**IN THE HIGH COURT OF SOUTH AFRICA**
**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

**Case no. 821/2005**

**In the matter between**

**K[…] T[…] P[…]** **Plaintiff**

v

**P[…] M[…] P[…]** **Defendant**

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**JUDGMENT GIVEN THIS THURSDAY, 27 JULY 2006**

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**CLEAVER J:**

[1] The plaintiff has instituted a matrimonial action against the defendant in which she claims divorce, custody of three children born of the union with the defendant and maintenance for herself and her children. The relief which she claims stems from a marriage entered into between the parties in Australia. In addition, she claims repayment of the sum of €1 337 386, said to have been lent and advanced by her to the defendant.

[2] The defendant denies that the marriage entered into by the parties in Australia was valid. As to the alleged loans, he contends that the money paid to him by the plaintiff was his own money and that the agreement in terms whereof the plaintiff had received the money was a sham agreement which, to the

knowledge of the plaintiff, had been entered into with the object of protecting the plaintiff's money from his creditors. The defendant accordingly denies that he is liable to refund any money to the plaintiff.

[3] On 16 February 2006, and by agreement between the parties, an order was granted in terms of Rule 33(4) of the Rules of Court to the effect that the issue of the validity of the parties' marriage and the issue of the loans claimed would be determined separately before the remaining issues in the divorce action are determined.

**THE VALIDITY OF THE MARRIAGE**

[4] The plaintiff was previously married to P[…] S[…] in Italy and the defendant was previously married to M[…] P[…], also in Italy. Defendant and M[…] P[…] were Irish citizens and domiciled in Ireland.

[5] In August 1993 the plaintiff obtained a divorce from P[…] S[…] in the Dominican Republic. The relationship between the defendant and M[…] P[…] broke down and the defendant and plaintiff began a relationship. At the time divorce was not recognised in Ireland. The defendant then commenced proceedings against his wife M[…] P[…] in the Dominican Republic and obtained a divorce from her in that country on 16 April 1996. Thereafter the plaintiff and the defendant underwent a ceremony of marriage in Australia on 29 June 1996 and three boys, now aged eight and six were born from this union. The youngest two are twins. The ordinary residence of the plaintiff and the defendant at the time of the commencement of their relationship, the time of their seeking

divorces in the Dominican Republic and at the time of the ceremony of marriage which the parties underwent in Australia, was the Republic of Ireland.

[6] The parties are agreed that the applicable law that determines the validity of the marriage which they concluded in Australia is that of New South Wales, Australia (*lex loci celebrationis*).

[7] The defendant called an expert on Australian law, Mr Max Meyer, to support his contention that the marriage in Australia was not valid. The only evidence relied upon the plaintiff regarding the validity of the parties' marriage was the marriage certificate obtained in New South Wales, Australia.

[8] At the conclusion of the hearing, the following agreement was reached between the parties in regard to of the issue of the validity of the marriage:-

8.1 The plaintiff admits that in accordance with the current Irish law, the divorces obtained in the Dominican Republic are not recognised and the marriage ceremony entered into between the parties was not valid as neither party had the capacity in Irish law to enter into a legally binding marriage;

8.2 This court, when determining the validity of the marriage concluded between the parties in Australia, must assume that the Dominican Republic divorces were validly obtained by the parties in that country.

It was also agreed that in the event of me finding that the marriage of the parties is valid (based on the assumption that the Dominican Republic divorces were validly obtained), the matter would be postponed so as to enable the defendant to lead evidence with a view to establishing that the divorces obtained in the Dominican Republic were in fact invalid.

[9] The plaintiff admitted Mr Meyer's qualifications to testify as an expert on Australian law. He is a senior lawyer in a firm specialising in family law in Sydney, Australia. The plaintiff did not lead any expert evidence regarding the law in Australia and relied only on the cross-examination of Mr Meyer. His evidence was to the effect that the law relating to married persons and their relationship to one another is set out in the Family Law Act 1975 ("the Act"), a law of the Commonwealth of Australia, which applies in each of the Australian states. The law relating to the recognition of what are in the Act referred to as *"overseas decrees"* is set out in section 104 of the Act. Section 104(3) of the Act records a number of factors which, if applicable, would permit a divorce granted in an overseas jurisdiction to be recognised in Australia. All the subsections of section 104(3) have to do with either party to a marriage being ordinarily resident in the Dominican Republic, the Dominican Republic having being the last place of cohabitation of the parties, either party being domiciled in the Dominican Republic, citizenship of the Dominican Republic and in the case of subsection (f), a combination of factors. Since it is clear from the evidence which I heard that neither the defendant nor M[…] P[…] ever set foot in the Dominican Republic, none of the criteria required for the divorce to be recognised in Australia as set out in section 104(3) were fulfilled.

[10] Section 104(5) of the Act does however create a separate ground upon which a foreign divorce may be recognised in Australia. It provides

> *"Any divorce or any annulment of a marriage, or any legal separation of the parties to a marriage, that would be recognized as valid under the common law rules of private international law but to which none of the preceding provisions of this section applies shall be recognized as valid in Australia, and the operation of this subsection shall not be limited by any implication from those provisions."*

Mr Meyer testified that in Australia two common law principles would, if applicable, permit recognition of the Dominican Republic divorce in Australia even if recognition could not be afforded in terms of section 104(3) of the Act. He identified these principles as being those of reciprocity and what he termed the 'real and substantial' connection.

[11] The reciprocity principle stems in Australia from the decision of the Court of Appeal in *Travers v Holley and Holley*1 where the court held that the domicile of both spouses at the time of the proceedings was not the sole test of jurisdiction in divorce, as had previously been the case. Prior to *Travers v Holley*, the English courts had not recognised a decree of a foreign court unless the parties were at the time of the proceedings domiciled in the jurisdiction of the foreign court, or, if domiciled elsewhere, such decree would have been recognised by the law of the domicile. The position in England had been altered by statute which provided that where a wife had been deserted by her husband and the husband had immediately before the desertion been domiciled in England and Wales, the court would have jurisdiction for the purpose of any proceedings. In *Travers v Holley* the wife had been granted a divorce in New South Wales on the grounds of her husband's desertion even though the husband had abandoned his domicile of choice in New South Wales on a date after the

1. [1953] 2 All ER 794

desertion. In the course of his judgment, Hodson LJ expressed himself as follows:-

> "It is unnecessary to consider the effect of these later statutory provisions since, at the material time when the New South Wales proceedings were instituted, the Act of 1937 was in force and s. 13 of this Act corresponds in substance with the provision under which the New South Wales counterclaimed jurisdiction between the parties to this appeal. It seems to me, therefore, that Parliament has cut the ground from under the argument put forward on behalf of husband. If English courts will only recognise foreign decrees of divorce where the parties are domiciled in the territory of the foreign court at the time of the institution of proceedings because that is the jurisdiction which they themselves claim, what is the situation when the courts of this country arrogate to themselves jurisdiction in the case of persons not domiciled here at the material date? It must surely be that what entitles an English court to assume jurisdiction must be equally effective in the case of a foreign court.
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> Lord Watson in the Le Mesurier *case (1) used the following language ([1895] A.C. 528):*
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> > *'… a decree of divorce a vinculo, pronounced by a court whose jurisdiction is solely derived from some rule of municipal law peculiar to it forum, cannot, when it trenches upon the interests of any other country to whose tribunals the spouses were amenable, claim extra-territorial authority.'*
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> *Conversely, it seems that where it is found that the municipal law is not peculiar to the forum of one country, but corresponds with a law of a second country, such municipal law cannot be said to trench on the interests of that other country. I would say that where, as here, there is in substance reciprocity, it would be contrary to principle and inconsistent with comity if the courts of this country were to refuse to recognise a jurisdiction which mutatis mutandis they claim for themselves."*

[12] *Travers v Holley* was expanded on in a later decision of the House of Lords in *Indyka v Indyka*[2]. In *Indyka*, the husband had married his first wife in Czechoslovakia. Both were Czech nationals domiciled in Czechoslovakia. The husband, who had joined the Czech army in 1939 later joined Polish forces and at the end of the war he was demobilised in England where he acquired a

2. [1967] 2 All ER 689

domicile of choice. His wife remained in Czechoslovakia. Under Czech law nationality formed the relevant basis for divorce jurisdiction. In 1949 the marriage of the parties was dissolved at the instance of the wife by a court in Czechoslovakia. The Law Reform (Miscellaneous Provisions) Act of 1949 which came into operation in December 1949 permitted a wife in England to obtain a divorce after three years residence in that country. In 1959 the husband remarried in England and in proceedings by his second wife for divorce he contended that his remarriage was void as the English court would not recognise the decree of the Czech court issued in January 1949. The court held that because the first wife had been residing for more than three years in Czechoslovakia before the divorce in that country, the fact that the decree preceded the Law Reform Act of 1949 did not prevent recognition of the divorce after that act on the principle that the English courts should recognise the jurisdiction which they themselves then claimed by virtue of the Law Reform Act. In this connection *Travers v Holley* was approved because there had been a substantial connection between the first wife and Czechoslovakia, where she had lived all her life, had married and had had her matrimonial home. Explaining the need to assist the wife and to depart from the strict rule that domicile was the only basis for jurisdiction for a divorce, **Lord Wilberforce** said the following during the course of his speech:-

