THE HIGH COURT

FAMILY LAW

[Record No. 2018/59M]

[2022] IEHC 529

IN THE MATTER OF THE JUDICIAL SEPARATION AND

FAMILY LAW REFORM ACT 1989

AND IN THE MATTER OF THE FAMILY LAW ACT 1995

BETWEEN

T

APPLICANT

AND

K

RESPONDENT

DRAFT JUDGMENT of Mr. Justice Jordan delivered on the 4th day of April, 2022

1. The applicant and the respondent were married in 1981. There are five children of the marriage, none of whom remain dependent.

2. The parties lived at first in rented accommodation after getting married and subsequently moved to the family home which was built on a site carved out of the

respondent's father's land. The family home is registered in joint names. The core issue in dispute between the parties in these proceedings is the provision to be made to the applicant wife out of the *"matrimonial assets".* In this regard, the family is involved in a substantial logistics business and a substantial farming enterprise.

3. An illustration of this core dispute is to be found in the following submission on behalf of the applicant:-

(a) The applicant has devoted thirty-five years of her life to working in the business and on the farm and in caring for the home and the children. The work was not just on inherited land, it was in a logistics business and a farming business. When the companies were incorporated both had equal shareholdings, with a son also having a one-third share in the logistics business. Land was acquired from the funds generated by these businesses. The applicant was jointly liable on loans and borrowings.

(b) Both parties are at the end of their working lives. The joint assets are there to provide for them into their old age. There is no requirement as in other cases to retain the farm from the point of view of deriving an income, given the age of the parties. If it is the case that the respondent wishes to retain lands then he is free to do so but this should not interfere with the applicant's entitlement to realise the fruit of her work and investment over the years in the farm and in the logistics business. This is not a case of redistribution of wealth. This is a case of the applicant benefitting from her many years of work and investment in the joint enterprise that was this marriage and the family businesses.

4. Insofar as the farming enterprise is concerned, the following lands were acquired during the marriage and have been farmed since acquisition:-

(a) In 1986, approximately 98 acres of lands were purchased in County _____ (redacted) and are held in the sole name of the respondent.

(b) In 1989, approximately 24 acres of lands were purchased in County _____ (redacted) and these lands are held in the sole name of the respondent.

(c) In 1991, approximately 21 acres of lands were purchased in County _____ (redacted) and these lands are held in the sole name of the respondent.

(d) In 1994, there was a purchase of approximately 56 acres of lands in County _____ (redacted) and these lands are held in the sole name of the respondent.

(e) In 2002, the respondent inherited approximately 151 acres of land near County _____ (redacted) and these lands are held in his sole name.

(f) In 2012, there was a purchase of approximately 8 acres of land in County _____ (redacted) and these lands are held in the sole name of the respondent.

5. After unhappy differences arose between the parties, the applicant left the family home in late 2016 and she has since resided in very basic rental accommodation in _____ (redacted).

6. The applicant sought maintenance in the District Court in early 2017 and a maintenance order was made in her favour in the sum of €400.00 per week in April of

2017. This maintenance order was increased to the sum of €500.00 per week in July of 2017.

7. These proceedings were commenced by the applicant in November of 2018.

8. An order was made on consent increasing the maintenance to €866.00 per week as of 6th December, 2019. This order was made in the High Court proceedings on foot of a motion dated 19th March, 2019.

9. The dispute between the applicant and the respondent has involved very significant engagement pre-hearing between both sides concerning the respondent's financial disclosure. The chronology of that engagement and the product of that engagement shows that the respondent has been extremely reluctant to make full and frank financial disclosure of his income and assets. His conduct in this regard forced the applicant's legal team to deal with the issue of financial disclosure in a meticulous and forensic fashion. This exercise did ultimately force greater disclosure by the respondent but at a significant cost.

10. The agreed D v D schedule provided to the court dated 30th June, 2021 shows an overall valuation of €3,878.006 with the assets of the applicant valued at €378,220.00 and the assets of the respondent valued at €3,499,786.00. Thus approximately 10% of the total assets are in the name of the applicant and 90% in the name of the respondent. This schedule includes provision for the significant costs incurred on both sides as liabilities.

11. The applicant is approximately 65 years of age and the respondent is approximately 70 years of age. The marriage was of long duration. The applicant gave up her employment to move to _____ (redacted) and to raise the children. It is clear from the evidence that she did work in the logistics business and she is a shareholder in both the logistics and farm companies. X Limited is involved in

running the farming enterprise and she is a 50% shareholder in that company with the respondent. The logistics company is Y Limited and the applicant, respondent and an adult son each hold 33.33% of the shareholding in that company.

12. It was apparent throughout the hearing that the respondent has a huge attachment to the lands and indeed to all the business assets. The attachment to the land is not unusual for a person of his age who has worked so hard in farming from childhood and who has been so intimately involved in the growing of the farm size through hard work. Unfortunately, this attachment to the land is and has been a real impediment to the resolution of the financial issues that arise as a result of the marriage breakdown.

13. The attachment to land has also impacted on the respondent's relationship with his own siblings concerning the sale of the "home place" which issue is dealt with later in this judgment.

14. Considerable emphasis was placed on the fact that two of the sons of the marriage have been working in two parts of the business - the farming business and the logistics business - and do, it is said, have expectations in that regard. It is undoubtedly the position that the breakdown of the marriage and the need to make proper provision for the applicant will impact upon the matrimonial assets and on the farming and logistics enterprises. This impact and the family situation are part of the circumstances of the case which the court must have regard to but ultimately the primary obligation under s.16 is that the court shall endeavour to ensure that such provision as the court considers proper having regard to all the circumstances of the case exists or will be made for each spouse and for any dependent member of the family concerned.

The reluctance of the respondent in relation to disclosure of his financial affairs

15. A District Court Maintenance Summons issued on behalf of the applicant on 23rd January, 2017.

16. On 28th February, 2017 the respondent prepared an unaudited statement of affairs which was provided to the applicant's solicitors under a cover of letter dated 13th June, 2017.

17. The District Court Maintenance Order in favour of the applicant in the sum of €400.00 per week was made on 10th April, 2017.

18. On 10th July, 2017 a District Court Maintenance Order in favour of the applicant in the sum of €500.00 per week was made.

19. The special summons in these proceedings issued on behalf of the applicant on 1st November, 2018 and the grounding affidavit of the applicant was sworn on 23rd November, 2018. An appearance was entered on 5th December, 2018 by the respondent's solicitors.

20. The first affidavit of means of the applicant was sworn on 25th February, 2019.

21. A notice of motion issued on behalf of the applicant on 14th March, 2019, returnable to 25th March, 2019, seeking maintenance pending suit and certain orders pursuant to s.35 of the 1995 Act restraining the respondent from mortgaging or otherwise disposing of any asset pending the determination of these proceedings. This motion came about as a result of a letter from the respondent's solicitors to the applicant's solicitors dated 3rd December, 2018. This letter requested the applicant's consent to the registration of a charge in favour of the Ulster Bank in the sum of €850,000.00 against folio number _____ County _____ (redacted), of which the respondent was the sole registered owner, and folio number ____ County _____ (redacted), of which the respondent was then entitled to a one-quarter

share. The respondent's three siblings were entitled to the remaining three-quarters share. These latter lands were referred to in the course of these proceedings as the "sibling lands".

22. On 3rd May, 2019 the respondent swore his replying affidavit to the special summons. He confirmed, *inter alia,* that he was a farmer and employed on a full-time basis in the family business, Y Limited. He averred that he took an income of €400.00 per week from X Limited on which to live (X Limited being the company involved in the farming enterprise).

23. The first affidavit of means of the respondent was sworn on 9th May, 2019. The total income listed in the affidavit of means is the sum of €475.00 a week – being €400.00 a week from X Limited and €75.00 a week from an Irish Life pension.

24. On 1st July, 2019, the case was listed in the directions list and to fix a date. The motion referred to above was listed for mention on 14th October, 2019. The case was listed for hearing (three days) commencing on 26th November, 2019. On consent a direction was given that a corrective affidavit of means be sworn by the respondent. At this stage, an AIB bank account had for the first time been disclosed into which the sum of €73,000.00 had been lodged since 2016.

25. On 14th October, 2019 it was indicated to the court that a corrective affidavit of means would be sworn by the time the matter was next before the court on 4th November, 2019.

26. Another motion issued on behalf of the applicant on 31st October, 2019 seeking an order that the respondent would not be entitled to defend the action – with the motion returnable to 11th November, 2019. This motion issued because the applicant's solicitors were not satisfied with financial disclosure. The first schedule in the respondent's affidavit of means entitled "*assets*" did not describe the assets or

identify the location or acreage of the lands owned by the respondent and did not disclose any other assets such as cars, farm machinery, positive balances in bank statements or other financial institutions or pension policies as set out in the respondent's statement of affairs dated 28th February, 2017. Vouching documentation was furnished on foot of the respondent's affidavit of means on 24th May, 2019 and letters raising queries were sent to the respondent's solicitors on 27th June 2019, 30th July 2019 and 12th August, 2019 and pursuant to which bank statements were for the first time furnished for AIB account number _____ (redacted). The respondent had not filed a corrective affidavit of means at the date of issue of the notice of motion. The respondent's tax returns received demonstrated a significant inaccuracy in the respondent's stated income.

27. On 4th November, 2019 the respondent swore a corrective affidavit of means. The income from X Limited and Irish Life pension was listed as €475.00 per week and rental income was now listed at €1,700.00 per month (gross). There was no reference to a windfarm asset. There was a reference for the first time to a _____ (redacted) Credit Union account with a balance of €27,000.00.

28. On 25th November, 2019 there was an application made to adjourn the action which was listed for three days commencing on 26th November, 2019. The application was made by reason of the alleged non-disclosure of the respondent in relation to financial matters and a disclosure made on 15th November, 2019 for the first time of a loan agreement and other documents concerning an investment by X Limited in a windfarm project. The adjournment application was refused.

29. On 26th November, 2019 the respondent swore the third affidavit of means. The respondent now disclosed gross rental income of €2,520.00 per month (not €1,700.00) and taxable farm profit of €5,631.00 per month in addition to an after tax

salary of €400.00 per week from X Limited and the respondent's pensions. The total weekly income (some taxable and some after tax) was now stated to be €2,693.00 per week with the after tax income stated to be €2,308.00 per week.

30. The matter was listed for hearing on 26th November, 2019 and an adjournment application was again made – coupled with an application to allow the applicant proceed on the basis of an undefended application. Ultimately the hearing was adjourned. On consent an order was made striking out the motion seeking the order that the respondent not be entitled to defend the proceedings with costs reserved to the trial of the action but on the basis that the respondent would make full disclosure of information and disclosure concerning the sibling lands, the windfarm and other specific matters.

31. The order adjourning the hearing on 26th November, 2019 adjourned the case into the list to fix dates on 17th February, 2020 with the costs of the day's hearing reserved to the hearing of the action. There was an order then made by consent pursuant to the notice of motion dated 19th March, 2019 directing the respondent to pay maintenance to the applicant in the sum of €866.00 a week as of 6th December, 2019 and the costs of that motion were reserved.

