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## *Abstract*

Matrimonial property law is an important but complex area of law and as a result has been the subject of much debate in many jurisdictions. The highly discretionary nature of Irish divorce legislation has made the development of a coherent and consistent body of case law particularly problematic in this jurisdiction. The constitutional and legislative requirement of “proper provision” represents the only judicial guidance but what is “proper” tends to vary on a case-by-case basis leading to an absence of predictability. A further complication, upon which this thesis focuses, is the absence of legislative guidance to the courts, in dealing with a spouse’s business or company assets on divorce. Whether the business assets of a spouse could or should be used to make proper provision for the dependent spouse is unclear, despite the constitutional importance attached to such provision. Central to the debate regarding company assets is whether the doctrine of separate legal personality applies in the divorce context. It is uncertain whether the family courts are acting *sui generis* and thus able to disregard this important doctrine or whether the judiciary in the family courts must also abide by this company law rule. In addition, the complicated nature of the valuation process for businesses and companies in the divorce context and the lack of legislative guidance in this regard, have led to unnecessarily costly divorce proceedings, and an inordinate amount of time spent by the judiciary in deliberating issues of valuation. This thesis examines the current caselaw governing these issues in Ireland and England. It also considers the treatment of business assets on divorce in British Columbia and concludes with recommendations for the introduction of legislative guidance in this area.

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*A.R.J v .Z.S.J* [2009] BCSC 1662.

*Arsenault v Arsenault* (1998) O.J. No. 1423 (QL).

*Baum v Baum* (1999), 182 DLR. (4th) 715 (BCSC).

*B.D. v J.D* Unreported, High Court, 5<sup>th</sup> December, 2003.

*B.D. v J.D* [2004] IESC 101.

*BD v JD* [2005] IEHC 407.

*B.G Preeco I (Pacific Coast) Ltd v Bon Street Holdings Limited* (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258.

*Bregman v Bregman* (1979). 25 OR (2d) 254 (CA).

*Re Bugle Press Limited* [1961] Ch 270.

*Canada Rice Mills v R* [1939] All ER 991.

*Re C* [2007] EWHC 1911.

*C v C* [1994] Fam LJ 22.

*C v C* [2003] 2 FLR 493.

*Carlton v Carlton* 997, P.2d 1028 (Wyo. 2000).

*Re Clubman Shirts Ltd* [1991] ILRM 43.

*Colgan v Colgan*, Unreported, High Court, 22<sup>nd</sup> July 1993.

*C.O'R v M.O'R*, Unreported, High Court, 19<sup>th</sup> September 2000.

*Colman v Colman* 743 P. 2d 782, 786. (Utah Ct. App 1987).

*Cowan v Cowan* [2002] Fam LJ 97.

*Crittenden v Crittenden* [1988] 1 WLR 1307.

*Cummins v Stewart* [1911] 1 IR 236.

*D v D*, Unreported, High Court, July 1991.

*D v D*, Unreported, Supreme Court, 5<sup>th</sup> December 2003.

*D v D* [2004] IEHC 142.

*D v D* [2006] IEHC 100.

*Dart v Dart* [1996] 2 FLR 286.

*Debora v Debora* (2006) OJ No. 4826 (QL) (CA).

*DHN Food Distributors Ltd v Tower Hamlet London Borough Council* [1976] All ER 462.

*Elsom v Elsom*(1982) 35 B.C.L.R. 293.

*Elsom v Elsom* (1983), 37, RFL (2d) 150 (CA).

*Elsom v Elsom* (1987) 13 R.F.L. (3d) 231.

*Evans v Evans* [1990] 2 All ER 147.

*F v F*, Unreported, High Court, December 2, 1999.

*Re Fredricks Inn* [1994] 1 IRLM 387.

*Goldman, Sachs & Co v Sessions et al* (1999) CanLII 5749 (BCSC).

*Gilford Motors Co Limited v Horne* [1933] Ch 939.

*Re H* [1996] 2 All ER 391.

*Hashem v Shayif and Another* [2009] 1 FLR 115.

*Hanlon v The Law Society* [1980] 1 All ER 763.

*HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159.

*Hollingsworth v. Hollingsworth*, 2 February 1995, New Westminster DO28795 & S-02181 (BCSC).

