proceedings herein the spouses have lived separate and apart from one another for at least four years during the previous five years.

    (b) There is no reasonable prospect of a reconciliation between the spouses, and

    (c) such provision as the court considers proper having regard to the circumstances exists for the spouses and the dependent children of the marriage, including the ancillary orders now to be made.

    The court in affirming the order of the Circuit Family Court hearing and in exercise of the jurisdiction conferred on it by Article 41.3.2 of the Constitution grants a decree of divorce in respect of the marriage contracted between the parties herein in September, 2002 in Dublin.

2. And the Court doth make the following ancillary orders. In affirming the order of the Circuit Family Court made on the 24th day of June of 2019, with some variations, and for the reasons set out in the written judgment delivered herein and dated the 19th day of February 2020 :

    Custody and access:

    (i) The Circuit Court Order is affirmed and both parties are to have joint custody of the dependent children M. and D.

(ii) The Circuit Court Order is affirmed and the dependent children are to continue to reside primarily with the respondent.

(iii) The Circuit Court Order is affirmed and this Court refuses the applicant's application for a s.47 Report.

(iv) For the avoidance of doubt this Court refuses the appellant's application that the in-camera rule be lifted.

(v) In respect of access between the appellant and the dependent children the access arrangements are to continue in accordance with the interim order (agreement) which was agreed between the parties on the 25th day of October of 2019 and which agreement is embodied in the interim order of this Court dated the 25th of October of 2019. These access arrangements are to continue pending the completion of the renovations of the appellant's home or until he secures suitable alternative accommodation in reasonable proximity to the respondent's home. For the avoidance of doubt reasonable proximity means 2km measured by the shortest route along the public highway.

(vi) On completion of the renovations to the appellant's home or when a suitable alternative property is procured by the appellant then the access is to be resumed in accordance with the Order of the Circuit Court of the 24th of June 2019 as set out at subs. 4, 6, 7 and 8 of the Order under the sub-heading 'Custody and Access'.

3. Maintenance for the children: -

a. The respondent , with normal parental discretion, is to discharge all the children's secondary education costs while they are dependent to include continuing to discharge the fees to the Secondary College.

b. The respondent , with normal parental discretion, is to discharge the third level education costs of the children while they remain dependents – including their reasonable subsistence costs.

c. The respondent, with normal parental discretion, will also discharge all reasonable extra-curricular expenses such as summer camps, birthdays, Christmas expenses, mobile phones, pocket money, travel costs, clothing and holiday expenses while the children are dependents save that the appellant is to be responsible for the holiday costs if he takes the children on holiday or short breaks.

d. The respondent , with normal parental discretion, is also to discharge the children's reasonable and necessary medical expenses while the children are dependents.

(4) Financial provisions: -

The Circuit Court Order is affirmed and the appellant's application for reimbursement of supervision fees is refused.

(5) The Circuit Court Order is affirmed in relation to the appellant's application for spousal maintenance and financial provision in his favour. This Court makes no order for spousal maintenance and no order for financial provision in favour of the appellant.

(6) The Circuit Court Order is affirmed in relation to the respondent's pension benefits. The respondent is entitled to retain her pension benefits in full. This Court therefore makes a nominal pension adjustment order in respect of the respondents' pensions and further orders pursuant to section 17(26) of the Family Law (Divorce) Act 1996 that the application of section 22 in relation to this pension adjustment order is excluded. This Court notes that the Circuit Court Order indicated that a date was to be fixed in the Circuit Court Office when the draft orders were ready for ruling. No date was fixed and the nominal pension adjustment orders were not ruled as the whole of the judgment and Order of the Circuit Family Court was appealed by the appellant. This Court therefore remits this outstanding matter to the Circuit Court in order that a date can be fixed in the Circuit Court office for the ruling of the nominal pension adjustment orders in respect of the respondent's pensions when the draft orders are ready for ruling.