32. A letter of undertaking was provided by the respondent on 22nd June, 2020 and an amended letter of undertaking was provided on 26th June, 2020. The amended letter of undertaking by the respondent was that he would not deal with or dispose of assets other than in the ordinary course of business unless with the consent of the applicant in writing through her solicitor and an undertaking that the respondent would not deal with or dispose of funds held in AIB account number _____ (redacted) other than in the ordinary course of business without the consent of the applicant in writing through her solicitor. He also gave an undertaking that the only

withdrawals from the X _____ Credit Union/ Y _____ Credit Union (redacted) would be the respondent's pension payments.

33. On 23rd July, 2020 a motion issued returnable to 12th October, 2020 on behalf of the applicant seeking an order directing the respondent to furnish replies and supporting documentation in reply to the applicant's solicitor's letters dated 29th June, 2020 and 16th July, 2020 together with such further directions as may be necessary to enable the case to proceed to final determination. The applicant says this motion was necessary because of queries raised by the applicant's accountant in relation to X Limited and the replies furnished to that letter dated 7th March, 2019 which dealt with second round funding for the windfarm project. At this stage, an email from one E. dated 8th June, 2020 was furnished stating that "*despite several discussions*" no further funding was provided. The reference to several further discussions was something of a red flag to the applicant's advisers in circumstances where they had understood that the respondent had little involvement in the windfarm project after initially investing money in it. Furthermore, documentation which was to be furnished in respect of the sibling lands had not been furnished. At the time the motion issued, the two contracts for sale had not been furnished to the applicant's solicitors.

34. The new solicitor for the respondent swore a replying affidavit to the applicant's solicitor's grounding affidavit. This replying affidavit somewhat ironically refers to the motion as premature and not necessary. It mentions the respondent's view concerning the sibling lands that the applicant's behaviour cost the family monies. The affidavit takes issue with the assertion by the applicant's solicitor that the respondent had *"obfuscated and resisted making full transparent disclosure"* although any objective assessment of the facts shows that assertion to be entirely correct. The respondent's sense of grievance, articulated on his behalf in his

solicitor's affidavit, concerning the disclosure required of him, is difficult to comprehend when one looks at the necessary pursuit which was required to get information concerning his assets and income from him.

35. The motion was adjourned on 12th October, 2020 to 2nd November, 2020 to allow the respondent to swear a further affidavit relating to the windfarm. The respondent swore an affidavit on 30th October, 2020 concerning the windfarm and matters moved on. It is not clear what order was made on the 2nd November, 2020 but the respondent had moved to address the issue by then and the motion was presumably struck out with costs reserved.

36. On 5th March, 2021 a motion issued on behalf of the applicant returnable to 15th March, 2021 seeking an order compelling the respondent to swear and file an updated affidavit of means together with updated vouching documentation necessitated by his failure to file an affidavit of means since 26th November, 2019.

37. The fourth affidavit of means of the respondent was sworn on 16th April, 2021. This now disclosed after tax income of €119,216.00 per annum being €9,935.00 per month or €2,293.00 per week. This was €1,818.00 per week after tax income more than that stated in the respondent's first affidavit of means.

38. The applicant's second affidavit of means was sworn on 25th June, 2021.

39. The issue of disclosure will feature again later but the above narrative does illustrate some of the problems created by the respondent's reluctance in that regard.

40. The case was heard over seven days. This was really six days as the last hearing date on 1st December, 2021 was due to an I.T. problem the evening before. Furthermore, a more focussed approach on the issues by both parties at and prior to the hearing would have seen the case conclude in four days.

41. There were then written submissions lodged on behalf of an applicant dated 21st December, 2021 and on behalf of the respondent dated the 17th January, 2022. There followed oral submissions on behalf of both, at the request of the applicant's side, on 2nd February, 2022.

42. In evidence, the applicant explained that she helped out in the business even when the children were young. She answered phones because there was no secretary in the office in the early days. She took all the calls from the farmers, kept the diaries and looked after giving the farmers their cheques when they called. She had to take messages for her husband in relation to cattle going to the factory and such like. Later, a secretary was employed in the office and the applicant continued to help. She would answer the phones in the evening, answer the doorbell to the farmers, look after workmen etc.

43. It was she who took care of the children because their father was never there. He was "*driving and gone*". She took the children to school and brought them home. She did their homework with them. If they had to go to the doctor, the orthodontist, games, ballet, football, she would bring them - she did everything with the children. She took them to everything, fed them and looked after them.

44. Later the applicant insisted on getting some help in the house so that she could have some time off – and girls were employed to babysit and help out on a Saturday because otherwise she was there all the time; morning, noon and night.

45. It was clear from her evidence that the applicant did not feel appreciated by the respondent. She explained that she was criticised on a regular basis. She said that she never had an issue with mental health until after she got married. Because of the mental abuse she was getting she was really feeling very low and very down. She went to the doctor's and had a nervous breakdown in 2006 and she ended up in

_____ Hospital (redacted) for six weeks. She was put on medication which she was on for about five years and she spent another period in _____ Hospital (redacted) (a couple of weeks) in 2009. She was taken off lithium and put on epilim. She said the diagnosis at that stage was a nervous breakdown. In 2016 she decided that she just couldn't take anymore and that she had to leave. She left and went to a family member. She explained that before she left, she took €55,000.00 from a joint bank account and she said she did so on the advice of her solicitor. She said that she needed money to live and to survive until she got maintenance.

46. In terms of provision, the applicant expressed a preference for a lump sum because "*then it's over and done with*".

47. It appears that the applicant got some help in the house after her second time in _____ Hospital (redacted) – she thought it was in or around 2010.

48. The applicant accepted that the respondent did look after the children and did the cooking for a while after she came out of the hospital. He did help her then for a very short period. The applicant rejected the suggestion that things got a bit difficult in the marriage because she sometimes did not take her medication. The applicant said that this suggestion by the respondent was very wrong. She said that she took her medication and attended her check-ups. She had her blood tested and if she was not taking the medication, her medical advisers saw this instantly.

49. In evidence the respondent told the court that he farmed the old farm (the sibling lands) with his parents from the age of five. He met the applicant around 1980 when he was 26 years of age. He explained how his farming and logistics business grew, lands were purchased and lands were inherited from his father after his father died in 2002. He explained how he was directly involved in building the family home himself, with paid help.

50. The respondent spoke of when the applicant was in _____ Hospital (redacted) and expressed a view that she was "*getting in bad form*" afterwards because she didn't always take her medication. He spoke of the separation happening and of the impact it had on him. He explained that he ended up in hospital himself and didn't know whether he was coming or going. He explained that he suffers from diabetes type 1 and is insulin dependent. He has had various health issues because of the diabetes.

51. The respondent told the court that:-

> "*my wife brought five great children for me into the world, and my wife looked after them. And that is just as simple as that and I appreciate that. And she will always be my wife, and I'll always look after her. Always*."

52. In the course of cross-examination it had been put to the applicant as part of his case that "*he accepts you were homemaker and carer of the children and he is very grateful to you for that…. and he acknowledges that*."

53. He explained that he always did his share of the cooking if he had to, always looked after his wife and always had somebody to help her when she needed it. He said she was never without money and went on to say later in his evidence:-

> "*…T. got money and if she was short money, she was never short any because there was no such thing as being this is mine and that is yours. It was always – I shared it out as best I could*."

54. On the former statements concerning gratitude, it is striking that what is expressed as such appears to be lacking in sincerity, respect or any true understanding of the equality of the partnership that constitutes a marriage. On the latter statement it should be observed that this reflection by the respondent on the sharing arrangement that existed in the marriage between he and the respondent does not fit well with the

respondent's current proposals in terms of the provision that ought to be made for the applicant out of the matrimonial assets - nor indeed with his conduct since his wife left.

55. It is worth pausing to mention that the respondent had from an early stage been seeking mediation – the requests commencing in August 2017 and repeated thereafter. A letter from the respondent's solicitors to the applicant's solicitors dated 21st March, 2019, concerning maintenance, refers to the repeated requests.

56. The letter acknowledges that it was not in dispute that this was a long marriage and that proper financial provision was required to be made for the applicant. It stated for example:-

> "*We wrote to you on the 24th August 2017 suggesting mediation – a comprehensive statement of affairs had previously been provided. No response was received to that letter."*

57. It referred to the subsequent requests in November 2018 and December 2018 and a continuing desire for the mediation or settlement discussions.

58. While such mediation is to be encouraged, it can only work fairly and properly if both sides have made full disclosure to the other. It cannot be used as a strategy to bounce the other side blindly into negotiations with the intention of brokering an advantageous settlement because the other side are unaware of the true extent of the matrimonial assets. When one looks at the persistent failures of the respondent concerning disclosure, it is not possible to conclude but that the respondent wanted to achieve just that.

59. In evidence, the respondent had a sharp and comprehensive knowledge of the financial aspects of the logistics business. He spoke of various European Regulations concerning emissions and changes to the tachograph regime and such like. He spoke

about the impact of changes on the logistics business including the impact of Brexit on it. He spoke also of the impact of COVID. The respondent's grasp of numbers and costs involved in the business was impressive. He was clearly a businessman with a detailed knowledge of his business affairs.

60. The respondent accepted that disclosure was inadequate for various reasons up to November of 2019 when he changed solicitor. According to the respondent, his previous solicitor simply wasn't advising him. In effect the respondent sought to blame his previous solicitor for the inadequate disclosure. This is dealt with elsewhere in this judgment.

61. In cross-examination, the respondent denied that there was any deliberate non-disclosure of assets and said that he never hid anything from his wife in his life. Although he endeavoured to explain the position adopted by him in relation to the sibling lands, his evidence only served to confirm that the position adopted by him in relation to the lands and the sale of the lands was unreasonable towards his siblings and towards his wife. It was clear that the respondent felt entitled to the sibling lands:- *"the farm that I worked on all my life, my siblings never worked on it. I worked on it all my life."*

62. In dealing with the issues concerning the windfarm it was apparent from the evidence of the respondent in cross-examination that he knew more about the windfarm investment, because of his efforts to recoup the money invested, than he admitted to knowing when the issues concerning the investment were raised by the applicant's team.

63. When dealing with the farming enterprise and land rented, the respondent again presented as a person intimately familiar with the financial aspects and

workings of the farming enterprise. The respondent had earlier explained how the land "*is in the four of the lad's hearts*".

64. When questioned about the fact that the applicant became a third equal shareholder in the logistics company when it was set up, the respondent explained that the reason for this was "*because you need a – well, I involved her in everything, that's why*." The respondent's position appeared to be that he ran the farms and he ran the whole show but he did involve her in everything.

65. The respondent was asked about the fact that the applicant was a 50% shareholder of X Limited but he was reluctant to acknowledge when cross-examined on the point that this meant that the applicant was a 50% owner of that business.