*Ian J Ward & Co. v Gilbert Vancouver* No. CA012064 (9 November 1990) BCCA.

*Irish Permanent Building Society v Registrar of Building Society and Irish Life Building Society* [1981] IRLM 242.

*Irish Press plc v Ingersoll Irish Publications Ltd*, Unreported, High Court, 13<sup>th</sup> May 1994.

*JCN v RTN*, Unreported, High Court, 15<sup>th</sup> January 1999.

*JD v DD* [1997] 3 IR 64 at 91.

*Jones v Lipman*[1962] 1 All ER 442.

*Komori v Mallins*, 1 November 1993, Vancouver No. D66631 (BCSC).

*Komori v Mallins* 1996 CanLII 470 (BC CA).

*Kosmopoulos v Constitution Insurance Co* [1987] 1 SCR 2.

*Kowalewich v Kowalewich* [2001] BCCA 92, BCLR.

*Kurcz v Kurcz* (1989), 20 RFL (3d) 206 (CA).

*L v L* [1991] 11 ILRM 465.

*L v L* [2007] IEHC 438.

*L. O'M v N.O'M* [2002] 3 IR 238.

*Lambert v Lambert* [2003] Fam LJ 103.

*Lee v Lee's Air Farming Limited* [1961] AC 12.

*Lynch v Segal* (2006) OJ No. 4810 (QL) (CA).

*Lytal v Lytal* 818 So. 2d 111 (La. Ct. App. 2001).

*Re Marriage of Moffatt* 279 N.W.2d 13 (Iowa 1979).

*Mastertrade (Exports) Ltd and Others v Phelan* [2001] IEHC 171.

*M.(B.B.) v M.(W.W.)* (1994) 7 RFL (4<sup>th</sup>) 255 (Alta. QB).

*Medlock v Medlock* 642 NW 2.d 113, 125 (Neb. 2002).

*Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500.

*Meskill v CIE* [1973] IR 121.

*MK v SK*, Unreported, Supreme Court, 6 November 2001.

*MK v SK* [2003] 1 IR 326.

*MK v JPK* [2006] 1 IRLM 534.

*Mubarak v Mubarak* [2001] 1 FLR 673.

*MY v AY* Unreported, High Court, December 11, 1995.

*M.McA. v X.McA* [2000] 2 ILRM 48.

*McFarlane v McFarlane* [2004] 2 All ER 921.

*McM v M.McM* Unreported, High Court, November, 2006.

*McNamee v Revenue Commissioners* [1954] IR 214.

*N v N* [2001] 2 FLR 69.

*N v N*, Unreported, High Court, December 18<sup>th</sup>, 2003.

*Re New-Ad Advertising Company Limited*, Unreported, High Court, 1<sup>st</sup> July 1997.

*Newson v Newson* (1993) 45 RFL (3d) 115.

*Nicholas v Nicholas* [1984] FLR 285.

*Ontario Ltd v Fleisher* (2001), 56 OR (3d) 417.

*Parlour v Parlour* [2005] 2 FLR 893.

*Parra v Parra* [2003] I FLR 942.

*Potter v Potter* [1892] 1 WLR 1255.

*Power Supermarkets Limited v Crumlin Investments Limited and Dunnes Stores (Crumlin) Ltd*, Unreported, High Court, 22<sup>nd</sup> June 1981.

*Piercy v Piercy* (1991), 31 RFL (3d) 187 (SC).

*Preston v Preston* [1982] 1 FLR 17.

*R v ICR Haulage Ltd* [1944] KB 551.

*R v Kite and OLL Ltd* Winchester Crown Court, 8<sup>th</sup> December 1994.

Reported *sub nom Broderip v Salomon* [1895] 2 Ch 323 at 323.

*Roundabout Ltd v Beirne* [1958] IR 423.

*RG v CG* [2005] 2 IR 418.

*R v R* [2005] 2 FLR 365.

*Samuels v Samuels* (1981) 30 BCLR 186.

*Salomon v Salomon* [1897] AC 22.

*Semkuley v Semkuley* (1992), 42 RFL (3d) 240 (SC).

*SN v PO'D* [2009] IESC 61.