> *"How far should this relaxation go? In my opinion, it would be in accordance with the developments that I have mentioned and with the trend of legislation -- mainly our own but also that of other countries with similar social systems -- to recognise divorces given to wives by the courts of their residence wherever a real and substantial connexion is shown between the petitioner and the country, or territory, exercising jurisdiction."*

Significantly for the facts in the case before me **Lord Wilberforce** went on to say:-

> "Equally they would enable the courts (as they habitually do without difficulty) to reject residence of passage or residence, to use the descriptive expression of the older cases, resorted to by persons who properly should seek relief here for the purpose of obtaining relief which our courts would not give. I draw support in this form from the opinion of le Mesureir v Le Mesurier *(183) where it was said (184):*
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> > *'Bona fide residence is an intelligible expression, if, as their lordships conceive, it means residence which has not been resorted to for the mere purpose of getting a divorce which was not obtainable in the country of domicil.' "*

[13] Both these decisions have been accepted as good law in Australia.

[14] Mr Meyer was of the view, based on the fact that neither party had ever set foot in the Dominican Republic, that the principles of reciprocity and the *"real and substantial connection"* could not apply and that therefore the divorce between the defendant and M[…] P[…] would not be recognised in Australia.

[15] Counsel for plaintiff did not challenge Mr Meyer's evidence. Instead he put it to him that because it was at the time impossible for the defendant and M[…] P[…] to obtain a divorce in Ireland, an Australian appeal court might on the grounds of hardship recognise the Dominican Republic divorce. For this proposition he relied on the final sentences of the judgment in *"In the marriage of DORNOM, G.B. and DORNOM, K.J."* a decision of the Family Court of Western Australia3, namely that

> *"The mobility of larger numbers of people increases each year. The mores of the community are continually changing. The statutory law has been substantially reformed. The common law must change or extend in conformity with all these factors."*

3. (1984) Fam LC 91 - 556

What counsel overlooked was that these remarks were made by the judge in support of his view that the husband in the proceedings had a *"real and substantial connection"* with the state of California where he had obtained a divorce. The portion quoted is no authority for the proposition that the law as presently understood in Australia likely to accommodate the view put forward by counsel for the plaintiff that the divorce in the Dominican Republic will be recognised in Australia because of the hardship which faced the parties at the time, namely that they could not legally be divorced in Ireland. In *Dornom* the parties, who were Australian citizens domiciled and ordinarily resident in Australia, were married in Australia and lived there for some three years before the husband went to live in California in late 1974. In June 1975 the husband filed for divorce in California on the grounds of *"irreconcilable differences which have caused the irremediable breakdown of the marriage".* The basis for jurisdiction in matters of dissolution of marriage under the American Civil Code is residence of one of the parties in the state for six months and in the county in which the proceedings are filed for three months next preceding the filing of the petition. In May 1993 the wife filed an application in the Family Court of Western Australia for the dissolution of her marriage, contending that the divorce granted in California ought not to be recognised in Australia.

[16] On the evidence, the judge in Australia found that the husband had met the American statutory residential provisions. Although he was unable to find that the husband had acquired a domicile of choice in California, he was satisfied that there had been a 'real and substantial connection' between the husband

and the state of California as a result of some seven to eight months continuous residence there preceding the filing of the petition. On the authority of *Indyka* and *Travers v Holley*, he was satisfied that *"the sacred power of domicile is no longer the yardstick, and that recognition should no longer be afforded under the Indyka principle to decrees obtained only by wives".* The Californian decree was accordingly recognised as valid.

[17] During the course of his argument counsel for the plaintiff relied heavily on the decision of the Family Court of Australia in the marriage of *E E Barriga and B F Barriga (No 2)*4. In that marriage the parties had been married to each other in Argentina. Unable to obtain a divorce in that country, the husband obtained a divorce in Mexico and five days later married the applicant in Mexico, although the domicile of both parties at the time was Argentina. After moving to Australia the parties went through a form of marriage in New South Wales. When the applicant's wife filed for dissolution of the marriage and for a decree of nullity, the court firstly determined the application for nullity. It held

1. When determining the validity, the court must have regard firstly to the form of marriage and secondly to each party's capacity to marry.
2. The form which the marriage took was in accordance with both the law of Mexico and of Argentina, but the capacity of the parties to marry depended on the domicile of the parties at the time that the marriage was contracted.
3. The Mexican divorce was incapable of recognition in Argentina pursuant to the rules of private international law and the marriage in Mexico was

therefor void.

4. The validity of the Australian marriage was dependent on the husband's capacity to marry and consequently the recognition by Australia of the Mexican divorce.

5. The applicant and respondent in the Mexican divorce proceedings were neither resident, nationals nor domiciled in Mexico and the divorce was therefor not capable of recognition in Australia.

The portion of the judgment relied upon by counsel was the following:-

> "The case of Travers v Holley *[1953] P 246 is authority for the proposition that an English court will recognize a foreign decree of dissolution of marriage where the foreign court assumes jurisdiction in a factual setting which, had the same facts arisen within the forum, would have entitled the forum to exercise jurisdiction to dissolve the marriage. The principle of reciprocity espoused in the latter mentioned case would suggest, for example, that if a Mexican court dissolves the marriage of a Mexican citizen there is in effect reciprocity with Australia because an Australian court has jurisdiction to dissolve the marriage of an Australian citizen. Reciprocity in that context means equivalent facts, not a parallel in the law relating to jurisdiction."*

[18] The portion quoted was not the basis for the judgment. Furthermore, and with respect to the learned judge, his understanding that a foreign court will assume jurisdiction in a factual setting, which, had the same facts arisen within the forum, would have entitled the forum to exercise jurisdiction to resolve the marriage, does not appear from *Travers v Holley*. In any event, the issue seems to have been put beyond doubt in the *Indyka* judgment where it was made clear that the courts would reject residence of passage. Furthermore, in his judgment in the *Dornom* matter the learned judge stated clearly that

"Recognition cannot be extended to a decree of the court of a foreign

4. (1981) 7 Fam LR 909

country to which the applicant resorted merely to obtain a dissolution of the marriage. If recognition is to be extended outside the exemptions of sec. 104(3)(a) to (f) within sec. 104(5) under the Indyka *principle, the residence must be 'bona fide residence'.*

[19] In the circumstances I am satisfied that the defendant has discharged the onus of establishing that the divorce obtained by him and M[...] P[...] in the Dominican Republic will not be recognised in Australia. In the result the marriage of the plaintiff and the defendant in Australia is not valid.

**THE LOAN AGREEMENT**

[20] The case as pleaded by the plaintiff is that she lent and advanced various sums of money totalling €1 337 386 to the defendant; that it was a term of the loans that defendant would repay the amounts loaned on demand, alternatively, in the event of their relationship breaking down irretrievably and that since their relationship had in fact broken down, she was entitled to repayment of the said amount.

[21] It is common cause that on the 11 March 2002 the parties entered into a written agreement in terms of which the defendant agreed that €1 337 386 out of the proceeds of the sale of an immovable property owned by him would accrue to plaintiff and that payment of that amount was made on behalf of the defendant to plaintiff. The background to the conclusion of the agreement is set out in succeeding paragraphs.

[22] The defendant was a very successful businessman in Ireland, having made his

name in the meat packing industry. In 1988 and acting on the advice of professional advisers he exercised a so-called *"put and call"* option in terms of which he *"put"* his shares to the other shareholder in the company which operated and controlled his businesses. He did so because he believed that the other shareholder, one Taher, would not accept the offer made by him. To his surprise, the offer was accepted and he was bought out for an amount of £2,75 million. The defendant says that he later discovered that the purchase of his shares had been engineered and financed by his major competitor in the meat market industry in Ireland, one Goodman who subsequently assumed control of the company which he had founded and from which he had been bought out. In 1989 he instituted action in the High Court of Ireland against Goodman and Taher claiming some IR£13 million as damages resulting from what he contended to be Goodman's illegal takeover of his company. It seems that the litigation which lasted until 2001 became something of a cause *celebré* in Ireland and enjoyed much attention in the press.