66. Notwithstanding the shareholdings in the two companies and saying that he involved the applicant in everything, it was apparent from the evidence of the respondent that he did consider that the family home and the farms of land were bought by him with his own money and were his:-

> *"I had no loans, as far as I know, as far as I know on anything ever, I always earned it and paid for it. I always earned it. When I had money, I bought it. I built my own house. I bought the bricks. I drove them home in the lorry. I put them in the yard. That's the way I done all my business. I never owed anyone anything."*

67. The above answer was in response to a question concerning the fact that the applicant and the respondent were jointly liable on foot of certain loans taken out and there was something of a misunderstanding by the respondent in relation to the joint loans which he was being asked about – but the reply is nonetheless useful in setting out the respondent's position concerning the assets acquired. As far as the respondent is concerned, the assets acquired were bought with his hard-earned money. Regardless

of shareholdings or any equality in the marriage, the mind-set of the respondent has been and remains that he is in fact legitimately entitled to full ownership of the assets which are in his name.

68. Whilst the respondent did in evidence endeavour to feign ignorance and offer legitimate mistake on his part for the inadequate disclosure concerning his financial affairs – and at times sought to divert blame elsewhere - it was plain to the court that the respondent has been and remains an astute businessman with a very clear grasp on his financial affairs. The drip feed and forced disclosure of the true state of affairs insofar as his assets and income are concerned was caused because of his reluctance to allow his wife and her advisers sight of his true worth and in circumstances where he understood all too well that his wife of thirty-five years had a legitimate claim on the matrimonial assets. The court rejects entirely the respondent's attempt to lay blame for non-disclosure at the feet of his first solicitor.

69. The conduct of the respondent in failing to make full and frank disclosure created a situation where the applicant and her advisers understandably lost all faith and trust in what they were being told concerning the respondent's assets and income. The costly forensic exercise which followed was caused entirely by the conduct of the respondent in trying to hide his true worth from the applicant and her advisers.

70. Mr. J.H., accountant for the applicant, prepared a detailed memo regarding the shortcomings in the respondent's disclosure and dealt with his findings in evidence. His memo, which is supported by the paperwork he put together in folders, is worth reciting:-

"

1. Statement of Affairs dated 28 February 2017 [TAB 1]

Assets & Liabilities

1.1 *No details of Respondent's interest in 'sibling lands'*

1.2 *Stated Acreage of Lands at _144_____* (redacted) *(Actual acreage approx.. 145 Farm ; approx.. 6 Yard)*

1.3 *Stated Acreage of Lands at _140_____* (redacted) *(Actual Acreage approx.. 154)*

1.4 *No details included of Respondent's AIB (Rent) Account ending 2000 [Balance was in fact €15,173 at 28 February 2017]*

1.5 *No details of Respondent's Farm entitlements.*

1.6 *No details of X Limited's Farm Entitlements.*

1.7 *No details of wind farm investment held by X Limited.*

1.8 *No details of Director's Loan Account Y Limited [Actual Balance due by MTL to Respondent was €2,350]*

Income

1.9 *No details of income included (NB – Statement of Affairs only)*

2. Statement of Affairs dated 28 February 2019 [TAB 2]

Assets & Liabilities

2.1 Similar issue with acreages

2.2 No details of Respondent's farm entitlements

2.3 No details of X Limited's entitlements

2.4 No details of windfarm investment held within X Limited

2.5 No details of Credit Union Account [Balance at 28 February 2019 was €30,276.33]

2.6 No details of Directors Loan Account X Limited (Due to PM €4,519)

2.7 No details of Directors Loan Account TL (Due to PM €347)

Income

2.8 No details of income included (NB – Statement of Affairs only)

3. Affidavit of means sworn on 9 May 2019 (TAB 3)

Assets & Liabilities

3.1. No details of shareholding in X Limited

3.2. No details of shareholding in Y Limited

3.3. Details of _____ Property (redacted) *Included notwithstanding that property had been sold (and cash had been received see 3.13 below)*

3.4. No details of Farm Machinery or Vehicles

3.5. No details of Farm Debtors.

3.6. No details of Livestock.

3.7. No details of Respondent's Farm entitlements.

3.8. No details of X Limited's Farm Entitlements.

3.9. No details of AIB Current Account ending 2190 [Balance on 9 May 2019 was in fact €44,440]

3.10. No details of AIB Savings Account ending 2000 [Balance 09.05.2019 was in fact €10,547]

3.11. No details of Credit Union Account. [Balance on 9 May 2019 was in fact €32,707]

3.12. No details of Standard Life Shares.

3.13. Balance on Ulster Bank Current Account stated to be €6,919 actual at 9 May 2019 was €106,000 [see 3.3 above re _____ Property (redacted)*]*

3.14. No details of Director's loan account X Limited [Actual Balance €8,188 due to Respondent]

3.15. No details of Director's Loan Account Y Limited [Actual Balance due to Respondent €269]

3.16. Inadequate details of Respondent's Pension Policies.

Income

3.17. No details of Respondents Farm Income.

3.18. No details of Respondents Rental Income.

3.19. No details of Respondents Salary from Y Limited..

3.20. No details of Respondents share of undistributed profits of Y Limited..

4. Affidavit of Means sworn on 4 November 2019 [TAB 4]

4.1. Liability included for Ulster Bank Loan €150,000. Actual balance was nil, the loan had been repaid in May 2019. [see Reply acknowledging amount included in error]

4.2. No details of Farm Debtors

4.3. No details of Respondent's Farm entitlements.

4.4. No details of X Limited's Farm Entitlements.

4.5. No details of Standard Life Shares.

4.6. Loan Balance due to B. €9,650 overstated [now confirmed that €6,000 had been repaid on 20 May 2019.]

4.7. Inadequate details ARF Policy

4.8. No details of AMRF Pension Policy. [see reply confirming AMRF was omitted from AOM in error]

Income

4.9. No details of Respondents Farm Income

4.10. No details of Respondent's Salary from Y Ltd.

4.11. No details of undistributed profits of Y Ltd.

5. Affidavit of means sworn on 26 November 2019 [TAB 5]

5.1. Loan Balance due to B. €9,650 overstated [now confirmed that €6,000 had been repaid on 20 May 2019].

5.2. No details of Respondent's Farm Entitlements

5.3. No details of X Limited's Farm Entitlements

Income

5.4. No details of undistributed profits of Y Ltd..

6. Affidavit of Means sworn on 16 April 2021 [TAB 6}

6.1. Director's Loan Balance payable to X Limited stated as €97,234. Actual Balance payable to X Limited had reduced to €13,000 by end of March 2021 as a result of, inter alia repayments made by the Respondent from his AIB Account ending 2190 of €73,341 on 24 March 2021 and €10,102 on 26 March 2021. The AIB Account balance per the AOM was €23,212 (i.e. that balance on 31 March 2021 after making the repayments) but the loan account balance set out in the AOM was a balance taken prior to making those repayments [The matter was corrected following our query requesting payee details for the €73,341 cheque payments and for details directors loan account transactions to 31 March 2021 and for copy X Limited Bank account statements for February and March 2021].

6.2. Loan Balance due to B. €9,650 overstated [The matter was corrected in Respondent's accountants report following query relating to a €6K payment in May 2019. It has now been confirmed that the correct loan balance should have been €3,018]

6.3. No details of Respondent's Farm Entitlements.

6.4. No details of X Limited's Farm Entitlements.

Income

6.5. No details of undistributed profits of Y Ltd.

7. Disclosure issues re X Limited's 5% (now 1.25%) interest in Z) Limited

7.1. See Separate Booklet of Documentation.

8. Disclosure issues re 'Sibling Lands'

8.1. *See Inter Partes Correspondence* "

71. It is true that the Statements of Affairs are just that and the point that they would not ordinarily include income is justified, nor is this a case of one or more very valuable assets being concealed. Yet the assets as disclosed early on - and until quite late in the day - when compared to the assets shown on the D v D schedule ultimately agreed and the income disclosed in the later affidavit of means as opposed to the earlier ones - prove material non-disclosure which was deliberate and designed to reduce the provision which the applicant would get. The picture now visible is so because of the tenacity and persistence of the applicant's legal team.

<u>The conduct of the respondent</u>

72. The sibling lands:

One contentious issue agitated during the hearing was the issue concerning the "*sibling lands*". The respondent was the co-owner of the old _____ (redacted) farm known as "_____" (redacted) along with his three siblings under the terms of their father's will. Around the same time as the separation occurring, the three siblings were anxious to have the property sold with a view to realising their respective interests. The respondent was less than enthusiastic about such a sale taking place. This resulted in proceedings being issued in the Circuit Court and a settlement agreement was mediated in September 2018. This mediated settlement resulted in a consent order being made in the Circuit Court in March 2019.

73. On 13th February, 2019 the respondent's then solicitors wrote to the applicant's solicitors as follows:-

> *"As your client will be aware the old* _____ (redacted) *farm known as '_____'* (redacted) *is registered in the name of K. and his three siblings. After lengthy, protracted and very difficult court proceedings, those proceedings have been settled on the basis that the interest of the three siblings will be acquired for €795,000. All of this money is being raised with a mortgage from Ulster Bank in the name of Y Limited.. The sole shareholders in Y Limited are C and D. Approximately 75% of* _____ (redacted) *is being bought in the name of C and D. The remaining 25% will be taken in the name of K.. The reason for this is that he must protect agricultural relief for inheritance tax purposes. However, K. will be charging his part of the land to Ulster Bank as part of the security for the borrowings of Y Limited..*
>
> *Ulster Bank are insisting on the security on the part of the lands described in folio* _____ *County* _____ (redacted) *as advised. They are lending a lot of money and, as you will be aware, banks will insist on being grossly over-*

secured. Our client certainly would not be charging this land to the bank if it was not necessary.

As advised in our telephone messages we are under very significant pressure herein. There is every danger that this agreement will fall through unless we can complete in very early course. We therefore look forward to hearing from you as a matter of urgency."

74. The background to this letter is that the respondent was seeking the consent of the applicant to the mortgage on folio _____ County _____ (redacted) (an earlier letter dated 3rd December, 2019 from the respondent's then solicitors referred to the request for a consent "*to this mortgage*").

75. The applicant was being requested to sign a draft family home declaration and a draft consent in respect of the land at _____ (redacted) (near the sibling lands) and which lands were referred to in these proceedings as "*the inherited lands*". These lands in folio _____ (redacted) comprise of approximately 151 acres and are the lands which had been farmed from the early stages of the marriage by the applicant and the respondent. The family home is on or adjacent to this farm and it and 13.96 acres around the house was to be excluded from the proposed mortgage.

76. The applicant declined to consent to the proposed mortgage. In evidence she explained that she was not prepared to do so until she had been looked after. This was an understandable and sensible approach for her to adopt. Indeed, it is striking the extent of pressure that was put on the applicant to consent to the proposed mortgage in circumstances where the separation had occurred and the originating letter had been written by the applicant's solicitors on 12th October, 2016 with a special summons having been issued on 1st November, 2018.