*S.J.N. v PC.O'D*, Unreported, High Court, November 29<sup>th</sup> 2006.

*Smith, Stone and Knight v Birmingham Corp* [1939] All ER 116.

*Swartz v Swartz* (1990) CanLII 244 (BC S.C).

*T v T* [2002] 3 IR 334.

*Taylor v Smyth* [1991] IR 142.

*Thomas v Thomas* [1995] 2 FLR.

*Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1986), 28 OR (3d) 423 (Gen. Div).

*Uram v Uram* (1981) 34 BCLR 99.

*WA v MA* [2005] 1 IR 1.

*Wachtel v Wachtel* [1973] 1 All ER 829.

*White v White* [1998] 2 FLR 310.

*White v White* [2001] 1 All ER 1.

*Wildman v Wildman* (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA).

## ***Table of Statutes***

### ***The Family Law (Divorce) Act 1996***

Section 5 of the Family (Divorce) Act 1996.

Section 14 of the Family Law (Divorce) Act 1996.

Section 15 of the Family Law (Divorce) Act 1996.

Section 16 of the Family Law (Divorce) Act 1996.

Section 18 of the Family Law (Divorce) Act 1996.

Section 17 of the Family Law (Divorce) Act 1996.

Section 19 of the Family Law (Divorce) Act 1996.

Section 20 of the Family Law (Divorce) Act 1996.

Section 22 of the Family Law (Divorce) Act 1996.

Section 37 of the Family Law (Divorce) Act 1996.

### ***Family Law (Maintenance of Spouses and Children) Act 1976***

Section 5(4) of the *Family Law (Maintenance of Spouses and Children) Act 1976*.

Section 3(1) of the *Family Law (Maintenance of Spouses and Children) Act 1976*.

### ***Judicial Separation and Family Law Reform Act 1989***

#### ***The Family Law Act 1995***

Section 47 of the Family Law Act 1995.

#### ***The Companies Acts***

Section 114(4) of the Companies Act 1963.

Section 205 of the Companies Act 1963.

Section 256 of the Companies Act 1963.

Section 297(1)(a) of the Companies Act 1963.

Section 297(1)(b) of the Companies Act 1963.

Section 202 of the Companies Act 1990.

***The Matrimonial Causes Act 1973***

Section 24 of the Matrimonial Causes Act 1973.

Section 25 of the Matrimonial Causes Act 1973.

***Family Law (Scotland) Act 1985***

Section 9 of the Family Law (Scotland) Act 1985

Section 10 of the Family Law (Scotland) Act 1985

Section 13 of the Family Law (Scotland) Act 1985

***Federal Child Support Guidelines 1997 (Canada)***

Section 18(1) of the Federal Child Support Guidelines 1997.

***Family Relations Act 1996***

Section 56 of the Family Relations Act 1996.

Section 58 of the Family Relations Act 1996.

Section 59 of the Family Relations Act 1996.

Section 65 of the Family Relations Act 1996.

***Constitution- Bunreacht na hEireann***

Article 41.2.1°, Bunreacht na hEireann, 1937.

Article 41.3.2°, Bunreacht na hEireann, 1937.

## Introduction

Significant changes in Irish society<sup>1</sup> led to the recent introduction of divorce in this jurisdiction.<sup>2</sup> Although divorce is a relatively contemporary development, it seems that many aspects of the Family Law (Divorce) Act 1996 are described as less than satisfactory and in need of reform. It is submitted that the provisions relating to ancillary relief are particularly problematic; their vague and discretionary nature has substantially hindered the development of a coherent and consistent body of case law. When compared with Ireland, England has a long history of divorce law and yet in the 1980's, the formula submitted by Lord Denning in relation to asset distribution on divorce was as follows:

The court takes the rights and obligations of the parties all together and puts the pieces into a mixed bag ... The court then takes out the pieces and hands them to the two parties – some to one party and some to another – so that each can provide for the future with the pieces allotted to him or her... the court hands them out without paying too nice a regard to their legal and equitable rights but simply according to what is the fairest provision for the future, for mother and father and the children.<sup>3</sup>

This vague and unhelpful statement seems to reflect the current lack of legislative guidance provided for the Irish judiciary faced with the prospect of granting ancillary relief. “Fairness” or “proper provision” (in the Irish context) seems to be the only guiding principle and this is a highly subjective decision for any judge. Lord Denning declined to be more specific about the asset distribution process as each case brings different issues, properties and considerations.<sup>4</sup> Nonetheless, there are certain types of assets, for example, business and company assets, which require specific legislative guidance with regard to their standing in the ancillary relief process and such guidance has not yet been provided in either Ireland or England. The absence of adequate guidance in this area has led to conflicting judgments and the development of an inconsistent body of case law.