[23] In 1993 the defendant purchased a property known as Lyrath Demesne ("Lyrath") measuring some 170 acres of farmland in Kilkenny, Ireland for IR£590 000. The historic house on the property measured approximately 10 000 square feet and required major repairs and refurbishment to restore it to what both the plaintiff and defendant termed its former glory. The defendant employed a professional team for this purpose. The refurbishment was completed in 1995 at a cost of some IR£557 500. Upon their return from Australia after their marriage in that country, plaintiff and defendant took up residence at Lyrath.

[24] The litigation between the plaintiff and Goodman was protracted and extremely expensive. In order to finance the litigation and to maintain his standard of living, the defendant was obliged to increase the mortgage bond over Lyrath which he had obtained from the Irish National Bank in the late 1990's. By 2001 his fortunes were declining and according to him *"things were getting tight".* He was accordingly obliged to sell Lyrath. This occurred in January 2002 when the property was sold for €5 523 360, with the sale becoming final in March of that year.

[25] Something else which had adversely affected the defendant's fortunes was the collapse of a restaurant business which he had set up in the United States of America and in which he had invested a large sum of money. The business collapsed after the September 11, 2001 attack on the World Trade Towers in New York.

[26] According to the plaintiff the defendant came to her in late 2001 and advised her that he was *"out of the door with litigation costs and that really we need to sell our family home, the biggest asset we had, the equity was in the house and he couldn't believe how much it had escalated since the time he had bought the house".*

[27] It is not disputed that towards the end of 2001 the defendant was involved in extensive litigation and that in the result his assets were at risk. The defendant says that when he came to the realisation that he would have to sell Lyrath he

decided to put portion of the proceeds of the sale into the plaintiff's name so as to shield that portion from possible attack by his creditors. In order to make his transaction *"bullet proof"* and to ensure that it would stand up in the face of his creditors he devised a scheme to protect these assets from attachment. Acting on the advice of his accountant and his sister, who appears also to have assisted him on the financial side in regard to his USA venture, a scheme was set up with the plaintiff, who according to the defendant, was a willing and active participant. Elaborate steps were taken to set up an agreement which would give the appearance of being genuine and above board. In order that the agreement would appear to have been concluded by parties who were at arms length to one another, the defendant arranged for the plaintiff to consult a solicitor and furnished her with information to support a claim by her to a portion of the proceeds of the sale. He says that the information furnished to the solicitor was discussed with and agreed to by the plaintiff. The plaintiff's solicitor then prepared a preliminary statement by the plaintiff based on the information which she had given him. This was to be forwarded to counsel for opinion as to what amount plaintiff might reasonable be beneficially entitled to were a court to be approached. A copy of the statement was sent to plaintiff who in turn discussed it with the defendant and certain alterations were made to it by both plaintiff and the defendant. The purpose of the statement was to record the contribution made by plaintiff to Lyrath, both financially and otherwise. This was followed by a letter from plaintiff's attorneys to the defendant. After recording that on the basis of evidence given to the solicitor that the plaintiff's marriage to the defendant was not a valid legal marriage, the purpose of the letter was stated, namely

*"The purpose of this letter is to put you on notice of our client's beneficial interest in the premises and to state that in our view, having taken Senior Counsel's opinion on the matter such beneficial interest amounts to 50% of the net proceeds of the entire premises, which we understand comprises a large house, gardens and a farm of 170 acres.*

*Assuming our interpretation of your marital status and that of our client is correct i.e. that you are not legally married in accordance with the laws of this jurisdiction, we consider you and our client to be an engaged couple since Christmas 1995 or thereabouts.*

*Our client's claim to a beneficial interest in the premises is based on the following grounds:*

*A. The fact that she is engaged to you and further the representations made by you to her in relation to her interest in the premises and her reliance thereon;*
*B. A contribution by our client of approximately £150,000 to the resources put into the premises and family, financed from : i) the sale of her own premises in Goatstown, ii) the sale of her interest in a commercial premises in Kilkenny and iii) the proceeds of a High Court personal injury award.*
*C. Unclaimed expenses of our client in respect of work carried out on your behalf in overseeing the refurbishment of Lyrath Demesne prior to taking up occupation therein.*

*As we are sure you are aware our client expended a considerable amount of time and effort in overseeing the refurbishment of the house which comprises approximately 10,000 square feet.*

*While we are advised that the relationship between you and our client remains excellent at this point in time our client is concerned to establish her separate interest in order to protect herself and the three children from any financial jeopardy which might arise out of the operation of your business.*

*In the event that an agreement cannot be reached in relation to the actual amount of our client's beneficial interest we propose that an acceptable sum of money be placed in a deposit in the joint names of you and our client pending a final resolution of the matter.*

*We await hearing from you."*

[28] The defendant responded to this letter in writing in the following manner:-

*"I accept and agree the basis of how you have approached K[…]'s beneficial interest in our home. However I do not accept that her*

*contribution entitles her to 50% of the net proceeds of the entire estate.*

*What I have proposed to K[…], who wants to seek your advice on the matter, is that she would receive 50% of the net proceeds of the sale of our residence, after the full repayment of the mortgage with National Irish Bank.*
*Subject to agreement in principal I will have my solicitors do the necessary calculations."*

[29] A draft agreement was then prepared by plaintiff's solicitor and forwarded to her for consideration. The amounts which were to be inserted in the agreement recording the price for which the property had been sold and the division of the net proceeds were left blank. It is common cause that the defendant made all the calculations necessary to arrive at the figures which were to be inserted and the figures were then filled in by the defendant whereupon the plaintiff then sent a letter to her solicitor by way of facsimile transmission recording that she and the defendant had filled in the figures and that the defendant's solicitor would be faxing a letter to him that afternoon *"to confirm the same".*

[30] The agreement which was then signed by the plaintiff and the defendant on 11 March 2002 contained the following provisions:-

*"WHEREAS:*

1. *The Husband and Wife became engaged in or about December 1995 and intermarried in Australia on the 29th day of June 1996 pursuant to the Marriage Act 1961.*

2. *The Husband acquired the premises know as Lyrath Demesne Co. Kilkenny comprising a large period residence with gardens (herein called 'the Premises') together with a farm of circa 170 acres (herein called 'the Farm'). The Premises and the Farm were financed by the Husband primarily from his own resources and also by a Mortgage from National Irish Bank.*

3. *Following acquisition of the Premises the Wife extended considerable*

*time effort and money in relation to the development, refurbishment and improvement thereof.*

4. *There are three children of the marriage namely B., O. and P. (twins).*

5. *The Husband admits that notwithstanding that the Premises were purchased in his name that the Wife has acquired a beneficial interest therein on the following grounds:*

   i) *the fact that the Husband and the Wife have been engaged to each other since December 1995 and were intermarried as referred to above and on the basis of representations made by the Husband to the Wife to the effect that she had an interest in the Premises and her reliance thereon.*
   ii) *A contribution by the Wife of approximately €190,000 to the resources put into the development, refurbishment, maintenance and care of the Premises.*
   iii) *Unclaimed expenses of the Wife in respect of work carried out on behalf of the Husband prior to their engagement in overseeing refurbishment of the Premises prior to taking up occupation therein.*

6. *The Husband has entered into an agreement with a third party for the sale of the Premises and the Farm at the price or sum of €5,523,360. It has been agreed between the Husband and the Wife and the Purchaser of the Premises and the Farm that a proper apportionment of the sale proceeds between the house and the farm is as follows:*

   - *€2,920,397 in respect of the Premises.*

   - *€2,602,963 in respect of the Farm.*

   *The Premises and the Farm are currently charged to National Irish Bank and a sum of €2,533,429 remains outstanding thereon of which €245,624 relates to the mortgage on the premises.*

7. *NOW IT IS AGREED AS FOLLOWS that for consideration already paid and given by the Wife to the Husband and in further consideration of the Premises the Husband agrees to pay to the Wife out of the proceeds of sale of the Premises the sum of €1,337,386 and the Wife agrees to accept same in full and final settlement on account of her beneficial interest therein.*

8. *Both the Husband and the Wife confirm that they have received independent legal advice in respect of this Agreement and are satisfied that it represents a fair division of the sale proceeds of the Premises in all the circumstances.*

Pursuant to the agreement the sum of €1 337 386 was paid over to the plaintiff.

[31] After holidaying in Cape Town in October 2001 the plaintiff and defendant decided to move to Cape Town. The defendant found a property to purchase in Fresnaye, Cape Town and it is common cause that in February 2002 an amount of €150 000 was transferred from an account in the name of the plaintiff in the First Active Bank in Ireland to defendant and was used to finance the purchase of the property. Thereafter €50 000 was transferred to defendant for the renovation of the Fresnaye property. It is also common cause that in March 2003 €1 million was transferred from plaintiff's account with First Active Bank to the defendant which amount was utilised for the purchase and / or development of a property known as Claridges Hotel in Green Point.