(7) This Court affirms the Circuit Court Order in relation to the parties' respective assets and declares that both parties are entitled to retain their respective assets as scheduled in their affidavits of means sworn in these proceedings, for their sole use and benefit.

This order affirms the Order of the Circuit Family Court pursuant to s.18(10) and makes an order pursuant to s.18(10) of the Family Law (Divorce) Act, 1996 that neither party shall on the death of the other party be entitled to apply for an order under this section for provision out of the other party's estate.

(8) This Court affirms the order of the Circuit Court which granted liberty to apply to the Circuit Family Court.

Appendix 2: Costs.

This whole issue concerning costs in family law proceedings and a perceived immunity from costs is something that has exercised the High Court and other courts over a number of years. In the context of judicial separation proceedings McKechnie J. considered the issue of costs in *B.D. v. J.D.* (unreported, High Court, 4th May 2005). In the course of his judgment, he stated: -

> *"In this branch of the law there is of course no tendering process similar to that which exists elsewhere and the availability and use of the Calderbank procedure is undeveloped. While it is true that "open offers" can be made by either party this facility is not commonly availed of. There is therefore no method by which the unreasonableness of one or other of the parties can be dealt with by the court, save for demonstrable conduct during the currency of a trial which rarely is evident. Given the obligation to make proper provision under the 1995 and 1996 Acts, many parties believe that as a result of this requirement they are, in effect, financially immune from participating in litigation no matter how lengthy the process may be or how unreasonably they may act. For this to be the situation or even perceived*

to be the situation, is not in my view in the public interest or in the interest of the administration of justice."

It is true that there is still a tendency to consider family law proceedings to be separate and apart from other types of litigation insofar as costs are concerned. Of course, that must be the situation in the initial stages of family law proceedings where the parties are endeavouring, with the assistance of the court, to untangle themselves from a failed relationship. But there comes a point in time when the situation changes; it changes when the litigation becomes unreasonably protracted and bitter and in particular when that has arisen by reason of the conduct of one of the parties in particular. In the same case, McKechnie J. went on to note that while a reasonably good number of cases are compromised, and many others do not have the intensity that can be a feature of some family law proceedings, he considered that the availability and utilisation of a costs order, either as a litigation benefit or deterrent must be considered in an overall manner. In this regard, he stated: -

"In my view I do not believe that any category of family law case should as a matter of principle be exempt from these costs provisions. It cannot be right that litigation can be open ended without even the risk of any type of costs order. Whilst I appreciate that the available assets are most frequently accumulated within marriage and that decrees of judicial separation and divorce are available without establishing fault, nonetheless, I cannot accept that a court should be powerless to award costs even where the case, or the parties to it or their conduct within the proceedings, merit the making of such an order. If that were so, I firmly believe that both justice and the public would be ill served".

In this case the following points are worth making in the context of the above observations of McKechnie J., with which this Court agrees : -

(1) This is a divorce application which came about many years after a fully contested judicial separation action. At an early stage the position of the appellant clearly was that the parties had moved on with their lives and that it was a matter of sorting out the divorce without altering the terms on which the judicial separation was granted – albeit there were also some issues surrounding access to be resolved. Approximately one year after issuing the divorce proceedings the appellant did an about-turn and has since then maintained that he is entitled to significant orders for financial provision in his favour against the respondent. It is the view of the Court that this is unreasonable behaviour on his part.

(2) This is a case in which an open offer was made during the hearing by the respondent, through her solicitors. It was in writing, albeit at a late stage, in effect on day three of the appeal hearing. It was a very fair and reasonable offer. It was clearly an offer that was prompted by fear on the part of the respondent that the Court would hold against her in relation to the pension adjustment orders which the appellant was seeking. Not only did the appellant refuse the offer made but he replied in writing setting out what only can be described as an avaricious and

wholly unrealistic demand in terms of financial provision in his favour. In the end the Appellant failed to beat the offer. He did not get near it.