This thesis will focus on this specific area within the ancillary relief process. Upon examining Irish and English case law relating to this issue it appears that the judiciary are incredibly

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<sup>1</sup> Shatter, *Shatters Family Law* (4<sup>th</sup> edn, Dublin: Butterworths, 1997) at pp 369-390.

<sup>2</sup> The Family Law (Divorce) Act 1996.

<sup>3</sup> *Hanlon v The Law Society* [1980] 1 All ER 763 at 770.

<sup>4</sup> In chapter four of this thesis some of the recent English legislative and judicial developments are discussed. The English courts now look at various factors such as the contributions of the spouses to the marriage and the liquidity of the spouses' assets. Section 25 of the Matrimonial Causes Act 1973 requires the court to have regard to the income and earning capacity of the spouses, their financial needs, obligations and responsibilities, the standard of living enjoyed by the spouses, any physical or mental disability of the spouses, the ages of the spouses and the contributions of the spouses to the marriage.

reluctant to grant a property adjustment order, order for sale or any other order in relation to company assets owned by a spouse. While in certain circumstances it is understandable that the judiciary needs to protect the ongoing business of a spouse, in other situations such protection can lead to an unjust result. When a spouse's business or company assets come before the divorce court, there are numerous competing aims and objectives which must be fairly and justly weighed and balanced and, as a result, legislative guidelines are required in this particular area to help the judiciary decide on which interests are to be given priority in any given case. On one hand, the interests of the dependent spouse come to the fore in the divorce context, but, on the other hand, it must also be necessary to consider the interests of the business, creditors and employees. In addition, in circumstances where the business has been incorporated the corporate veil principle may pose some problems for the divorce courts and thus some guidance is required as to the application of the doctrine of separate legal personality in this particular situation. Without such guidelines the courts may remain reluctant to interfere with such assets as they seem to be unclear as to their jurisdiction in this regard and this may be to the detriment of one of the parties involved.

This research will provide an analysis of the aforementioned issues and highlight where the problems arise in this context. Chapter one of this thesis will discuss the provisions in the Irish legislation which relate to the granting of ancillary relief, namely sections 13, 14, 15, 16, 17, 19 and 20 of the Family Law (Divorce) Act 1996. In addition, chapter one will provide an analysis of the very significant "proper provision" requirement and will look at its application by the family law courts. That the court must properly provide for the dependent spouse and children is at the centre of the divorce process and thus must be central to any ancillary relief granted. This chapter will also examine the factors provided in section 20 of the same Act, which the courts are directed to consider in granting or refusing ancillary relief. Furthermore, this chapter will outline the uncertainty which currently prevails in this jurisdiction, in relation to what exactly amounts to proper provision in any given case. In addition, this chapter will briefly outline the main academic critiques which have emerged in relation to Irish matrimonial property law in recent times, in particular the clean break divorce debate and the potential usefulness of adopting a community property approach or guidelines to property redistribution on divorce.

Chapter two of this thesis will examine the company law aspect of this debate. It will look at the separate legal personality doctrine and its development in the *Salomon*<sup>5</sup> case. This doctrine requires that the company be seen as an entity which is distinct from its shareholders. The company becomes a legal person who can sue and be sued, incur debts and have assets and liabilities of its own. Subsequently, the chapter will examine the application of the *Salomon* principle by the courts and the exceptions to the doctrine which have developed over the years to prevent companies from abusing the separate legal entity doctrine. This author will then examine some of the criticisms which have emerged since its introduction and whether there may be a basis for an exception to the doctrine in the family law context. The first two chapters will therefore provide an overview of two distinct areas of law, thus equipping us with a solid background upon which to build this thesis.