[32] The defendant testified that after being in court for forty days in his action against Goodman he achieved a major success when Goodman made a concession in court on 11 September 2001, the effect of which was that he had all but won the case. The concession did not bring about an immediate end to the litigation for Goodman's counterclaim remained, as did the defendant's claim against Taher. The litigation with Goodman was settled on 13 February 2002. In terms of the settlement, the defendant received payment of some €1 million, but this was entirely consumed by the costs of the action. The litigation with Taher was settled on 21 February 2002. In terms of that settlement the defendant received a nominal award of £1.

[33] The defendant was also involved in other litigation. In 1993 one Maher had instituted action for damages against him claiming that he was entitled to the

value of 15% of the issued share capital in the defendant's group of companies. The defendant did not believe that there was any merit in the litigation, and says that it had been instituted against him so as to divert his attention from the Goodman case and that the litigation was funded by Goodman. The action was dormant for years, but around Christmas 2001 the defendant received information from one of his brothers that Maher had heard about the sale of Lyrath and that he intended to place an injunction on the defendant's funds. That Maher's information was obtained from another of defendant's brothers appears from papers filed in the Maher action. In May 2002 Maher successfully launched an application for a Mareva injunction against the defendant's assets, contending that the defendant was intending to leave Ireland with a view to avoiding his liability to him. This resulted in all the defendant's funds being frozen and necessitated proceeds from the sale of Lyrath, which had been paid to plaintiff, being used for the day to day expenses of the family. The Mareva injunction was eventually lifted in terms of a judgment handed down in the High Court of Ireland on 12 July 2002.

[34] The plaintiff denies that the arrangement whereby she received €1 337 386 from the proceeds of Lyrath was a scheme designed to warehouse portion of defendant's assets from his creditors. She maintains that the agreement represented a genuine transaction concluded at arms length from the defendant and that she was in fact entitled to the amount which she received from the sale because of the contributions which she had made. It is accordingly necessary to review both her actual contributions as well as the contributions recorded in the statement prepared by her solicitor prior to her entering into the agreement

with the plaintiff.

[35] Although the onus of proving the loans as set forth in the pleadings rests on the plaintiff, it is first necessary to decide whether the defendant has established that the transaction which resulted in the funds being paid over to the plaintiff was in fact a simulated transaction. In this regard it must be remembered that the defendant is not suing for the recovery of amounts paid to the plaintiff in terms of the agreement. In that event, the plaintiff would have been saddled with the full onus of establishing that there was a real intention, definitely ascertainable, which differs from the simulated transaction. The agreement is more of the nature of a background to the loan transaction and as such I am of the view that what onus there is on the defendant is no more than what is termed a *"weerliggingslas"*. In order to consider this aspect it is necessary to have regard to the evidence of the plaintiff and the defendant who were the only persons to testify in this connection.

[36] Plaintiff met defendant at the end of 1993. Their relationship was on and off and they had a major break up in September 1995. In December 1995 the defendant proposed marriage to the plaintiff whereafter she moved into Lyrath. She testified that the contribution she made to the property was as follows:-

> *"The house that he bought in Kilkenny, I made large contributions to the house from the point of view that I helped him furnish it. I did furnishings and fine touches, I bought things like pot plants, and the plant holders, I went on a shopping trip with him, we went to Harrods, we bought all the towels for the different – there was about seven bathrooms in the house, so we bought towels for all the bathrooms in different colour coordinations, we bought soap dishes, we bought toilet brushes, we bought tissue holder boxes, I mean I was the person who, with him some of the time and not all the time, most of the time I did it on my own, picked up the nice finishing*

*touches for the home."*

She also testified that she made financial contributions to the maintenance of Lyrath. This comprised £85 525, 34 from the proceeds of the sale of a property which she had owned in Goatstown, Ireland, £54 000 from the proceeds of the sale of Florentina Shoe Boutique which she had owned and £50 000 from compensation which she had received for injuries sustained in a motor accident. In her evidence in chief she testified that the amount of £85 525, 34 which she had received from the sale of her Goatstown property, was an amount which *"in turn I ploughed into Lyrath Demesne in soft furnishings".* When questioned about this, she testified *"some of the money I invested in our home the rest of the money and I opened a shoe and bag boutique called Florentino".* The figures given by plaintiff in her evidence do not tally with the figures which she gave to her solicitor for the purpose of drawing up the agreement with the defendant. In her statement she recorded that she had contributed £150 000, comprising £60 000 from the sale of her Goatstown property, £40 000 from the sale of the shoe boutique and £50 000 from her compensation award.

[37] The defendant denied that the plaintiff made any major financial contribution towards the upkeep of Lyrath. He admitted that she had added a feminine touch to the choice of furnishings and decorations in the house, but pointed out that when the plaintiff moved in late in December 1995 the renovations and refurbishing had already been completed at his expense. Any financial contribution which she might have made in respect of decoration or the acquisition of ornaments was insignificant. Apart from defendant's denial of plaintiff's allegations as to the relatively large amount of money which she

allegedly spent on the house, I found her evidence as to what she had spent the money on, and the amount she says to have spent, entirely unconvincing. The photographs of the house which she tendered in evidence showed the house as it was when she moved in. As to the amount which she says she received from the sale of the shoe boutique, namely £54 000, she says it was used to purchase items for the house *"be it plants, and pots and maybe buying new towels, or just generally, like maybe buying a new chair for a room or a desk for the children's room, I mean I can't – as P[…] likes to say, I like to spend money, I live to shop, so I never had a problem buying things for our home. I constantly bought for our home. It was the only home I had. I bought for it constantly."* Apart from the vagueness of plaintiff's evidence in regard to the amounts allegedly spent out of the proceeds of the sale of the shoe boutique (it would seem that in fact it was the lease which was sold), such documentary proof as was available hardly supports her version. Copies of what are presumably the final accounts for the business which were produced by the defendant reflected that the business had no stock on hand and had net liabilities over assets of IR£55 374. Furthermore, she conceded that some of the proceeds may have been used for general living expenses. When questioned about the amount of £60 000 which she says she received as a compensation award, she conceded that the amount received by her was £50 000 and not £60 000. When questioned as to how much was spent on the house she testified *"I really can't remember the exact amount".* Later she stated *"he asked me for money and I gave him £10 000 and I would say that the balance of that money more or less found its way into the house".*

It is also not clear how or why a financial value should be placed on the advice and opinions which may have been given by the plaintiff in respect of the colour scheme, furnishings and her *"feminine touch"*. All the plaintiff's evidence about the amount she spent on Lyrath was very vague and significantly, in my view, no documentary evidence in the form of bank statements or paid cheques or anything else was produced in order to substantiate any of the alleged payments.

[38] Plaintiff was cross-examined at length about the contents of the statement prepared by her solicitor. Clearly her alleged contribution of £150 000 was an important part of her case for an entitlement to a share of the proceeds of the property. The cornerstone of her claim is recorded in the following fashion in the statement:-

> *"Relationship : K[…] / P[…] / Property Refurbishment:*
>
> *Following her separation from P[…] S[…] K[…] lived in her house in Birchfield Avenue, Goatstown. She worked as a self employed display / interior designer. She met P[…] and began to work for him on a professional basis in relation to the refurbishment of his premises at Lyrath Demesne which he had purchased in 1993 for circa IR£600,000 (€761,842.85). This was part financed by a mortgage from AIB in the sum of £224,000.*
>
> *The property comprised a house of circa 15,000 square feet, gardens and 170 acres of farmland. The house was in dire need of repair. Work started in September 1993 (or thereabouts). K[…] was paid fees for her work as an interior designer advising generally and sourcing materials / furniture etc. She was retained professionally for about 6 months after which their personal relationship had developed to the extent that they lived together in Dublin (date to be confirmed if required). K[…] says she spent a huge amount of time and effort working on the property buying furniture dealing with workmen, sourcing materials and generally managing much of the refurbishment works. At weekends she and P[…] would go down to the property. She says the house was completed in or about Christmas 1994 but they only moved into the house full time before Christmas 1995 when she moved there permanently with her child (B[…]).*
>
> *They got engaged at this time and married in 1996.*
>
> *Children:*

*The first child born to P[…] and K[…] was called B. who was born on the 1[….]. They then had twins (O. and P.) on the 2[…]. Up until September 1997 K[…] effectively worked full time looking after the children and directing the continuing works to the premises which were ongoing. There is one workman employed full time at the premises and she would effectively direct his work on a daily basis. In addition she would purchase furniture and organize repairs maintenance and general upkeep of the property and the grounds. The farm of circa 170 acres is leased out to a farmer and Karen has no involvement in same.*

*In September 1997 she opened a shoe shop in Kilkenny named Florentina Shoes. She closed this down in March / April 2001. She had little income in the first year or so but thereafter she took a small weekly allowance (circa £150).*

*<u>Financial Contributions:</u>*

*When K[…] sold her house in Goatstown before moving to Kilkenny she realized a net sum of circa £70,000. She says the majority of this sum (perhaps up to £60,000) was spent by her on the premises. In March / April 2001 she sold her interest in the shoe shop for £60,000 and after tax she believes that she had circa £40,000 available the majority of which was spent on the property. In addition she was injured in a road traffic accident and as a result she was awarded compensation in the sum of £50,000 in the year 2000. Again the majority of this was spent on the property. In this regard she says that certain of the monies would have been spent on furniture / contents as well as the fabric of the building.*

[39] As I have already remarked, plaintiff's solicitor sent a copy of this statement to her for approval before the agreement was finalised. Apart from the inadequacy of plaintiff's evidence in regard to her alleged financial contributions to the property, a number of facts recorded in the statement to support her claim for an entitlement to portion of the proceeds are not correct. She did not work for the defendant on a professional basis in regard to the refurbishment at Lyrath; she was not paid fees for her work as an interior designer and she was not retained professionally for about six months. She was hard pressed to explain why incorrect information appeared in the statement and could do no

more than tentatively suggest that it was merely a preliminary statement and that she must have amended it later. She also testified that she would have given her solicitor documentary proof of the amounts expended by her on the property. Her response is dealt with more fully in paragraph [63] *infra*.