77. The sale contemplated by the mediated settlement did not proceed in circumstances where the applicant would not consent as requested to the proposed mortgage.

78. Ultimately the property was sold to a stranger for €960,000.00 (less five acres in dispute with a person/s in occupation). The matter was revisited in the Circuit Court and a fresh consent order was made. The respondent apparently refused to sign the document necessary to close the sale and it appears that the County Registrar ultimately did so. The mediated agreement earlier entered into made provision for the payment of interest in the event of default. Because of his default, the respondent ended up retaining the five acres which were apparently the subject matter of the dispute or a claim of adverse possession plus a sum of €35,000.00. The remaining proceeds went to his siblings and they were responsible for their own costs.

79. In summary:-

(a) The respondent involved himself in a protracted and expensive dispute with his three siblings by adopting an unreasonable approach when they endeavoured to have the lands sold to realise their interest.

(b) The sale contemplated by the mediated settlement did not proceed in the absence of the applicant's agreement to a mortgage or charge on the land at _____ (redacted) comprised in folio _____ (redacted) because she was in dispute with the respondent in relation to the provision to be made for her out of the matrimonial assets.

(c) The respondent was unreasonable in his dealings with his siblings and unreasonable in making the demands of his wife which he did in relation to the mediated agreement. He was unreasonable and unrealistic when it became apparent that the mediated agreement could not proceed because he had not

sorted out the financial issues with the applicant. At the end of the day the position adopted by the respondent in relation to the sibling lands cost him a significant sum of money. Whilst the exact cost to the respondent is not certain, it was probably something in excess of €150,000.00 when one takes into account his own costs and possible tax liability.

80. It should be said that the proposed purchase under the mediated agreement would have involved a first legal charge on the property being purchased in favour of Ulster Bank. The additional security apparently involved a personal guarantee from the respondent for the sum advanced, supported by a legal charge on the lands comprised in folio _____ (redacted). It would have been very unwise of the applicant to consent to the proposed charge without having achieved a satisfactory settlement with the respondent in circumstances where the impact of the personal guarantee and the charge would be such as to diminish the value of the matrimonial property. The transaction would probably also have been a drain on the respondent's income because the debt would have to be serviced and it does seem clear that his farm income and rental income were identified in this regard.

81. The lack of disclosure and transparency in the context of the sibling lands gave rise to unnecessary costs in the context of this litigation.

82. The evidence of J.H. illustrated a reluctant drip feed of information as a result of his persistent questions. It was a struggle to obtain from the respondent the information which he required to complete a schedule of assets and liabilities. The necessary information in relation to the sale of the sibling lands was finally received in the middle of 2020, although the case had been listed for hearing in November 2019.

83. One cannot help notice that the respondent's intransigence in terms of the sibling lands and the resulting court proceedings is an intransigence also evident in his conduct concerning the resolution of these proceedings.

84. **The windfarm**:

The respondent made an investment of €120,000.00 in a windfarm through X Limited. Thus the applicant also had a half share in the investment, yet she knew little about it and had great difficulty finding out what was involved once it came to the knowledge of her legal team proximate to the first hearing date fixed. The respondent had dealt with the investment and the applicant was largely ignorant about it in terms of it being an asset. The respondent pretended that he had put the investment out of his head and played down it's possible value. In 2019/2020, the respondent was meeting with the promoters of the windfarm because he wished to get his money back. He attended at least one meeting in _____ (redacted) in March 2019 at a time when a motion in respect of maintenance, disclosure and s.35 relief was before the Court. In November 2019, the respondent was pretending that he had had no contact from any person in respect of the windfarm, which from his own evidence and that of F., was clearly not so.

85. As matters have transpired, the investment may or may not come to fruition. It is far from a write-off but there is much to be done yet before it will hopefully yield a dividend.

86. The late "discovery" of the windfarm investment created a further reason for the applicant's advisors to believe that there was concealment of assets. Their belief created something of a futile hunt for something more than the information concerning the investment which was belatedly received. They were convinced that there was more to the story than a somewhat risky investment of €120,000.00.

87. These suspicions led to time spent on the topic in court and outside which yielded no additional asset or concealment. But all that wasted time and expense incurred was a result of the respondent having done a perfect job of convincing the applicant's advisors that his disclosure could not be trusted as complete.

88. The sum of €18,273.40:

Right up to the hearing of the action the respondent refused to make proper disclosure in respect of the €18,273.40 inherited from his mother. A cheque in the sum of €18273.40 was only lodged by him in a Credit Union account in March 2018. It was only because of cross-examination and an adjournment that the full ledger was made available, showing that two cheques were issued to the respondent from 2016 and that both expired. The first issued in October 2016 and the second in May 2017. The third cheque issued and was lodged in March 2018 in the Credit Union Account - which was opened on 21st March, 2018. The respondent gave evidence that he was in trouble with the bank in 2016 as a result of the applicant removing €50,000.00 from the joint account.

89. When being questioned about his failure to disclose the €18,273.40, the respondent said:-

> *"I never hid anything from anyone but I wasn't told what to put down, I wasn't told the ins and outs of the legal, for instance he lodged money to his, my mother left me €18,000.00 and I got something, I don't know €5,000.00/€6,000.00 or €4,000.00 out of an accident and anyway I put that away for, I tell you I put it away in the Building Society and I said to him that I have money in the building society, no you haven't heard from that, it doesn't matter…."*

90. _____ _____ Street, _____ Street and farming (redacted) :

In or about 2016, the respondent was in the process of purchasing the property in _____ _____ Street in County _____ (redacted). The rent paid in respect of this property was lodged by the respondent into an account in AIB. This rental income was not disclosed until October/November 2019. The manner of payment at the outset was also irregular as it involved the vendor receiving the rent and passing it on to the respondent.

91. Around the same time the respondent became owner of a property at ____ Street in County _____ (redacted). Acquisition of it pursuant to a trust executed in 2016 for a Mr. N. was touched on in evidence but not fully explored or explained.

92. The respondents dealing in relation to his investment properties appears convoluted and lacking in transparency.

93. Not until cross-examination of the respondent did it emerge that he rented 300 acres in County _____ (redacted). In giving her evidence to the court, Ms G. referred to the farm enterprise consisting of 402 acres, including rental lands. The respondent was evasive in evidence concerning the _____ lands (redacted) and sought to convey the impression that he did not remember the acreage. Yet it is clear from Mr M.'s evidence that X Limited receives 100 basic entitlements worth €28,919.00 on foot of these rental lands. The rental does appear to be somewhat bespoke and involves the rental of grazing and accommodation for cattle on the lands rather than sole occupation by the respondent/X Limited – but the arrangement is clearly a significant part of the farming enterprise. The combined total farm enterprise for 2020 was circa 674 acres, and not 402 acres.

94. When the hearing resumed on 30th November, 2021 the court heard evidence from agricultural experts namely, Mr. B. for the respondent and Mr. M. for the applicant. Mr. B. focussed his attention on the land at _____ (redacted). His

brief was to do a report on the farm at _____ (redacted). He expressed a view that the land at _____ (redacted) is exceptional farming land. It would appear that Mr. B. was asked to do a report on the basis of what would happen if the land in _____ (redacted) was sold. Mr. B.'s evidence was essentially that the land at _____ (redacted) is the hub or heart of the farming enterprise and would nearby be impossible to replace – which he clarified to the extent that it would not be impossible to replace but replacement would be at a big price.

95. It was clear to the court that the message was that the land at _____ (redacted) could not and should not be sold because it was so valuable to the farming enterprise – and in circumstances where the other message from the respondent's side in relation to the 151 acres at _____ (redacted) was that it should not be sold because it is inherited land.

96. The report and evidence of Mr. M., the Agricultural Consultant for the applicant, was more comprehensive. His analysis of the figures and of the farm performance at pp. 14 and 15 of his report is helpful and his treatment of asset realisation is clear and compelling. The options available to the respondent and for the farming enterprise as presented by Mr. M. are viable options and the court is satisfied that the sale of the land at _____ (redacted) will not prevent the farming enterprise continuing as a viable entity. Indeed, the court is satisfied from the evidence of Mr. M. that even more land could be sold and the farming enterprise would remain as a viable entity. This is apparent from the evidence of Mr. M. and from the opinion expressed by him in his report (pp. 16 to 20 inclusive).

97. Part of the hearing on 30th November, 2021 and the short hearing on 1st December, 2021 was occupied dealing with a dispute concerning the cost of renting farm land. On behalf of the respondent, a Mr. H. had earlier given evidence to the

court citing the cost of renting land and the figures he gave indicated that rental costs were significantly higher than those contended for by the auctioneer/valuer for the applicant, Mr. P. At the resumed hearing a Mr. K. was called and he was eager to give evidence concerning the true rental value of lands which he owned and which had been referenced by Mr. P. as a comparator. Mr. P. had given evidence at an earlier hearing referring to Mr. K.'s land – and had said:-

> "*It was a farm I sold two years ago, 155 acres. It was sold at €2.5m which is €16,000.00 an acre. It was bought by an investor from County* _____ (redacted). *It is leased at €200.00 an acre on a five-year lease with a further €15,000.00 approximate – state of the art yard, modern farmyard with accommodation for 300 beef cattle."*

98. The lease recites €286.62 per acre and Mr. K. was most anxious to point out that there was no breakdown in the lease between the farmyard facilities and the land.

99. When later cross-examined in relation to this issue Mr. P. stood by his valuation and explained his position as follows:-

> Question by senior counsel for the respondent – *"…and if we look back then at your evidence where you are trying to claim that it's €200.00 an acre when the lease very clearly says, drawn up by your office, 157 acres, 45 per annum, as you rightly say, divide 45,000.00 x 157 you get €286.62 which is what it says. So your evidence was inaccurate to put it at its politest, Mr. P.?"*
>
> Answer – "*It was inaccurate in that I said that the land was leased at €200 per acre – when I checked I found that the lease cited €286.00. The lease also cites that the yard is included. And what I have just said and what I repeat is that Mr. K. said that he agreed the rent with the tenant at €286.00 per acre. And he then more or less informed us and we committed that to paper. That is not*

correct. It is ridiculous, absolutely ridiculous for Mr. K. to suggest that he agreed and negotiated at €286.00 and then gave free use of this very extensive yard that accommodates 300 animals to this man free of charge for seven years. It is ridiculous to suggest that that yard would be given to anybody free of charge for seven years – it is in the region of €15,000.00 per annum which would bring it back to €200.00. You can argue about the €15,000.00 but you cannot argue and say that Mr. K. was naive enough, he is a businessman, he is very – that he was naive enough to give this valuable yard to this man for seven years free gratis, for nothing".

100. The court is entirely satisfied that the view expressed by Mr. P. above is correct. In return for €45,000.00 the tenant got state of the art farmyard facilities and the 157 acres of land for grazing. The fact that the lease identified the rent at €286.62 per acre cannot and does not change this fact and Mr. P. is entirely correct to look at what the tenant got in return for the payment of €45,000.00 per annum.