Chapter three will highlight the current status of business assets in the Irish divorce courts. It will discuss the absence of guidance for the judiciary, who are faced with significant business and company assets in a divorce context and the resulting judicial reluctance to interfere with such assets. The chapter will highlight some of the issues which have been identified by the judiciary as significant in examining whether an order should be made in relation to such assets: the absence of clean break divorce in this jurisdiction, the viability of the business, the contributions of the non-owning spouse and the origin of the business in question. Finally, this chapter will comment on recent caselaw regarding the application of the corporate veil in the matrimonial property law context. It will highlight the prevailing uncertainty in this area and discuss academic commentary on developments in the divorce court with regard to the corporate veil.

Chapter four will examine the English case law relating to business assets. It will highlight some of the main considerations which have influenced the English courts and discuss the importance of the following factors: spousal contributions and “special” contributions to the marriage, the source or nature of the assets in question and liquidity issues associated with the division of assets. The chapter will also discuss cases which have arisen where the family home is a company asset and the uncertainty prevailing in England as a result of two recent conflicting decisions regarding the corporate veil and its application in the divorce court.

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<sup>5</sup> [1897] AC 22.

Finally, this chapter will look at the relevance of English case law on this issue in the Irish courts.

Chapter five will discuss how business assets are dealt with by the divorce courts in British Columbia, Canada. The chapter will focus primarily on the legislation which relates to family and business assets of divorcing spouses and the operation of the community property regime in that jurisdiction. However, it will also examine the Canadian Child Support Guidelines, which have been adopted in British Columbia, which allow the corporate veil to be lifted in the context of providing maintenance. The chapter will look specifically at the criteria which must be met, before a business asset can qualify as a family asset, for the purposes of the division of assets of divorcing spouses under the community property regime. It will analyse the importance of spousal contributions in British Columbia and discuss how shares in a company, classified as a family asset, may be divided. This author will conclude by highlighting the aspects of matrimonial property law in British Columbia which may aid in the development of clear legislative guidelines in this jurisdiction regarding the division of business assets on divorce.

Chapter six will look at the current system of valuing companies and businesses in the commercial and divorce court. It will also examine the specific methods which have been used to carry out the difficult task of valuing shares in private limited companies. It will discuss the application of such valuation methods by the English and Irish divorce courts and highlight specific difficulties that arise in the divorce context. This chapter will also make some recommendations to improve the valuation process and reduce costs and time spent in the divorce court.

Finally, to conclude this thesis, this author will summarise some of the conclusions made during the previous chapters and conclude with recommendations for the introduction of certain legislative amendments to govern the courts' dealings with business assets on divorce. These recommendations, it is submitted, will help to reduce the extensive discretion afforded to the judiciary and will guide the judiciary in a positive way in relation to business assets. Such guidance, it is hoped, will help build a more coherent and consistent body of case law in relation to the treatment of a spouse's business and company assets on divorce. This is something which this jurisdiction must strive to achieve, in order to bring about elements of predictability in matrimonial property proceedings. The legislative amendments suggested by

this thesis will become increasingly urgent into the future, as a result of the increased number of businesses within our society in spite of the economic recession, the many advantages which are associated with the incorporation of a business and the possible expansion of limited liability to allow partnerships to avail of this commercial advantage. The need to modernise and improve the legislative provisions which relate to ancillary relief and to clarify the status of the business and company assets of the spouses is clear and this thesis aims to direct the legislature in this regard.

## Chapter One – Irish Matrimonial Property Law and Proper Provision

Although divorce has been part of Irish law since the introduction of the Family Law (Divorce) Act 1996, it could be argued that very little progress has been made in relation to establishing certainty, finality and coherency in the area and such has been detrimental to the ancillary relief process. In addition, it has been stated that the type of divorce available in Ireland is restrictive and burdensome<sup>1</sup> as Irish law does not allow for a “clean break” divorce, which if approved, would allow the parties to eventually be wholly independent of one another. Instead, the parties remain financially obligated to one another after the divorce decree is granted. It is submitted that while the introduction of divorce in this jurisdiction was an important stepping stone in Irish family law its continuous development and constant modernisation and improvement should be at the fore of the minds of our legislators. As noted by one academic, the “[l]aw must...be clear, logical and above all consistent, possessing some degree of predictability.”<sup>2</sup> It will become evident in this chapter that these are not qualities easily associated with Irish matrimonial property law. The absence of such qualities is particularly apparent in the business assets debate, which forms the basis for this thesis.