[40] The defendant's fears that his creditors might seek to lay claim to his financial resources were of course realised when the Mareva injunction was taken out against him. Plaintiff's counsel made much of the fact that since the Goodman case had been settled in February 2002 there was no longer any threat against the defendant's assets when the agreement was concluded with plaintiff on 11 March 2002. Therefore, he argued, the inference was to be drawn that the agreement was what it purported to be. The fact is, however, that the preliminary work for the agreement had already been done before the Goodman case was finally settled on 13 February 2002.

**THE ALLEGED LOAN AGREEMENTS**

[41] In the pleadings as initially drafted the plaintiff alleged that the full amount of €1 337 386 which she had obtained from the sale of Lyrath had been readvanced to the defendant by way of separate loans. These allegations were repeated in affidavits filed by her in two Rule 43 applications, the dates on which the affidavits were sworn to being 1 February 2005 and 14 March 2006. In the defendant's plea he admitted that the full amount of €1 337 386 which was paid to the plaintiff out of the proceeds of the sale of Lyrath was repaid to him. In the plaintiff's reply to the defendant's request for further particulars, she stated that she had no recollection of the precise dates when the parties had

entered into the loan agreements pursuant to which she had paid over the various amounts to the defendant, but averred that these were concluded before 10 February 2003. At the pre-trial conference the plaintiff was requested to identify precisely how she had made payment to the defendant in the sum claimed by her and in response she answered as follows:-

1. "*On 10 February she transferred the amount of €1 000 000 from her First Active bank account to the parties' joint investment bank account and which was withdrawn by the Defendant on 17 March 2003;"*
2. *"On 9 March* (sic May) *2002 the Plaintiff transferred an amount of €150 000 from the First Active bank account, which amount was utilised by the Defendant towards payment of the purchase price of the parties' family home in Fresnaye;"*
3. *"On 1 November 2002 the Plaintiff transferred a further amount of €50 000 from her First Active bank account which was used by the Defendant to pay for the renovations costs in respect of the Fresnaye family home;"*

She also stated that she intended to amend her particulars in due course to reflect the total amount claimed by her to be €1 201 994.

[42] By the time the trial commenced, no application for amendment had been filed by the plaintiff. In her evidence at the hearing she testified that she readvanced the money received by her from the proceeds of the sale of Lyrath pursuant to three oral loan agreements concluded between March 2002 and February 2003. She testified that

1. An amount of €150 000 was advanced to the defendant as her investment in the family home in South Africa.

2. A further amount of €50 000 was paid by her to the defendant in respect of renovations of the Fresnaye property.

3. In February 2003 she advanced a sum of €1 000 000 to the defendant which was utilised in the property investment of the Claridges Hotel which he was developing in Green Point.

[43] During cross-examination the plaintiff was asked why her evidence as to amount which she had readvanced to the defendant (i.e. €1 200 000) differed from the amount claimed in her particulars of claim. She testified that she was not seeking repayment of the full amount that she had received from the property because she had spent money on *"different things"* and was not looking for that money back.

> *"What I would like to say there is that when we looked at the whole thing – when I got my money a lot of the money that I spent was because of the (?) and living expenses with P[…]. So basically I felt that at the time that I had actually given most of my money back ….*
> *To fund our lifestyle. We had a* (Mareva) *against us – well against my husband, and as it happened I had got my money before the* (Mareva) *was put into situ. My husband's funds were frozen and we didn't have much of a choice but to live off the money I luckily had, otherwise we would have had not funds and no way of feeding even our children. So initially when I looked at the situation I felt well, I was entitled to probably get all my money back from my husband but then when I looked at it I thought that things that were very provable and that were possible to get my money and made my loan obviously that I had given to him credible, because I didn't want to look wrong in what I was trying to do because in the years gone by as the husband and wife he had supported me, I had supported him and I wasn't trying to nit pick. So I thought at a later date it was fairer to look at the sums that were the biggest sums that I had paid towards things that I had genuinely – the loan that I had given him and also towards my family home that I had been evicted from*
> …I thought I will claim all the money that I had used in due course with my husband, that I had lent to him, used in the transition time that we were coming here. In retrospect I looked at it and thought in fairness he had often – he had often paid things for me and I looked at the situation, I did my housekeeping and thought that the bigger amounts of money were the important things and to try and trace where I spent 5 000 or I gave him 10 000 and to remember all those details is pretty hard so I decided to be fair and to just look for the bigger amounts that I lent to him."

[44] Although the plaintiff in giving her evidence restricted her claim in respect of the alleged loans to €1,2 million, it is in my view also necessary to examine the circumstances in which additional amounts were repaid to the defendant. The plaintiff testified that the following amounts were also repaid by her to the defendant at the request of the latter.

1. €50 000 which she discovered in a bank account in Ireland and which it is not disputed belonged to the defendant. She deposited this amount into her personal Nedbank account in South Africa at the request of the defendant. The funds were used to pay the family expenses and R230 000 was paid into the defendant's Rand Merchant Bank account to enable him to purchase a farm property in South Africa.
2. €50 000 which was withdrawn from the plaintiff's building society account in Ireland on 5 June 2002 and which payment was necessitated by the defendant's funds having been frozen upon the grant of the Mareva injunction on 29 May 2002. The funds were used to pay for the family's living expenses as well as for payment of certain of the defendant's debts.
3. €46 000 which according to the defendant was used inter alia for moving costs to South Africa, the purchase of aeroplane tickets and cash for use by the family on arrival in South African.
4. A further amount of €50 000 which was deposited into the parties' joint Investec account in South Africa at the end of July 2002 which was also used to fund the family's living expenses.
5. €15 000 which was transferred to South Africa in April 2004 and utilised to

pay for the purchase of a four wheel drive motor vehicle used by the plaintiff.

The significance of this evidence is that amounts which totalled some €161 000 were utilised to pay for the family's living expenses and the move to South Africa and certain of the defendant's personal expenses. On plaintiff's own evidence these payments could never have been loans from the plaintiff to the defendant.

**THE ALLEGED LOANS TOTALLING R1,2 MILLION**

[45] These comprise the sum of €150 000 repaid by the plaintiff to defendant on 9 May 2002, €50 000 repaid in November 2002 and €1 million repaid in February 2003. The two payments made in 2002 related to the property purchased by the defendant in Fresnaye.