101. The respondent's replying submissions are referenced elsewhere in this judgment. Some points require mention here.

102. Brexit probably does impact adversely on the Y Limited business as will the new Environmental Regulations. These are industry-wide problems and are part of the business. The court must and does proceed on the basis of the evidence concerning the business. The court is satisfied on the evidence that the business is strong and able for the challenges ahead. The balance sheet is healthy.

103. The applicant's proposed purchase of a large house/home in the most expensive part of Ireland is challenged "*particularly in light of her total lack of relationship with all the children of the marriage brought about by her actions".* It is

said that the properties submitted by her are unnecessarily expensive and distort what is proper provision.

104. On this, the applicant is entitled to have proper provision made for her out of the matrimonial assets and is entitled to decide how to invest what she is entitled to. It is not just a matter of a house being provided for her. The respondent is wrongly looking at what might be the applicant's reasonable requirements as he sees it, as opposed to proper provision for her.

105. It is submitted that the applicant now seeks to obtain accommodation far in excess of the value of the family home. Again, the respondent appears not to appreciate the legitimate claim of the applicant on the matrimonial assets, as referenced in the case law discussed below.

106. The reference to the children in the submission quoted above reflects an opinion held by the respondent which view may not accord with the truth of the situation. The court is satisfied that the respondent is very much in control of almost all of the family assets - which at present are "*his assets"* as he sees it. This situation is probably an influence on the children's relationship with their mother - which relationship may improve and/or be expressed more clearly when this litigation is concluded and when the applicant is independent and properly provided for.

107. In reply to the submission on the applicant's behalf that the Court should take into account alleged "*litigation misconduct*" by the respondent and "*wastage of assets*" regarding the sibling lands, it is submitted that the bar for alleged litigation misconduct is extremely high and effectively amounts to fraud. It is submitted that nothing is this case would justify its application. It is submitted that the conspiracy theories regarding the windfarm and the sibling lands did not bear up and much Court time was spent futilely trying to establish these issues. There is some basis for this

latter submission. However, the situation giving rise to the suspicions on the applicant's side was created and fuelled by the conduct of the respondent.

108. It is submitted that Mr. A. was a promotor of the litigation misconduct approach and only reluctantly agreed in cross-examination that all his voluminous sets of queries were satisfactorily answered when pressed. Again, the more important point is the absolute struggle that unfolded in trying to obtain the necessary and complete financial information. It is no credit to the respondent that patience and persistence on the part of the applicant and her advisors forced him to make greater disclosure.

109. In so far as the sibling lands are concerned, the respondent takes a different view to the applicant on the events – but the court orders and the situation are quite clear. On behalf of the respondent, reference is made to the omission from the applicant's submissions of the fact that the applicant vetoed the purchase of the lands by her sons "*as are the consequences which have affected the entire family*".

110. This submission reflects once more the respondent's sense of grievance and sense of betrayal which is evident throughout. These are mis-placed sentiments on his part as his defeat concerning the sibling lands was entirely of his own making.

111. On behalf of the respondent, it is submitted:-

> *"that the concept of litigation misconduct has no bearing on this case. Any failures by the respondent can be reflected in a partial costs' order if on balance this Honourable Court feels it appropriate to do so bearing in mind the overall circumstances of the case, the manner in which it was conducted by the applicant and, most importantly, in the context of proper provision for both parties and the Orders to be made by the Court".*

This submission is considered when dealing with s. 16.

The Law

112. 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 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.

113. In that 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 misconduct relating to the making of proper provision."*

114. 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 tending to demonstrate the innocence of the party has to be carefully weighed up by the court. Once 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."*

115. The applicant submits that this is a case which approaches the gross misconduct on the part of the husband in the case of *A.A. v. B.A.* [2014] IESC 49 where Irvine J. found that it was highly likely that even at that stage that the full extent of his assets at the time of the judicial separation/divorce would not be known. Irvine J. distinguished that situation in the *Q.R.* case. Clarke J. in the Supreme Court upheld the decision of Irvine J. on *"substantial and material non-disclosure"*. That 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.

116. In this case the respondent concedes, as concede he must, that there was poor disclosure and discovery at the commencement of the proceedings. On his behalf it is said that the failures have been freely accepted by the respondent in evidence, through correspondence and on affidavit and that any gaps in information were fully dealt with in the comprehensive replies to the extensive queries sought on the applicant's behalf.

117. However, the respondent also makes the case that he was advised by his previous solicitor that he did not need to make certain disclosure and elsewhere states that his first solicitor due to illness was not "*on the ball*". He did not provide any corroborative evidence concerning these excuses.

118. It is also clear from the evidence that disclosure was made through _____'s Accountants (redacted) with defects and non-disclosure again arising.

119. The simple fact of the matter is that the disclosure was incomplete and inaccurate and involved an ongoing battle because the respondent was not willing to disclose "his" true worth - or more correctly the true worth of the matrimonial assets.

120. The applicant submits that the litigation misconduct is relevant either in the context of the provision to be made or from the point of view of costs. Mr. H. gave evidence concerning the amount of work necessitated to prepare a D v D schedule for the Court. He gave evidence of the long process of obtaining disclosure from November 2019 to the date of the hearing. His memo referred to above illustrates the process whereby false, incomplete and misleading documentation, including sworn affidavits, were provided by the respondent throughout this case.

121. The written and oral submissions of both sides refer to relevant case law in the area. Most of the cases relied on are common to both sides.

122. A useful starting point 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 obligations, continue with a standard of living commensurate with her standard of living during marriage but to enjoy what may reasonably be regarded as the fruits of the marriage so that she can live an independent life and have security in the control of her own affairs, with a personal dignity that such autonomy confers, without necessarily being dependant on receiving periodic payments for the rest of her life from her former husband."*

123. In the recent Court of Appeal case of *N.O. -v- P.Q.* [2021] IECA 177, the farm at issue was a much smaller unit (100 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.

124. The case involved the following distinguishing factors; there were three dependent children, both parties were much younger and the husband had to maintain the family from his annual earnings of €100,000.00 from the farming enterprise. A lump sum of €120,000.00 was awarded in addition to the €200,000.00 already provided to the wife which allowed her to obtain a six-bedroomed house for herself and the children. The appeal did not relate to this award but rather to the fact that the trial judge had awarded 4 years maintenance at €800.00 per month for the wife, meaning the capitalised maintenance together with lump sum amounted to one-third value of the assets. The Court of Appeal found that the court had erred in

the approach to maintenance and the award was overturned and amended to €1,600.00 per month maintenance without a time limit.

125. 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.*"

126. 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…""*

127. In dealing with the fact that the only asset was the inherited asset, Whelan J. stated:-

> *"The statutory remit and the principle of fairness requires a more calibrated approach where a farm holding has been within one spouse's family for generations and was assured to one spouse, who carries on the business of farming on a full-time, or substantially full-time, basis and where it constitutes the sole or a significant source of income to the family, particularly if it was acquired from a parent or relative with at least an implicit expectation that it would be retained in specie for future generations. In my view the nature of the inherited property is relevant as are all the material circumstances surrounding its acquisition. Furthermore, if an inherited property provides the entire or a substantial portion of the income for one of the spouses and/or provides employment for a spouse, same are material factors which must be taken into account in balancing the competing rights and interests of the parties.*
>
> *79.Having said that, I do not think that there are any strict rules governing the approach of a trial judge in "farming cases" per se. Each case will turn on its own particular facts and the circumstances of the case. The nature and source of an asset and the moral duties and obligations implicitly attendant upon the acquisition of same may well be factors to be taken into account by a trial judge in determining what constitutes "proper provision" in the context of a claim where one of the parties derives a significant source of income from an inherited or acquired farm holding."*

128. The case of *HN v. BN (BY)* [2016] IEHC 330 involved lands which had been transferred in their entirety to the respondent wife by her father. She then

transferred the lands into the joint names of herself and her husband, and her husband subsequently made a significant investment into the farm. The marriage between the parties lasted from December 2004 until November 2010. There were no children of the marriage. Although a short marriage, the husband had financially contributed both to the farm and the marriage. The farm was the subject matter of the proceedings and consisted of 90 hectares of land which had been in the wife's family for several generations. The notice party was the wife's mother who had rights of residence and maintenance registered on the title deeds of the farm, as she had lived in a period home on the farm since she married the wife's father. A brother also had rights registered on the land in question.

129. At para. 89 of the judgment, Keane J. cited Denham J. in *G v. G* [2011] 3 IR 717:-

> *"Assets which are inherited will not be treated as assets obtained by both parties in a marriage. The distinction in the event of a separation or a 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 in a 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."*

130. Keane J. went on to find that on the authority of *T v. T* [2002] 3 IR 334:-

> *"Property acquired by inheritance does not thereby 'escape the net' of proper provision"*

131. Murray J. in the same case, although in the slightly different context of assets acquired after separation, said:-

"That is not to say that the resources of one spouse which could be said to have been acquired completely independently of the marriage should be excluded from consideration by the court. Each spouse has a continuing obligation to make proper provision for the other and the resources which are available to each of them may be taken into account so far as is necessary to achieve that objective. Each case will necessarily depend on its own particular circumstances. Where there are quite limited resources available it may only be possible to provide for the basic needs of each spouse. On the other hand, different considerations would also arise where one spouse was independently wealthy before the marriage and the marriage was of a very short duration".

132. Keane J. referenced High Court judgments of O'Higgins J. [*B v. B (*Unreported High Court Ex Tempore 11th of April 2005*)* and *C. -v- C. (*Unreported High Court O'Higgins J 25th of July 2005)] and Abbott J. [*N v. N (*High Court 18th December 2013)]. In each of those cases the Court permitted the relevant party to retain the full benefit of the inherited farm or estate. He goes on to state:-

" *……. it does seem to me relevant to observe that in each of those cases the Court was able to make significant alternative provision for the non-inheriting spouse out of the other assets and income available to the parties*".

133. The wife had put a proposal to the court. She proposed that her husband retain the house in town worth €200,000.00 and that he would have the benefit of the proceeds of sale of 50 acres. The judge, on foot of valuations that he allocated to assets, calculated the value of the wife's proposal, concluding that after discharge of

costs, the husband would receive approximately 23% of the total net value of the matrimonial assets. This was inadequate in the view of the court.

134. In *D.T. v. C.T.* [2002] 3 I.R. 334, the Supreme Court at p. 419 observed that the trial judge should in particular give:-

> *"consideration to the matters to which the Statute requires him to have regard and he should not have regard to matters which are beyond the scope of his discretion".*

135. Unlike the mother and brother in the *H.N. -v- B.N.* case above, the adult sons here have no legal rights registered on the land.

136. The unreported 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 LJ, 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).”

137. It is submitted on behalf of the respondent that the Supreme Court decision in *D.T. v C.T* [2002] 3 I.R. 334 is authority for the following propositions:-

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 and be decided on its own circumstances and proper provision must be assessed having regard to those circumstances;

iv) there is no provision requiring equal division of assets since some cases may require a greater division in favour of a dependent wife for instance, particularly where there are dependent children and others may require a lesser portion due to other facts like inheritance.