As outlined in the introduction, this research spans two significant areas of law and focuses on the intersection between family law and company law in the divorce context, where the aims of both areas appear to conflict. Before delving into an analysis of this specific conflict it is necessary to outline the background to both areas of law in some detail. This chapter examines the principal objective of Irish divorce law and highlights certain legislative and judicial features which set the scene for the analysis of the treatment of business assets on divorce in chapter three. It also sets out the main criticisms which have been levelled against our system of re-distribution of matrimonial property and outlines some academic suggestions for reform which have been made in this area. Chapter two examines the company law element of this research, more specifically the company law doctrine of separate legal personality, the *Salomon* case and the recognised exceptions to the doctrine.

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<sup>1</sup> Martin, “From Prohibition to Approval: The Limitations of the “No Clean Break” Divorce Regime in the Republic of Ireland” (2002)16 IJLPF 223 at 224.

<sup>2</sup> Martin, “Judicial Discretion in Family Law” (1998) 16 ILT 168 at 169.

## Statutory Remedies Available on Divorce/Judicial Separation

As Martin notes, “family courts have now available to them a wide battery of remedies to achieve a so-called ‘fair’ distribution and a ‘fair division’ of assets (equitable or legal) held either in possession or reversion, between the family members.”<sup>3</sup> The court has been given substantial discretion to apply these remedies to the situation before the court, the only restriction being, that proper provision must be made and what is “proper” is decided by the presiding judge in each individual case. The court may grant a periodical payment order,<sup>4</sup> a lump sum order,<sup>5</sup> a property adjustment order,<sup>6</sup> an order for sale,<sup>7</sup> miscellaneous ancillary orders including orders relating to the family home,<sup>8</sup> an order conferring a right of residence,<sup>9</sup> a financial compensation order<sup>10</sup> and a pension adjustment order.<sup>11</sup>

### Irish Divorce Law – The Principal Aim

#### *Proper Provision*

In this section the “proper provision” criterion will be examined and it should be noted from the outset that this criterion has both constitutional and legislative importance. It is enshrined in the Constitution by Article 41.3.2° and the court is therefore under a constitutional obligation to ensure that such provision as the Court considers proper having regard to the circumstances exists or will be made for the spouses, any children of either or both of them and any other person prescribed by law.<sup>12</sup> “Proper provision” is one of three<sup>13</sup> conditions which must be satisfied before the court may grant a divorce decree and “is of relevance not

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<sup>3</sup> Martin, above n.2 at 168. See also Shannon, *Law Society of Ireland – Family Law* (Dublin: Oxford University Press, 2003) pp 55-69.

<sup>4</sup> Section 13 of the Family Law (Divorce) Act 1996.

<sup>5</sup> *Ibid*

<sup>6</sup> Section 14 of the Family Law (Divorce) Act 1996.

<sup>7</sup> Section 19 of the Family Law (Divorce) Act 1996.

<sup>8</sup> Section 15 of the Family Law (Divorce) Act 1996.

<sup>9</sup> *Ibid*.

<sup>10</sup> Section 16 of the Family Law (Divorce) Act 1996.

<sup>11</sup> Section 17 of the Family Law (Divorce) Act 1996.

<sup>12</sup> Article 41.3.2°, Bunreacht na hEireann, 1937.

<sup>13</sup> Before a divorce decree can be granted three criteria must be satisfied: Firstly the parties must have lived apart for at least four years, secondly the court must be satisfied that there is no reasonable prospect of reconciliation and finally there must be proper provision for the dependent spouse and children.

only to the grounds upon which a decree of divorce can be granted but also to the ancillary relief that might be ordered by the court in divorce proceedings.”<sup>14</sup>

This constitutional imperative is reinforced by Section 5(1) of the Divorce Act which provides as follows:

Subject to the provisions of the Act, where, on application to it in that behalf by either of the spouses concerned, the court is satisfied that:

...such provision as the court considers proper having regard to the circumstances exists or will be made for the spouses and the dependent members of the family,

...the court may, in exercise of the jurisdiction conferred by Article 41.3.2° of the Constitution, grant a decree of divorce in respect of the marriage concerned.