[46] The plaintiff testified that she regarded the property in Fresnaye as half hers and that the €150 000 which she had repaid to the defendant was her money and she wanted to make it work by investing it in the property. The difficulty about this evidence is that it was not what had been pleaded by the plaintiff. When the evidence was led, defendant's counsel pointed out that the evidence did not accord with the pleadings and the following interchange between counsel and me then followed:-

> "*MR McCLARTY: His Lordship, may I just interrupt my learned friend? I must say I'm somewhat surprised to hear what appears to be a case which hasn't been pleaded.*
> *COURT: Yes.*
> *MR McCLARTY: The case pleaded is that about 1.3 million euros was re-advanced to the Defendant. The case as pleaded is not that the Plaintiff invested …(intervention)*

*<u>COURT</u>: Got a half interest.*
*<u>MR McCLARTY</u>: Invested these moneys in property and unless my learned friend is going to suggest – because I don't want him to lead evidence and then say at a later stage 'Oh, but I've got a claim for half the property in Cape Town', because that's not the case that we've come here to meet here, M'Lord. So I must say I'm somewhat at a loss to understand this evidence because it's certainly not what's pleaded.*
*<u>MR WEINKOVE</u>: M'Lord, I'm just leading evidence what's in her mind, I'm not claiming half the house in Fresnaye, I can't claim that, that would have to be a written document signed by the parties. I don't have a claim of that nature. I'm just proving that 1.2 million euros was paid by my client to the Defendant, that's the amount of the loan that I'm claiming back, partly, I can't treat it more than a loan and I don't claim that 'I own part of the house'.*
*<u>COURT</u>: Alright, you've got 150 000 and 50.*
*<u>MR WEINKOVE</u>: It's the 150 000 euros plus the 50 plus later on Your Lordship will hear about the million.*
*<u>COURT</u>: Alright.*
*<u>MR WEINKOVE</u>: It brings it up to 1.2 million euros. But just, the house was never put into your name, you're not claiming that you own half the house today? --- No."*

[47] In the light of plaintiff's evidence and the response of her counsel to defendant's counsel's concern about plaintiff's evidence not according with her pleading, it is not surprising that defendant's counsel objected to an amendment to plaintiff's particulars of claim which was moved by plaintiff's counsel after the close of both the plaintiff's and the defendant's cases and at the time of argument. In terms of the amendment plaintiff seeks to delete the particulars relating to the alleged loans totalling €1 337 386 and to replace these with two separate claims. The first claim is for payment of €1 million, being the sum which the plaintiff alleges she on 7 February 2003 undertook to lend to the defendant and did in fact pay over to the defendant on 10 February 2003. The amendment records further that it was an express alternatively an implied / tacit term of the loan agreement that the defendant would repay the €1 million on demand, alternatively on the event of their relationship breaking down irretrievably and

that since the relationship had broken down irretrievably plaintiff demands immediate payment of the sum of €1 million. The second claim relates to the monies advanced in respect of the Fresnaye property and is set out in the following terms:-

> *11.1 On or about 9 March 2002 and at the parties' family home in Ireland Defendant orally requested Plaintiff to contribute the amount of €150 000 towards the acquisition of a new family home at Avenue Protea, Fresnaye in Cape Town ('the Fresnaye property').*
>
> *11.2 On the aforementioned occasion Defendant orally undertook to cause the Fresnaye property to be registered in the parties' joint names.*
>
> *11.3 Pursuant to the aforesaid undertaking Plaintiff in the bona fide and reasonable belief that Defendant would cause the Fresnaye property to be registered in the parties' joint names, as promised, transferred an amount of €150 000 from her First Active bank account to Defendant, at his special instance and request, to be used by him towards the payment of the purchase price of the Fresnaye property.*
>
> *11.4 On or about 1 November 2002 and at the Fresnaye property Defendant orally requested Plaintiff to contribute an amount of €50 000 towards the renovation costs of the Fresnaye property. In the bona fide and reasonable but mistaken belief that the Fresnaye property had in fact been registered in the parties' joint names, Plaintiff transferred a further sum of €50 000 from her said First Active bank account to Defendant at his special instance and request to be used by him towards the payment of the aforementioned renovation costs.*
>
> *11.5 In fact, the Fresnaye property was never registered in the parties' joint names.*
>
> *11.6 Plaintiff has accordingly effected the aforementioned payments to Defendant in error and hereby repeats her demand for payment of same."*

[48] The effect of the amendment is to reduce the plaintiff's claim to €1,2 million. There was no objection to the amendment relating to the alleged loan of €1 million, but as I have already remarked, the portion of the amendment

relating to the Fresnaye property was opposed. Counsel for the plaintiff submitted that on the authority of *Van der Spuy and Another v Malpage*5 the amendment should be granted. In *Van der Spuy*'s case an application to amend the pleadings was made to the court of appeal but the principle to be applied is equally apposite to an application made after the close of pleadings. The principle relied upon by plaintiff's counsel, which is referred to very briefly in the judgment and is well known and trite, is to the effect that a court of appeal will only allow an amendment of pleadings only in order to give effect to existing facts which have been fully canvassed before the lower court. In the present case, there is no question of the facts having been fully canvassed before me. The amendment seeks to introduce a new cause of action, namely an undertaking by the defendant that the Fresnaye property would be registered jointly in the names of the plaintiff and the defendant. To start with, this cause of action was specifically disavowed by both plaintiff and her counsel. No evidence was led to support allegations that the defendant orally undertook to cause the property to be registered in the parties' joint names. As to the allegation that the property was to be registered in the names of the parties, it is clear from the evidence given by both plaintiff and the defendant and from documentary evidence before me that a local attorney who had assisted the parties with their move to South Africa had informed them that it would be preferable for the property to be owned by a company or a trust rather than the property being held in the name of an individual. Acting on this advice the property was registered in the name of a company. The proposed amendment clearly introduces an entirely new cause of action and since the facts necessary

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to sustain that new cause of action have not been canvassed at all due inter alia to both plaintiff and her counsel disavowing any intention to rely on the new cause of action, the amendment relating to the Fresnaye property cannot be allowed. The amendment relating to the loan of €1 million was not opposed and will be allowed. This means that the plaintiff's claim has been reduced to one for payment of €1 million. Clearly the evidence given by the plaintiff relating to the payments of €150 000 and €50 000 utilised in respect of the Fresnaye property does not support the allegations that these sums constituted loans.

**THE €1 MILLION LOAN**

[49] The plaintiff's evidence as to the terms of the loan is not entirely clear. She started off by saying that in early February 2003 at a time when they were getting on *"amazingly well"* defendant asked her how much money she had and she told him that she had about *"a million"* left. He then asked her to lend him the money as it would be in the best interests of the family and it would help him to buy the Claridges Hotel which he wished to purchase without the need to borrow funds for that purpose. Asked by her counsel whether any time was fixed for the repayment of this money, the plaintiff testified no, *"there was no fixture of when I would get the money back".* She testified that the defendant told her that he intended to establish a rental pool. She then went on to say:-

> *"Yes initially when the first time when he brought up the issue of me lending him the money I wasn't so keen because my idea was we had no family base in Ireland and I actually had been keenly looking on the Internet to maybe buy something that would have a base in Ireland with, so I wasn't so keen initially and then as he talked me through it and whatever, I thought okay and he said also he was willing to give me 4 one-bedroomed apartments in the complex, 2 at the front and 2 at the*

*back and… (intervention).”*

At that stage plaintiff’s counsel made it clear that the plaintiff was making no claim to four apartments and the plaintiff then went on:-

> *“So those four apartments would be given to me so that I could put them into the rental pool. I would generate an income from them and also it would be a nice thing for my children to have one each, say, in my will when I, you know, would die. So I thought that was a nice idea and I was quite happy after a lot of consideration to go along with it. I felt that the money wasn’t really doing much for me, as I said, in the Irish Bank and although I wanted to buy something in Ireland, Irish property had actually gotten very expensive and for a million Euro’s you won’t be able to buy too much, so I decided it best to help him out and let him make the investment and hopefully help – it would also be an advantage for the whole family.”*

[50] The circumstances leading up to the payment of the €1 million to the defendant were explored during the course of her cross-examination. On 31 December 2002 an altercation occurred between the parties at their home in Fresnaye. The plaintiff’s version is that the defendant was in a bad mood that day and criticised her for being ‘lazy’ and ‘fat’ and for spending money excessively. The defendant’s version is that he criticised her only for her excessive spending. When she emerged from taking a shower, she found that the defendant had bent and effectively destroyed an Investec credit card which she had been using. She became hysterical and reported the incident to her parents who were living with them at the time. It is also common cause that the parties then had words about €1 million which the plaintiff had in her First Active Account in Ireland at the time. As a result of the altercation the defendant did not go out with the family for dinner that evening, but took the children out with him. The plaintiff’s version is that the defendant telephoned her while he was away with the boys and threatened that she would never see the children again unless she

repaid the €1 million to him. Defendant denies this. His version is that he raised the question of the €1 million with the plaintiff at the time of the altercation and in the presence of plaintiff's parents, saying that he wanted her to repay the amount in question as he required the money for the Claridge's project. The plaintiff's father attempted to diffuse the situation saying *"What's a million euros?"*. This remark was highlighted by plaintiff's counsel during the course of argument as I will explain in due course.

[51] As I have mentioned, the defendant denies that he ever threatened not to return the children or that he coupled that threat with the demand for repayment of the €1 million. He admits that he telephoned the plaintiff while he was away from home with the boys. He says that during the conversation he told the plaintiff that he would return with the boys, but that she should get her father and mother out of the house. He found it difficult to get on with plaintiff's mother who was domineering and treated his house as if it were her's and that that was why he wanted them out. Plaintiff duly booked her parents into a hotel at the defendant's expense.