(3) In this case the appellant is a professional person of considerable intelligence and ability. Having discharged his solicitors, he has represented himself and he has used the adversarial system to maximum benefit in terms of creating difficulties for the respondent and her advisers. This is apparent from the number of and the nature of the motions brought by him in these proceedings. It is apparent also from his failure to properly vouch and detail his own financial position – and in particular the financial situation in relation to the works on his family home. His combative attitude and approach and his gratuitous and unfounded assertions concerning the professionalism of the respondent's legal team - coupled with allegations of criminal wrongdoing which he said required to be investigated insofar as the respondent and her legal team were concerned - are matters which cannot be ignored in the context of an application for costs.

(4) It is apparent to the Court that the appellant sees strategic and tactical litigation leverage in being particularly difficult and in forcing the respondent to incur significant costs in terms of legal representation to defend herself against his legal campaign.

Ultimately, allowing a litigant such as the appellant a form of immunity in terms of an award of costs against him or her is extremely unwise for a whole host of reasons including: -

(a) It encourages bad behaviour.

(b) It is an opposing force in terms of realising the objective of achieving certainty and finality in family law litigation. This is all the more so when protracted litigation and an unnecessary escalation in legal costs is very much contrary to the interests of the welfare of the children at issue in the proceedings. Quite apart from the financial ramifications it is a fact that endless litigation and high legal costs impact on the ability of either one or both parents to care for and look after the dependent children. Such matters also impose significant mental pressure and strain on both parties and in particular on the party who is at the receiving end of a litigation campaign.

In this case it seems to the Court that it would be contrary to the interests of justice and the public interest not to make an award of costs in favour of the respondent. The Court is however conscious of the financial position of the appellant. It has heard what he has said on the issue of costs including an offer of an undertaking that there would be no more family law between he and the respondent. The Court is reluctant to accept an undertaking from the appellant in relation to future litigation. It seems to it that if the Court did so it might be said that the undertaking was extorted from him, on pain of otherwise suffering a costs order against him. Allowing such a perception let alone doing so would be wrong on the part of the Court. Having said that, it hears what Mr. R says in

relation to this litigation being at an end and is prepared to take him at his word. What he has said in that regard is influencing what it is going to do in relation to costs.

The Court thinks it would be equally wrong to try and manage a costs order by imposing some conditions in terms of the respondent pursuing the recovery of those costs although Counsel for the respondent intimated that his client would not object to such conditions as her real concern is to avoid more litigation. In other words she is looking at a costs order primarily as a deterrent.

The truth is that the Court sees no good objection in principle to making a full order for the costs of the appeal against the appellant. In all the circumstances however, it will make an order which is a relatively small contribution to the respondent's costs in the hope that it will bring home to the appellant the fact that he cannot embark upon family law litigation time and time again without exposing his assets, which are valuable although limited, to jeopardy.

The Court will order and direct that the costs of the appeal hearing be adjudicated, in default of agreement on costs within 28 days of the date hereof, and that the appellant bear responsibility for 20% of the respondent's costs of the appeal (including VAT) as determined.

The Court will say also, as it has said before, that it is not easy for parties in the situation they find themselves in following an acrimonious split-up to forgive and forget. It would be unrealistic of the Court to ask the parties here to do either of those things but what it can ask them to do is to move on with their lives and try to put the Four Courts, Phoenix House and any other court they have in mind, behind them. It is a matter entirely for the respondent how she deals with the order for costs in her favour. She is perfectly entitled to pursue the order for costs in her favour, that is 20% of the adjudicated bill (including VAT) and Mr. R. should be alert to that. But ultimately it is her decision, she is not forced because the order is there to pursue it. A measure of goodwill from Mr. R. moving forward might bring some influence to bear on the respondents mind insofar as the order for costs is concerned. However, there is no embargo, and seeking to recover the costs awarded to her is a matter entirely for the respondent.