The respondent quotes from the judgment of Denham J. :-

“*(ii) Not division*

The scheme established under the Act of 1996, is not a division of property. The scheme established under the Act of 1996 provides for proper provision, not division. It is not a question of dividing the assets at the trial on a percentage or equal basis. However, all the circumstances of the family, including the particular factors referred to

in s. 20(2) of the Act of 1996 are relevant in assessing the matter of provision from the assets".

v) the manner in which assets are held is not the sole focus of the court i.e. jointly or solely. It is submitted the way assets are held is not the most important factor as is maintained on the applicant's behalf but rather the way they should be dealt with when making proper provision.

vi) Further, in *D.T. v C.T* [2002] 3 I.R. 334 the Supreme Court considered that a yardstick of one-third as being a useful benchmark at the lower end of the scale which may be a useful benchmark to fairness looking at the specific circumstances and the factors in s. 20 (or 16). Therefore it is submitted that looking at these principles, the Court has a broad discretion to be exercised fairly which discretion is only circumscribed by the matters in Sections 16 of the 1995 Act or Section 20 of the 1996 Act.

138. The above submission on behalf of the respondent seems fair.

Section 16 of the Family Law Act 1995

The legislation requires that such provision is made for each spouse and for any dependent member of the family concerned as is proper having regard to all the circumstances of the case. As stated by Whelan J. in *N.O. -v- P.Q.* [2021] IECA 177:-

"*The check-list in section 16(2) is not to be treated as exhaustive. It also, by necessary implication, entitles a court to disregard issues not considered to be relevant or material irrespective of how strenuously same may have been canvassed at the hearing "*

Section 16(2) factors:

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

The D v D schedule is agreed. Since August 2021 the applicant has been in receipt of Old Age Pension. Her evidence was that it would be €230.00. Together with the maintenance of €866.00 per week, her annual before tax income is approximately €57,000.00 which, on the figures agreed between both accountants amounts to €43,623.00 per year or €3,623.00 per month (€838.00 per week.)

The respondent swore an affidavit of means on the 3rd May, 2019 stating his income was €475.00 per week. He swore a corrective affidavit of means on the 4th November, 2019 where he swore his weekly income was €475.00 and he had gross monthly rental income of €1,700.00. On the 26th November, 2019 he furnished an (unsworn at that stage) affidavit setting out his income as being €120,042.00. Of this, the gross rental income is stated as being €2,520.00 not €1,700.00 per month. In the updated affidavit of means sworn on the 16th April, 2021 his after tax income was stated as being €119,216.00, or €9,935.00 per month. Gross rent is stated as being €2,602.00 gross per month. The maintenance the respondent pays to the applicant is deductible for the purposes of income tax.

The applicant is circa 65 years and has no income-generating capacity as such. The respondent is circa 70 years. He has health issues. He has a pension, farm income and a director's income from Y Limited.

There is more income available to the respondent from Y Limited. In particular over the last three years there was a combined sum in respect of both parties of €39,000.00 which could be drawn from this company - on the evidence of Mr. J.H.

It is significant that the applicant is owner of one-third shareholding in Y Limited and equal shareholder in X Limited.

Y Limited is a strong and healthy company.

There is substantial income available to the respondent.

These matters were dealt with in the two forensic accountants' reports and in evidence.

It is submitted by the respondent that the approach of the applicant's team was to entirely disregard the farm, its workings and its personnel and purely regard them as dispensable in meeting the applicant's claims. It is submitted this is not the correct approach.

At the end of the day the court is entirely satisfied that this is a case where there is sufficient income and resources to allow proper provision be made for the applicant and still leave the respondent very well off.

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

The needs of the parties are similar. The applicant needs proper accommodation. She is a dependent spouse and requires a secure income for her lifetime together with provision for her older years in the event of illness. The respondent requires secure accommodation and secure income into the future. Both have the similar needs going forward – i.e. security of accommodation, income and provision in the event of becoming ill.

It is submitted on behalf of the respondent that his open offer endeavours to satisfy this criterion without seeking to totally liquidate the working assets of the family and preserving employment for the sons and the local employees.

This latter submission would have the court significantly dilute the provision that ought to be made for the applicant by reference to matters which do not carry sufficient weight to permit this. The court is not oblivious to the fact that the family farming and business enterprises will be impacted by the financial re-adjustment that is necessary because of the

breakdown of the marriage. In a utopian world the making of proper provision for the applicant could be achieved without any adverse impact on anyone but in the real world that is impossible.

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

The parties had a comfortable life and a comfortable family home. They did not lead an ostentatious lifestyle.

It is true that the section refers to the "family" and not just the spouses - but the focus is clearly meant to be on the spouses and on any dependent children.

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

The parties are aged circa 65 and circa 70 respectively. They married in 1981. They have been married for over forty years and lived together for thirty-five years until the applicant left the family home in 2016. This is a marriage of long duration.

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

The applicant had been prescribed lithium and epilim in the past but the evidence is that she is free of medication and symptoms. The respondent has medical issues. Both spouses are of an age where they should be able to relax and enjoy life as senior citizens - after working hard, rearing a family and accumulating sufficient wealth to allow them to do so.

(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 contributions made by either of them by looking after the home or caring for the family.

The applicant worked as a typist in _____ (redacted) before the marriage but gave it up to move to _____ (redacted). She did work in the farming business while caring for the children. She did the haulage licence course in 1989 and 1990. After a full-time bookkeeper was employed, the applicant continued to answer phones in the evening, looked after workmen and did the banking. This relationship was that of a busy family with a busy farming and logistics business. It was not a clock on/clock off enterprise. The applicant was immersed in the work of running a home and a business on a 24/7 basis along with her husband.

There is no question but that the respondent was and is an extremely hard-working farmer and businessman. He can fairly be regarded as the principal

earning spouse - but his ability to work as he did was supported and enabled by his wife who also worked extremely hard.

The farm consists of lands purchased from the fruits of the labour of both parties together with inherited land. Y Limited was built up by both parties from a cattle trading business into the successful logistics business which it is at present. It is important to note that the farm enterprise is run through a company of which the applicant is an equal shareholder, although the land is owned solely by the respondent. On incorporation of both X Limited and Y Limited the applicant was given a shareholding equal with the respondent in both enterprises.

The additional contribution by the respondent of inherited lands is not being ignored by the court in this case. It is probable that this inherited land will pass to the next generation.

Proper provision can be made for the applicant out of the remaining assets with the inherited land remaining intact.

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

The applicant gave up her secretarial work in _____ (redacted) to move to _____ (redacted). She was involved in the family enterprises as detailed above. She was remunerated for her work for a period of time but her money went back into the household. Both spouses are at retirement age and earning capacity for the applicant does not really feature - while the respondent continues to have an income as a farmer and businessman.

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

Both are in receipt of the Contributory Old Age Pension.

The surviving spouse has rights under the Succession Act, 1965 which would prove of value to the wife in particular if the respondent predeceased her.

(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.

In this case, the applicant asks the court to take into account litigation misconduct and wastage of assets (sibling lands) in exercising its discretion.

The respondent rejects the applicant's submission.

This whole issue is detailed elsewhere. It is the view of the court that the respondent is guilty of litigation misconduct because he sought to mislead the applicant and the court as to the true worth of the matrimonial assets and as to his income. His conduct involved he being obstructive and un co-operative - as he was tenaciously pursued by the applicant's legal team for proper disclosure. There is no other plausible explanation for his conduct other than that he did not want the true income and value of the assets to be known because he wanted to minimize what the applicant would ask for or be awarded in terms of her fair share.

This conduct was cumulative with a drip-feed of information which destroyed any trust the applicant's side might have hoped to have concerning the ongoing disclosure. The behaviour is particularly unfortunate because the picture is one of the respondent running up significant costs on both sides relative to the value of the assets and income he sought to conceal – albeit the difference between the original income deposed to and the actual income finally deposed to is large.

The conduct does meet the threshold of conduct required to merit sanction because it was deliberate, ongoing, brazen and deceitful.

Why did the respondent behave in this way?

The court is satisfied that he did so because of his desire to hold onto the land – and to a lesser extent, the logistics business – at all costs. He does

not wish to contemplate the sale of any land, although that reality has slowly permeated his psyche – doubtless by reason of the now obvious determination of the applicant to be fairly provided for and by the advice he has received.

There is some irony in the fact that the legal costs generated by the conduct of the respondent have placed “the land” at further risk. A more business-like approach by the respondent to the need to resolve matters with the applicant would have served him much better.

The respondent has been foolish to allow the land to become so important in his life.

Having said all of that, the Court has concluded that it would not be unjust to disregard the misconduct of the respondent - as opposed to increasing the provision to be made for the applicant by reason of it. The respondent will lose much of the land which he holds so dear - and that is likely to be a great blow to him.

The conduct of the respondent must feature when it comes to costs as that conduct has created a high conflict case with a protracted course and substantial legal costs. It will never be known what course the dispute would have taken if the respondent had come clean at an early stage in relation to all of his assets and income. One thing can be said as a matter of

probability - the dispute would have been resolved inside or outside court much quicker and cheaper.

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

This issue is dealt with elsewhere. The applicant's case is that she requires a sum of at least €600,000.00/€700,000.00 to provide a nice house to accommodate herself. Her evidence was that it is difficult to obtain accommodation in _____ (redacted) itself so she requires access to ready cash so that when something suitable comes on the market, she can purchase it. She indicated that she wished to be near the village as she is happy there, where she has company and activities. The respondent suggested she buy a house in _____ (redacted). The respondent is entitled to point out that a comfortable home can be bought down the country for a fraction of the cost in _____ (redacted).

However, the court is satisfied that the applicant wishes to be in _____ (redacted) for sensible reasons, not least that she is now settled and happy there. It is not the case that she chose _____ (redacted) because property is expensive there. Her need to have a nice home in _____ (redacted) is not unreasonable and the cost should be viewed in the context of the assets available. The house will be an investment and will provide the security of bricks and mortar to the applicant - and the enjoyment of having a nice home where she wants to be.

The respondent has a nice home where he wants to be.

(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.

The respondent does not agree that the small pension should be divided as sought on the applicant's behalf since it will render it rather insignificant for both parties. The court does not differ from the view of the respondent and will not divide the pension. It is an asset nonetheless which is part of the overall total valuation.

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

The applicant's own evidence did acknowledge the two sons' involvement in the farming and logistics businesses. She understandably indicated that she did not want to be unreasonable and did not want to take away their livelihoods or anything like that. She did point out that she was their mother and that before any of her children got anything, she had to be looked after.

The line of questioning, though necessary cross-examination because of the defence the respondent presented, did place the applicant in that difficult

position of trying to look out for herself while at the same time not wanting to appear callous or uncaring.

The line of questioning was consistent with the strategy of the respondent when dealing with “the sibling lands”, the “site for the daughter” and his apparent theme throughout; that it was the applicant who was cold and unyielding.

The court will stop short of considering if the adult children have been weaponised by the respondent in his quest to keep the applicants share to a much smaller share than that which she is entitled to – but only because a finding on that issue will not really assist a decision on the important issues.