[52] Plaintiff testified that as a result of defendant's threats she spoke to her medical doctor who advised her to consult an attorney. She attempted to consult an attorney in the *"forecourt"*, but was unable to make contact with the attorney as his offices were closed over the Christmas period. Thereafter she made no further attempt to consult an attorney. Her version is that she loved her husband who apologised to her for the incident and that she then forgave him. Thereafter she says that their relationship improved to such an extent that she

likened it to a honeymoon period, so much so that on 7th February she was prepared to repay the €1 million to the defendant. The defendant does not deny that he attempted to make a go of the marriage, but he denies that it every reached the ecstatically happy state which the plaintiff described.

[53] Plaintiff's counsel submitted that I should disbelieve the defendant because of false statements made by him in

1. His replying affidavit in the Maher proceedings;
2. His *"means"* affidavit in proceedings with M[...] P[...] which, it would appear, are not yet finalised; and
3. Letters and affidavits after the disposal of Lyrath.

[54] In my view the false statements in the Maher proceedings are not of any great moment. The defendant stated on oath that he had purchased a holiday property in South Africa and would let the property when not required for use by his family. He also stated that he intended to remain resident in Ireland. Even though the defendant did in fact relocate to South Africa and obtained the right to carry on a business and to reside with his family in this country, it is clear that he and the plaintiff continued to regard Ireland as their country of domicile.

[55] As to the proceedings instituted by M[...] P[...], the defendant indicated that although he had entered into a settlement with his first wife M[…] P[…] the proceedings in question were instituted by her as a result of her allegations that he had failed to comply with the terms of the settlement. The defendant's

version is that M[…] P[…] had in fact agreed that certain payments could be discontinued. As to the contents of the means affidavit, the defendant's explanation is that he sought to minimise his assets and to maximise his liabilities and it is clear that in doing so certain of the information furnished by him in the proceedings in question was false.

[56] In regard to the sale of Lyrath, plaintiff's counsel understandably argued that since the defendant had made a number of statements in letters and affidavits in which he confirmed that the plaintiff had acquired a right to portion of the proceeds of the sale of the property, those statements should be believed. Furthermore he submitted that the plaintiff would in any event be entitled to some portion of the proceeds.

[57] Defendant's explanation is that information was furnished to the plaintiff's solicitor in order to make out a case for plaintiff to be able to share in the proceeds of the sale as set out in the agreement which the parties concluded. His attitude is that once the agreement had been entered into, he perpetuated the sham. In fact it suited him to do so in the M[...] P[...] matter. While one would normally have serious misgivings about the credibility of a witness who is shown to have made false statements under oath, this case is somewhat different, for clearly if the agreement was in fact a sham, it would have been necessary to make false statements.

[58] The plaintiff admitted that she assisted the defendant in signing a letter in which it was recorded that certain valuable paintings which had been given to her by

her family had been sold and that she was to receive the net proceeds of the sale amounting to €76 000. In cross-examination she admitted that the letter was false and that the paintings had belonged to the defendant and were hanging in the house of Lyrath when she moved in. To her knowledge the letter was to have been used and was in fact used in defendant's means affidavit in the M[…] P[…] proceedings. Her explanation as to why she signed the letter, like some of her other evidence, had a very hollow ring to it.

> *"… but I remember him calling me into his office as he often did to sign a document or witness a document and I read a very quick thing and it said something like, and I think we have discovered that these were from my family – which is not true – and he said he was doing it as a tax liability. So he's my husband, I signed it. It wasn't a correct document I admit it was wrong but at the time if it was to save him some tax so I told a white lie but I knew there was a paper trail to actually show that that wasn't, they weren't my family home photographs, sorry pictures."*
> …..
>
> *"I actually never got that money and he physically didn't owe it to me it was my husband's money and it was a total scam of some sort which I'm sure you can cross-examine him in time about it but I did sign it, it is my signature that document and yes I did read through it, I did understand that it was a white lie, but it was a lie but he had some issue with tax he said with me so I did do that."*

[59] Plaintiff sought to attribute some significance to a letter addressed to her by the defendant in March 2004. This was a letter in which the defendant recorded his views as to the reason for the breakup of the relationship with the plaintiff and in which he set out terms on which he was prepared to deal with the plaintiff in the future. The portion of the letter relied upon by plaintiff's attorneys is the following:-

> *"Be prepared for P[…] S[….] or your father/mother 'What is a million euros' to be slow to put their hands in their pockets."*

According to the plaintiff the reference to 'What is a million euros' was an admission by the defendant that he owed the plaintiff the sum of money referred to. In my view there is no merit in this submission, which was supported by plaintiff's counsel. The defendant was the author of the letter and explained that he used the term 'What is a million euros' as a nickname for the plaintiff's father who, though not well off, had used the expression when the defendant mentioned to him in December 2002 that the plaintiff was spending excessively and that he wanted the return of his €1 million.

[60] As to the agreement signed by the parties, it is clear that the defendant was the guiding hand to the instructions given to the solicitor whom he had suggested the plaintiff should consult in order to set up the agreement. The basis on which the agreement was approved by counsel is set out in the recordals made in the agreement and which I have quoted in paragraph [30]. I am not satisfied, on the evidence before me, that the plaintiff made any meaningful contribution to the value of Lyrath before her marriage to the defendant. The defendant's evidence was that the refurbishment and improvements to Lyrath were funded entirely by him and full details as to the amount making up the total of IR£557 500 were placed before the court. As to the division of the proceeds of the sale, the defendant's testimony, borne out by documentation, demonstrated that in fact the plaintiff received a larger share of the net proceeds of the property including the farm than did the defendant. The defendant allocated the outstanding mortgage bond almost exclusively to the farm and only a small amount was attributed to the house. He also paid all the expenses relating to the sale such as conveyancing costs, stamp duty and other payments. These amounts were deducted from his share of the property and

after the payment of Capital Gains Tax, he ended up receiving a lesser amount from the sale of the proceeds of the property than did the plaintiff. Having regard to the fact that the parties had been *"married"* for less than six years when the agreement was signed, the legal justification for the division of the proceeds seems highly questionable. Although the agreement was apparently approved by counsel, it is clear that this was on the strength of false information in regard to the involvement of the plaintiff and the amounts allegedly ploughed into Lyrath by her.

[61] In my view the probabilities strongly favour the defendant's version relating to the agreement entered into by the parties. The suggestion that the agreement was an arm's length transaction based on independent advice furnished to the plaintiff is not sustainable. The hand-written notes made on the preliminary statement prepared by plaintiff's solicitor, effected at a time when plaintiff and defendant went through the statement together, include the notations *"2M"* and *"50%"*. This is presumably an indication that each party was to receive 50% of the approximately €2 million which would be available. In the result the plaintiff did in fact receive an amount slightly in excess of €1 million. Then there is the correspondence between plaintiff and defendant and between defendant and plaintiff and plaintiff's solicitor preceding the signing of the agreement, and indeed also plaintiff's visit to her solicitor, which must attract suspicion. In a letter addressed by the defendant to the plaintiff and dated 15 November 2001, the following was recorded:-

> *"Dear K[…]*
> *In order that the signing of the contract for the sale of our home at Lyrath may proceed today I confirm that I am agreeable that the proceeds of the*

*sale of the house of £2.3m less our mortgage will be apportioned between us, on the basis of our legal advice, to be agreed before the closing date of February 28th 2002."*

(The defendant testified that this letter was actually written on 25 January 2002 and backdated to 15 November 2001 and his file copy of the letter bears an inscription to this effect.)

This was followed by the letter from plaintiff's solicitor to defendant on 6 March 2002 putting him on notice and the immediate response on the following day by the defendant which I have quoted on paragraphs [27] and [28].

[62] The question which springs to mind is why the defendant should write a letter in the form of that contained in the letter dated 15 November 2001. It is a peculiar letter for a husband to write to a wife. The correspondence which then ensued certainly creates the impression that negotiations had ensued between the parties in order to give some form of credibility to the agreement they subsequently signed. Having regard to the gross inflation if not falsification of amounts allegedly contributed by the plaintiff to the value of Lyrath and the involvement of both parties in arriving at the figures, the value to be placed on such 'negotiation' is questionable, to say the least.