The requirement for “proper provision” is crystal clear; however, what exactly amounts to proper provision in the varying circumstances of different cases is not always apparent. Divorce law in Ireland has been described as a “very inexact science”<sup>15</sup> as it is virtually impossible to predict the outcome of any given case.<sup>16</sup> Shatter explains the illusive nature of this criterion stating:

What is ‘proper’ in the circumstances varies from case to case and is dependent on the economic circumstances and needs of both spouses and children... What the court deems ‘proper in the circumstances’ may vary from case to case and is very much constrained by the economic circumstances of both husband and wife.<sup>17</sup>

### ***The Section 20 Guidelines***

Ouazzani states “[a]ncillary relief law is an innately subjective area of law. While subjectivity can often be particularly beneficial for aiding fairness, it can also be especially treacherous.”<sup>18</sup> To date, the only real limitation on the judge’s discretion is that they must

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<sup>14</sup> Shatter, *Shatters Family Law* (4<sup>th</sup> edn, Dublin: Butterworths, 1997) p 886. See also Shannon, *Divorce Law and Practice* (Dublin: Thomson Round Hall, 2007) at pp 36-51 and Shannon, *Law Society of Ireland – Family Law* (Dublin: Oxford University Press, 2003) pp 42-43.

<sup>15</sup> Coveney, “Proper Provision in Matrimonial Breakdown: The Debate Continues in the Aftermath of T v T” (2003) 6 (1) IJFL 3 at 3.

<sup>16</sup> See also Martin above n.1 at p. 230 who notes that the phrase “proper provision” is “by its very nature... vague and is used as a general criterion for the courts’ discretionary approach to the distribution of marital assets.

<sup>17</sup> Shatter, *Shatters Family Law op.cit.*, at p 342.

<sup>18</sup> Ouazzani, “Ancillary Relief and the Public/Private Divide” (2009) Fam Law 842 at 853.

ensure proper provision is made and in doing so they must consider the factors listed by section 20 of the Family Law (Divorce) Act 1996.<sup>19</sup>

Some of the factors to be considered by the court are as follows:

*“The income, earning capacity, property and other financial resources which each of the concerned has or is likely to have in the foreseeable future”*<sup>20</sup>

This includes both earned and unearned income, for example, dividends, wages, bonuses, overtime and interests on investments. It also refers to the earning capacity of the spouses into the future.<sup>21</sup> Shatter has also noted “where on the evidence it is likely that a spouse’s income or assets will significantly increase or diminish or that a spouse will inherit property or make a substantial gain or obtain some financial benefit, this may be factored into the overall circumstances considered by the court.”<sup>22</sup>

*“The financial needs obligations and responsibilities (of both spouses<sup>23</sup>)...*

*“The standard of living enjoyed by the family.”*<sup>24</sup>

Shatter explains the latter factor stating where “the spouses are relatively affluent or wealthy, the court bases its determination of the spouses’ needs on the standard of living which the court considered a spouse is entitled to enjoy in the context of the totality of the parties’ financial obligations.”

*“The ages of the spouses, the duration of the marriage and the length of time during which the spouses lived with one another<sup>25</sup>...Any physical or mental disability of either of the spouses”*<sup>26</sup>

*“The contributions which each of the spouses have made or is likely in the foreseeable future to make to the welfare of the family...”*<sup>27</sup>

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<sup>19</sup> Coveney above n.15 at 5. See also Shannon, *Divorce Law and Practice op.cit.*, at pp 78-93 and Shannon, *Law Society of Ireland – Family Law* (Dublin: Oxford University Press, 2003) pp 69-73.

<sup>20</sup> Section 20(2)(a) of the Family Law (Divorce) Act 1996.

<sup>21</sup> Nestor, *An Introduction to Irish Family Law* (Dublin: Gill and Macmillan) p 93. See also *JCN v RTN*, unreported, High Court, Lynch J, August 9, 1994, where the court considered the fact that the dependant spouse was a 78 year old woman who had never worked outside the home and was not likely to do so in the future. The court wanted to compensate the wife for her domestic duties and considered her age, the duration of the marriage and the amount of time they lived together.