The court must emphatically reject the suggestion that the applicant has been unreasonable at any stage - and must observe that the evidence proves that it is the respondent who has been unreasonable.

It is submitted by the respondent that a more flexible and nuanced approach is necessary by the Court when dealing with a farm case, particularly where there is also an inherited aspect. The law in this respect is dealt with above.

All the circumstances must be taken into account and all weighed and balanced in the recipe for proper provision. But that does not skew the balance in favour of adult children working in a family business or businesses who may have certain hopes or expectations for the future. It is

for businesses to organize their own affairs amongst the participants. Also, any adverse consequence for employees of either business is really beyond the purview of the court.

A court dealing with the difficult decision of making proper provision for the spouses and dependent children of the family is obliged to focus primarily on doing just that in accordance with the legislation.

Obviously, the court should and will consider the manner in which provision is made in the hope that the mechanism chosen is as fair as it can be having regard to all the circumstances.

Proper Provision

The applicant's position

139. The applicant's starting point is that she owns half the family home, half the shareholding of X Limited and a third share of Y Limited. There is no reason why the applicant should leave Court with a sum which is less than that which she owns, nor that she should be deprived of the income generated from her assets (e.g. the profit accruing as reserved capital in Y Limited and X Limited).

140. The D v D schedule was agreed on the basis that provision for legal costs is deducted prior to determining the net value. It is appropriate that the court now looks at the net value prior to either party making provision for their costs, particularly in light of the fact that the costs have escalated since the D v D schedule. The total assets, before making provision for costs, is €4,176,898.00. The applicant already has legal ownership of assets with a net value of €628,220.00 (this is arrived at by

totalling the €378,220.00 plus €250,000.00 which had been deducted in respect of her costs in the second column of both Mr A.'s and Ms G.'s columns in the D v D schedule).

141. The respondent on the 10th October, 2021 made an open offer to the Court, whereby he offered to pay the applicant a sum of €500,000.00 and to transfer the investment properties with a net value of €244,265.00 to the applicant, from which she is to derive an income. This is to effectively offer the applicant a sum of €116,045.00 above that which she owns.

142. Looked at in percentage terms, it constitutes 17.8% of the overall assets in circumstances where the applicant already owns 15%. More importantly, the uncontradicted evidence before the court is that the applicant requires at least €600,000.00 to purchase a house together with €10,000.00 costs of purchase and the sum of €70,000.00 to furnish same. Her costs as of June 2021 were estimated at €250,000.00. They now stand at €310,000.00.

143. An approximate equal division of the net assets allows the respondent to retain the inherited land, the home he lives in, the entire of the farm enterprise and his shareholding in Y Limited. The evidence given by Mr A. was agreed with by Ms G. and set out in a chart known as Schedules A and B, dated the 7th July, 2021 and 2nd July, 2021 respectively (Appendix 6). The evidence was that in order to provide a sum of €1,500,000.00 to the applicant, two options arose. From that chart it is clear that a sum of €1,620,000.00 can be provided by the respondent selling all properties from (b) to (e) inclusive and transferring the investment properties to the applicant. Both accountants agreed that (as reflected in the chart) the respondent will have to sell the property, in order to avail of entrepreneurial relief.

144. In addition, the agreed evidence is that as of 28th February, 2021, there is cash on deposit within Y Limited of €548,797.00. (In Ms G.'s report, Appendix 10). This had increased from €199,596.00 in 2019 despite the company purchasing rather than leasing vehicles. In those circumstances, there are funds available to allow the company to buy back the applicant's shareholding valued at €420,075.00 before tax (see Agreed Schedule, Appendix 2). This sum will be subject to either income tax or capital gains tax in the hands of the applicant. In the event that income tax is applicable, this will provide a further approximate sum of €200,000.00 for the applicant. Additionally X Limited can, with its cash reserves of €187360, purchase back the applicant's shareholding. (Appendix 8, Ms G.'s report).

145. This would provide approximately €1,840,000.00 (or €2,100,000.00 if the X Limited shareholding is purchased) to the applicant. This includes her assets and liabilities at 9 and 10 of the D v D. Schedule. The respondent would be left with the remainder of the assets in the schedule D, save that all but €10,000.00 approximately of the entrepreneurial relief and capital gains tax losses at 1(g) and 1(h) will have been utilised. This would leave him with assets valued somewhere in the region of €2,000,000.00 to €2250,000.00 of an adjusted total net of approximately €4,090,000.00. This will allow the applicant to be independent of the respondent into the future. She may retain the investment properties as income or may sell to reinvest nearer home or otherwise.

146. The applicant strongly expressed her preference for a clean break so that she could be afforded with enough funds to provide for herself rather than maintaining a link with the respondent. A division of €1,840,000.00 to the applicant and €2,250,000.00 to the respondent would represent an approximate 45% /55 % split. A large portion of the applicant's share will be necessary to provide accommodation for

her, in addition to paying her costs subject to what is said below. The amount left with the respondent already generates significant income for him, and he is already provided with a home. He may, if he so wishes, retain the inherited property to leave it to his children after his death.

147. Mr M. gave evidence that the respondent would have income of approximately €50,000.00 from the _____ (redacted) farm. In any event he will now own 50% share of Y Limited and will continue to have an income therefrom. The payment of a capital sum will mean that the respondent will not need to maintain life policies presently in existence in order to secure maintenance.

148. The pension fund of €162,108.00 should be divided equally.

149. In the event that the Court does not make such capital provision it will need to ensure that the applicant has sufficient to provide accommodation, furnish same, pay her costs, provide for transport, and in addition order appropriate maintenance together with securing same for her lifetime.

Costs

150. The applicants costs now stand at €310,000.00 (Appendix 7).

151. In the case of *B.D. v J.D.* [2004] IESC 101, the Supreme Court found that a costs order could have a skewing effect of proper provision. So too can a refusal to make an order of costs in the appropriate case. It is the applicant's case that this litigation was prolonged, and costs increased by the respondent's behaviour. It would not be equitable that the applicant fund the litigation from her share of the assets. Depending on the provision this court otherwise makes for the applicant, the respondent should be directed to make an appropriate measured contribution to the applicant's costs. In this regard the Court should specifically note the instances in which costs were reserved. In addition, the Court will note that the sums of

€35,000.00.00 (less €1,500.00.00) from sibling lands and approximately €30,000.00 (being the balance of the undisclosed Credit Union Account) have been frozen on foot of undertaking given by the respondent.

The respondent's position

152. It is submitted that the applicant's proposals are extreme and disproportionate and would destroy the farm and seriously affect the Y Limited business which employs a significant number of local people in its area. It is submitted that this is not the function of the Court nor a proper application of the legal principles applicable.

153. The respondent has made his case on evidence and in putting his case to the applicant and her witnesses. The respondent seeks to preserve what can be retained of the farm for the sake of the two sons of the marriage who work on or with the farm. It is submitted that this reality was accepted by the applicant during the case, even if she made it clear that she wanted her claims met first.

154. In cross-examination of the applicant on the 29th of June, 2021, Counsel for the respondent put it to the applicant that taking large amounts of capital out of the farm and business would destroy the enterprise and kill the golden goose. From line 24 on, Counsel said: -

> "*..It's not that simple. You can't just snatch capital from the company. It's a nice idea but it's not that simple. So, if the Court were to follow what you have sought today from the Court, not only would my client be out of business, but your two sons who have been working the two parts of a business, the farming and the logistics business, in expectation that they will get the business but that would be gone. So you would actually be depriving your children as well. Again, if I may so, Mrs. M., is that what you wish to do?"*

155. The applicant replied: -

"Well, I certainly don't. I love my children and I certainly want them to have a lovely life but I'm their mother and before any of my children get anything I have to be looked after.

Q. May I suggest that has to be reasonable, Mrs. M.?

A. Reasonable, yes, and I don't want to take away their livelihoods or anything like that, certainly not."

156. The respondent has made an open offer which is before the Court in which he seeks to deal with the applicant's needs and requirements. His proposal is as follows:-

- To transfer three apartments and an office at ____ _____ Street, County _____ (redacted), free from encumbrance, into the applicant's sole name giving her a minimum income of €27,702.00 gross per annum.
- To provide both an asset and secure income for the applicant.
- A lump sum of €500,000.00 to include a contribution towards her costs.
- Both parties to retain their half share in the windfarm investment via a new company.
- The applicant would transfer her interest in the farm and business to the respondent.
- Orders and cross orders pursuant to s. 14 and s. 15A(10), save for security regarding the applicant's V.H.I. payment.
- The current maintenance position would be maintained until the payment of the lump sum and transfer of properties.

157. In this regard, the respondent reluctantly acknowledged that it is likely that substantial tracts of farmland would have to be sold to fund any such settlement. Therefore evidence was heard from agricultural experts in relation to the viability of the farm and business into the future if such sales are necessary. Evidence was also

given as to the cost and problematic issues arising in renting lands to replace lands for farming to preserve "Farming Entitlements". It is submitted in light of all the evidence, including the recall of Mr. P., that the rental figures put forward on behalf of the respondent are more persuasive and should be accepted by the Court.

158. The respondent made it clear, as is demonstrated by the above questions to the applicant, that he is extremely anxious that the sons of the parties would be able to continue to work in the business and on the farm. It is submitted that the evidence demonstrated that the business of Y Limited is integrally connected to the farm. Further, the applicant did not at any stage challenge the fact that P. has been working on the farm without salary throughout his life. This is a classic case of children working on a farm with the reasonable expectation in taking same over in due course. The submissions on behalf of the applicant that this is irrelevant does not reflect the applicant's own evidence. It is submitted that the Court can – and should – take this factor into account.

159. The respondent has found this case difficult to deal with and remains emotional in this regard. He has never objected to reasonable provision being made for the applicant but wishes to do so in the context of the obligations that he feels the parties have towards their children.

Costs

160. Ironically, these submissions rely upon the exact same case and quote as that cited in the applicant's submissions. In *B.D. v J.D.* [2004] IESC 101 the Supreme Court, *inter alia,* set aside an award of costs given to the wife in the High Court as excessive where she had obtained monies by way of lump sum relief. Hardiman J. delivering the judgement of the Court (with Denham J. and Kearns J.) stated:-

"Because this is a family case, and because one must look to the detailed result of the case and the overall propriety of the provision for both parties and because in such circumstances an award of costs may itself have a skewing effect or be a cause of bitterness, I would not consider it appropriate to make any order in respect of the costs of the High Court action."

161. The case for the applicant for costs is based upon the whole premise of alleged "*litigation misconduct*" which is dealt with extensively above and disputed. It is submitted that this Honourable Court needs to bear in mind how this case was run on the applicant's behalf and the case which was sought to be made which considerably lengthened the duration of the case. The D v D schedule was agreed with differences, the consequences of the sale of lands was agreed and the tax implications as well as the effect on the "Farm Entitlements".