[63] The plaintiff's evidence as to the information contained in the statement given to her solicitor is not satisfactory. I have already remarked on the unsatisfactory nature of her evidence as to which amounts she expended in effecting improvements to the property. In cross-examination she conceded that the amounts reflected in her statement were incorrect. Pressed as to why no documentary proof had been supplied to verify her claims in respect of these

amounts, she testified:-

> "I would probably have submitted my sale of my home, I would have submitted the sale of Florentina Shoe Boutique. I would have given him paperwork to substantiate these figures, and probably at the time I could have even given him bank statements … He would have wanted proof and documentation, which I must have provided with him at the time. So the figures were all a bit confusing in this preliminary draft because they are not the right figures and I think to get to the appropriate proportion of the 190 Euros, which is about 150 Pounds, I would have had to shown (sic) *him some resources. I don't think he would have just taken my advice willy nilly and drawn up a document without those details."*

The file of plaintiff's solicitor was obtained during the course of the trial and from this it is apparent that only limited corrections were effected to the preliminary statement of the plaintiff and that it was this document that was sent to senior counsel for his advice. It is also evident from the solicitor's file that no documents had been given to him with regard to the breakdown of the amounts, nor had he been supplied with any proof in support of plaintiff's claims as to the amounts she had allegedly expended on the property. The plaintiff's testimony that her solicitor could have misunderstood the information given to him is unconvincing and is not borne out by the solicitor's documentation. His notes indicate that she advised him that she had in fact been paid fees for refurbishing the house for some six months. This is patently not true. Plaintiff also denied that she had ever had sight of the letter written by defendant to her dated 15 November 2001 in which the defendant indicated that he was agreeable to the proceeds of the sale of the house being apportioned between the two of them on the basis of legal advice, yet a copy of this letter was found in her solicitor's file and could only have come from her.

Plaintiff was reluctant to concede that save for minor amendments which she and the defendant had made to the preliminary statement, that statement was the document relied upon to formulate the agreement, saying that it was merely a draft and that there could have been another statement which was used. The fact is however that no other statement was found in her solicitor's file and the incorrect information and incorrect figures appearing in it found their way into the final agreement.

[64] I must also deal with the impression which I formed of the parties in court. I did not find the plaintiff to be credible witness. She seldom answered questions put to her in cross-examination directly. Not only did she appear to attempt to anticipate the purpose of the questioning and then to tailor her answers accordingly, but she repeated, sometimes ad nauseum, evidence which she had previously given. All of this was, if I am not mistaken, done in an attempt to persuade me of her attributes as a caring wife and mother; and of course that she had made major financial contributions to the refurbishment, maintenance and upkeep of Lyrath. She was loquacious in the extreme and, having regard to the country in which she and the defendant had lived, one might be excused for thinking that she had been in close contact with a certain stone in Blarney.

[65] In cross-examination the plaintiff conceded that the purpose of the preliminary statement made to her solicitor was in order to secure an agreement which would have to be *"bullet proof"* to stand up in the face of her attack from the defendant's creditors. When she realised that this evidence supported the evidence of the defendant, she insisted that there had been no risk to the defendant's assets after 11 September 2001 as the defendant's action against Goodman had been settled on that day. The plaintiff's evidence, supported by documentation, was that the action was settled only in February 2002, but in

spite of documentary evidence to this effect, the plaintiff continued to insist that the case had been settled or effectively settled on 11 September. There is also a question mark over her evidence that she remembered telling her solicitor that she had never been paid fees by the defendant and that her solicitor had misinterpreted what she had told him. The plaintiff could also not explain why the document that was eventually sent to senior counsel for his opinion as to her right to share in the proceeds of the sale of Lyrath had not been amended prior to the dispatch thereof to counsel. Her cross-examination in this regard proceeded as follows:-

> *"The question is that the document contains statements which are not correct and if this was not a fabrication, why did you allow the incorrect statement to go through? That's the question. --- Okay.*
> MR McCLARTY*: What's your answer? --- I don't know. I can't remember exactly all those details. So I don't know what I was thinking at the time."*

When asked to explain why the statement recorded that she had been professionally retained by the defendant, her answer was that she was a professional and that that was why the statement reflected that she had been professionally retained. This explanation is not understandable.

Importantly, the plaintiff led no evidence to indicate that any portion of the amount received by her from the proceeds of Lyrath was used for her own purposes, which one might have expected had she been the only party entitled to the funds.

[66] As to the defendant's credibility, plaintiff's counsel urged that his evidence should be discredited because of the false statements which he had made in the Maher proceedings, in the proceedings with M[...] P[...] and in connection

with the disposal of Lyrath. These I dealt with in paragraphs [53], [54] and [55]. Other aspects on which he was criticised were his version as to why the investment of €1 million in the plaintiff's name was recorded in two accounts with the bank and the fact that he had continued with the sham after the Goodman and Taher actions had been settled. His difference as to the reason for two accounts being created in the plaintiff's bank is in my view of no great importance and even though plaintiff's counsel submitted that once the Goodman and Taher cases had been settled, his funds were no longer at risk and there was no need for him to maintain the sham, the fact is of course that what the defendant says he had feared came to pass when the Mareva injunction was taken out against him. As far as the defendant's evidence was concerned, I found him to be a credible witness. The documentation submitted by him supports his version that the plaintiff had readvanced to him the full amount of the proceeds which she had received. Importantly, the amounts were used for the general living expenses of the family, the purchase of a home and an investment in a hotel in Green Point. As and when he required the funds, they were paid over to him by the plaintiff.

[67] Notwithstanding a natural reluctance to recognise an agreement which has been set up on the basis of false statements and recordals, I conclude that the defendant has, at least on the balance of probabilities, established that the agreement concluded with the plaintiff in March 2002 was a sham and was concluded in order to protect his assets from attack by a third party. In my view the fact that the plaintiff actively involved herself with the defendant in compiling her statement and gave false information to her solicitor for the purpose of

setting up the agreement makes this clear and in fact confirms the defendant's evidence. I would have come to the same conclusion even if the onus resting on the defendant were a full onus.

[68] Having reached a conclusion as to the sham agreement, it is strictly speaking not necessary to deal with the plaintiff's claim for repayment of the loan, which has now been reduced to one for payment of €1 million. I will nevertheless deal with this issue, in case it should be necessary. The plaintiff bears the onus of proving the terms of the loan account. On the plaintiff's own evidence it is in my view clear that the money was repaid to the defendant with the intention that it was to be invested in the Claridge's Hotel developments. After testifying that the defendant had asked her to lend him her money to help buying the hotel as that would be in the best interests of the family, she was asked whether there was any time fixed for the repayment of the money. Her answer was:-

> *"No, there was no fixture of when I would get the money back, he did say, …"*

And:-

> *"He did, he said it was already a rundown hotel and that he was going to develop into a six star state of the art hotel and that it was gong to be a six star development and that the idea was that there would be a rental pool where people, overseas investors and stuff, would come, buy a hotel, put it back into the rental pool when they weren't using it and then the hotel would utilise these rooms as hotel room as well. So it was an investment opportunity."*

This was followed by the testimony which I quoted in paragraph [49] relating to the four apartments and the proposed rental pool agreement.

Interestingly, and contrary to the plaintiff's evidence, the rental pool agreement only got off the ground in September 2004 and not at the initial stage as testified by the plaintiff.

[69] I am satisfied that on the plaintiff's evidence, she did not intend to loan the €1 million to the defendant, but rather intended to invest it in the hotel development in return for which she would receive four apartments from which she was to receive the rental income. Added to this is the unsatisfactory nature of the plaintiff's evidence in regard to the altercation with the defendant concerning the €1 million which led to a credit card being bent and the contradiction between her evidence relating to the €1 million payment and that of the defendant which is more fully referred to. I accept the defendant's version as to this discussion. Having regard to the fact that on her version it was necessary to conclude the agreement relating to the division of the proceeds of the Lyrath sale at a time when the relationship between the parties was very good, it is difficult to understand why plaintiff did not take steps to record the terms of the alleged loan of €1 million to the defendant in writing. After all, there had been a serious disagreement between them when the €1 million was discussed and plaintiff's evidence was that as a result of defendant's threat not to return the boys to her unless she repaid the €1 million, she sought out an attorney so that she could obtain legal advice. Her evidence as to where and how she attempted to find an attorney and who this person was was extremely vague and her evidence that the relationship with the defendant improved so dramatically that by early February she was prepared to repay the €1 million to the defendant without recording the arrangements, is difficult to accept. In all the circumstance, I conclude that the plaintiff has failed to

establish her claim that she loaned the defendant €1 million.

[70] Defendant's counsel submitted that in the event of the defendant being successful, plaintiff ought to be ordered to pay the defendant's costs of bringing Mr Meyer to court to give expert evidence on an attorney and client basis. The submission is that since it was clear what evidence Mr Meyer was to give and since plaintiff had declined to put her view to him, notwithstanding being requested to do so, her failure to concede that the marriage in Australia was void, should be visited with a punitive costs order against her. I am not disposed to grant such an order. Plaintiff's counsel indicated that plaintiff was not possessed of sufficient funds to employ an expert witness and chose to rely instead on cross-examination of Mr Meyer in order to persuade me to hold contrary to the view expressed by him. Although the cross-examination was relatively ineffective, and although plaintiff's counsel ultimately argued this aspect of the matter on a ground not fully explored with the witness, I do not consider that a punitive costs order would be appropriate.

[71] In the result, the plaintiff's claim is dismissed with costs, which costs shall include the costs attendant upon the employment of two counsel.

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**R B CLEAVER**