162. This is not an ample resources case in any real sense of the concept other than its value exceeded €3 million justifying its issue in this Honourable Court. A substantial award of costs would, it is submitted, unbalance any delicate, calibrated approach this Court might take when making orders for proper provision for the parties.

163. At p.75 of the transcript (line 6 to 9) towards the end of her cross-examination, the applicant specifically asked to say to the Court and to Counsel to pass on to the children that despite what they might think, that she did love them very, very dearly and her door would always be open for them. Many difficulties have occurred since the separation affecting the children. It is respectfully submitted that a costs' order might engender further bitterness, to quote Hardiman J., and might unbalance proper provision.

Decision

164. Subject to the making of the provision set out below, the Court is satisfied on the evidence to grant a decree of judicial separation pursuant to s. 2(1)(f) of the Judicial Separation and Family Law Reform Act,1989.

165. It is the position that the D v D schedule has been agreed on the basis that provision for legal costs is deducted prior to determining the net value.

166. The applicant states that her costs as of June 2021 were estimated at €250,000.00 but now stand at €310,000.00.

167. In the D v D schedule the respondent's legal costs were stated to be €42,000.00 plus €169,000.00 making a total of €211,000.00. The respondent's legal costs will presumably also have increased somewhat since June of 2021.

168. Thus, the estimated legal costs which will have to be paid out of the funds available (the matrimonial assets) are somewhere in excess of €521,000.00. It is necessary to make a number of observations in relation to these estimated figures:-

(a) The figures are very high and total more than 12% of the matrimonial assets. Both the applicant and the respondent have had the benefit of legal representation and other expert advice in a difficult case and the professionals involved must obviously be paid reasonable fees for their services. The parties themselves must however be aware of their right to have the costs adjudicated on a solicitor [legal practitioner] and client basis to avoid having to pay excessive charges. The fact that figures are recited as estimated legal costs in a D v D schedule, which schedule is referred to by the court, does not mean the court is in any way endorsing the amounts as reasonable. In the event of a dispute

between the solicitor and the client then the costs are a matter for adjudication.

(b) The conduct of the respondent did cause this case to be high conflict and protracted. His failure to make full and frank financial disclosure at an early stage, his ongoing failures in relation to disclosure and his obfuscation placed the applicant's legal team and experts in the position that they believed they had to pursue disclosure forensically. They were understandably unable to accept that the true financial picture had been presented to them. Furthermore, the open offer made by the respondent to settle the case at a late stage is wholly inadequate.

(c) The case took longer than it should have at hearing and a more focussed approach on the issues by both sides at and prior to the hearing would have shortened the hearing. The case should have concluded in four days of hearing.

(d) While the court is not imposing any financial sanction on the respondent pursuant to s.16(2)(i) it is only fair that the respondent be obliged to pay a substantial sum in respect of the costs of the applicant to her.

(e) It is desirable that there be finality to this litigation. An order for the payment of costs on a specified percentage basis with an adjudication of costs, which the court has considered making, would protract the matter further. Such an adjudication would also add further costs. The court will fix the sum of €160,000.00 [one hundred and sixty thousand euro] as a payment to be made by the respondent to the applicant in respect of legal costs incurred by her in these proceedings. In so fixing

the payment, the court has had regard to all of the circumstances of the case and to the figures for costs in the agreed D v D schedule, the evidence given in respect of costs and the submissions of both parties. In so fixing the payment the court can also achieve greater certainty in relation to the overall financial picture and this is desirable where provision is being considered.

(f) The court will if necessary deal separately with the motion in relation to the alleged breach of the in-camera rule and will hear from both sides in that regard before making a final order in relation to that motion.

169. The respondent will be responsible for his own legal costs out of the assets remaining to him.

170. Both the applicant and the respondent have worked very hard throughout their working lives and, as a matter of probability, are both likely to remain sensible in relation to their income, expenditure and investment of their assets.

171. At the end of the day, both the applicant and the respondent will each have sufficient wealth after proper provision is made for the applicant without fatally damaging the farming enterprise and the logistics business although re-arrangement and re-structuring are inevitable.

172. When all the circumstances identified are taken into account, the suggestion in relation to the provision which ought to be made and which is contained in the applicant's submissions is excessive.

173. The submission of the applicant has the appearance of being modelled on a division of the assets as opposed to proper provision being made - and the court does not consider the proposed split to be appropriate in all the circumstances of the case.

174. The court finds that proper provision in all of the circumstances requires that the applicant receive **one-third** of the overall valuation of the assets as listed in the D v D schedule dated 30th June, 2021 **but after removing** from that schedule the provision in respect of outstanding legal costs such that the total overall valuation, including the pension policies, is €4,339,006.00. One-third of that figure is €1,446,335.00. In addition, the respondent is to pay to the applicant a contribution to her costs in the sum of €160,000.00 (including VAT) making a total provision for the applicant, inclusive of costs, of €1,606,335.00.

175. On payment of this sum the applicant is to transfer to the respondent her interest in the family home and in the remaining properties and assets listed as the respondent's in the D v D schedule. She is also to be indemnified in respect of any liabilities attached to or in any way relating to the assets retained by the respondent.

176. On payment of the sums aforesaid, the applicant's interests in X Limited and in Y Limited are also to be transferred in such a tax efficient manner as the accountants for the applicant and the respondent agree [or in default of agreement as the court decides]. The transfer of the applicant's interests in either company may be to a nominee or nominees of the applicant or of the respondent if both parties agree.

177. The court considers it necessary to make orders to ensure that the applicant receives the provision as soon as reasonably possible.

178. The applicant left the family home in October, 2016 and these High Court Proceedings were commenced in November, 2018. The hearing itself eventually commenced in June, 2021. The original hearing date was fixed for November, 2019 but an adjournment was sought by the applicant and granted because of the respondent's incomplete disclosure. The respondent is the main cause of the delay and

he cannot be allowed to cause further delay. He has had ample time to make arrangements concerning the outcome of these court proceedings.

179. The payment of the sums aforesaid is to be achieved by –

(i) a transfer of the respondent's investment properties to the applicant [valued at €244,265.00 in the agreed D v D schedule and with the value fixed at that by the court], and

(ii) the sale of the land at _____ in County _____ (redacted) (folio _____ and _____) - with the net proceeds of sale to be applied in or towards satisfaction of the total figure of €1,606,335.00 - and with any surplus above to belong to the respondent should the land achieve a higher price than the value indicated , and

(iii) with any balance outstanding of the €1,606,335.00 following the payment from the net proceeds of the sale of the land at _____ (redacted) to be made up in cash.

(iv) The court will hear from both sides and decide whether the sale should be made subject to the approval of the court.

180. The applicant's bank accounts at number nine and the applicant's other assets and liabilities at number ten in the D v D schedule are to be taken into account in the figure of €1,606,335.00.

181. Any monies remaining unpaid to the applicant on 1st October, 2022 shall incur interest at the courts act rate as and from the date of this judgment until payment.

182. In the event of non-payment of any part of the sums aforesaid by 1st October, 2022 the court may direct the sale of more land or make further orders to secure the payment of the €1,606,335.00.

183. The current maintenance payments are to continue until the total provision is transferred to the applicant - and likewise in respect of the VHI/healthcare contributions.

184. Whilst the agreed D v D schedule contains valuations in respect of the lands and in particular the lands at _____, Co. _____ (redacted), the D v D schedule is dated 30th June, 2021 and the figures are obviously based on professional estimates. The court has heard evidence from agricultural experts on both sides in November of 2021 and is satisfied that the land at _____ (redacted) is good quality farmland which is sought after and desirable albeit the focus of the evidence was on rental value, entitlements and asserted importance to the farming enterprise. As a matter of probability the court is satisfied that the land when sold should achieve the estimate but this is not certain. In any event the net proceeds are to be used to satisfy the total provision referred to above and any balance outstanding is to be made up in cash by the respondent. This may work to the advantage or to the disadvantage of the respondent depending on the price achieved for the land.

185. The court harbours a concern that the sale of the lands at _____ (redacted) may be made difficult or frustrated and that payment of the net proceeds to the applicant may become protracted. The respondent may seek to influence the market or the sale. The court has decided what the entitlement of the applicant is and how the payment and provision ought to be secured. In the event of any difficulty, there will be liberty to apply and the court reserves the right to make such further and other orders as are necessary to secure to the applicant the actual provision made for her without undue delay.

186. Insofar as implementation is concerned the following will be part of the court order:-

(a) the court directs that the lands at _____, County _____ (redacted) be put on the market for sale within one calendar month from the date of this judgment and that the firm of Mr. . (auctioneer) be appointed as auctioneers (an alternative to be appointed on application to the court if he does not wish his firm to act in the sale) - and with the applicant's solicitors having carriage of sale.

(b) The court directs that the respondent, his servants or agents shall not obstruct, hinder or interfere in any way with the marketing or sale of the lands and shall co-operate fully with Mr. . and the applicant's solicitors, their respective servants or agents, in relation to the marketing and sale of the lands.

(c) The court directs that the investment properties are to be transferred to the applicant free from encumbrances (and with all utility bills, rates, taxes and outgoings paid to date of closing) within two calendar months of the date of this judgment with a direction that the respondent do cooperate with the applicant's solicitors in relation to any existing tenancies in the premises - the intention being that the applicant will take the investment properties with any current tenants in situ and have the option thereafter to manage the properties and the tenancies with a view to sale or rental as she decides.

(d) The court directs that any loans secured against the property in _____, County _____ (redacted) and any loans secured against the investment properties are to be rearranged forthwith and secured against property to be retained by the respondent - and that the applicant be indemnified in respect of any liabilities attached to or

connected to the assets retained by the respondent or connected to either company.

(e) The court directs that the transfer of the applicant's interests in X Limited and in Y Limited including any entitlements she has in respect of the retained profits in the said companies be finalised on the date of receipt by her of the final instalment due in respect of the sums aforesaid - and be attended to in such a tax efficient manner as the accountants for the applicant and the respondents agree or the court decides in default of agreement.

187. The court will direct mutual extinguishing and blocking orders in respect of the parties' respective succession rights and otherwise - with a stay on the effect of same as far as the respondent's estate is concerned until the final balance in respect of the sums aforesaid is paid.

188. The court directs that the parties prepare a draft order and it will list the case for mention on Wednesday 6th of April, 2022 - or on a later date if the parties or either of them require more time - to hear submissions in respect of any outstanding aspects of the court order and the form of same and to hear any other application by either party. In addition, the court will if necessary finalize dealing with the motion concerning the alleged breach of the in-camera rule.

Summary

189. The court finds that proper provision in all of the circumstances requires that the applicant receive **one-third** of the overall valuation of the assets listed in the D v D schedule dated 30th June, 2021 **but after removing** from that schedule the provision in respect of outstanding legal costs such that the total overall valuation (including the pension policies) is €4,339,006.00. One-third of that figure is

€1,446,335.00. In addition, the respondent is to pay to the applicant a contribution to her costs in the sum of €160,000.00 (including VAT) making a total provision for the applicant, inclusive of costs, of **€1,606,335.00**.