<sup>22</sup> Shatter, *Shatters Family Law*, op cit., at p 933.

<sup>23</sup> Section 20(2)(b) of the Family Law (Divorce) Act 1996.

<sup>24</sup> Section 20(2)(c) of the Family Law (Divorce) Act 1996.

<sup>25</sup> Section 20(2)(d) of the Family Law (Divorce) Act 1996.

<sup>26</sup> Section 20(2)(e) of the Family Law (Divorce) Act 1996.

The importance of contributions to the home and the business in this jurisdiction will be discussed in greater detail in chapter three. It will become apparent in that chapter that the contributions of the non-owning spouse in the home and business are often undervalued. Shannon notes that viewing financial and non-financial contributions as equal “may be regarded by some financially-minded persons as unrealistic.”<sup>28</sup> However, Buckley has emphasised that even though the spouses’ contributions to the marriage may be entirely different, all contributions are vital to the success of the marriage, which Buckley refers to as a “joint enterprise.”<sup>29</sup> Shannon notes that section 20(f) of the Act “places an onus on the courts, when making ancillary orders, to distribute the assets on an equitable basis of both financial and non-financial contributions.”<sup>30</sup> He senses the development of a recent tendency by the courts to equate financial and non-financial contributions and he says non-financial contributions “clearly have an impact on the court’s assessment of the periodical payments or lump sum orders to be made.”<sup>31</sup> However, it is submitted that while section 20(f) requires that non-financial contributions be considered, it does not specifically direct the courts to treat them as equivalent to financial contributions. Non-financial contributions are often very difficult to value and unfortunately this author has found little evidence of the new development suggested by Shannon, as will become more apparent in the discussion of the caselaw set out in chapter three..

*“The effect on the earning capacity of each of the spouses of the marital responsibilities assumed during the period when they lived with one another...”<sup>32</sup>*

One academic carried out a study in this area and found that even if married women are wage earners, being a mother may affect their ability to earn money and to increase earning abilities during and after the marriage. She also found that most women were likely to see

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<sup>27</sup> Section 20(2)(f) of the Family Law (Divorce) Act 1996.

<sup>28</sup> Shannon, *Divorce Law and Practice op.cit.*, at p 86.

<sup>29</sup> Buckley, “‘Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the Wake of *T v T*” (2004) 3 IJFL 8 at 8. See also Parkinson, “The Yardstick of Equality: Assessing Contributions in Australia and England” 19 (2005) IJLP&F 163, Shatter, *Shatters Family Law op.cit.*, at pp 941-943, Shannon, *Divorce Law and Practice op.cit.*, at pp85-88 and Moore, ‘The significance of the “home maker” contributions upon divorce’ (2007) 10(1) IJFL 15.

<sup>30</sup> Shannon, *Divorce Law and Practice op.cit.*, at p 86. *D v D* is authority for the fact that non-financial contributions of the spouses will be considered. Denham J in this case found that the wife had dedicated herself to her children and as a result of this “the defendant husband had the time and opportunity to develop his business skills and to achieve business success...”<sup>30</sup> See also Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’ (Dublin: Thomson Round Hall Annual Family Law Conference, 24<sup>th</sup> November, 2007) pp 29-31, where he discusses the proper approach to the work of the spouse within the home.

<sup>31</sup> Shannon, *Divorce Law and Practice op.cit.*, at p 86.

<sup>32</sup> Section 20(2)(g) of the Family Law (Divorce) Act 1996.

their children as their prime responsibility and will try to fit other commitments around them, while most of the fathers in the study remained bound up primarily with their employment.<sup>33</sup>

*“The rights of any person other than the spouses but including a person to whom either spouse is remarried”*<sup>34</sup>

This guideline has proven to be of particular importance in the discussion of business assets, as a business or a company will often involve third parties whose rights and interests must be considered by the court. Directors, members and sometimes even the employees of the company or business will be seen as third parties whose rights are worthy of consideration in the divorce court. This will be discussed in greater detail in chapter three of this thesis.

*“Any separation agreement that has been entered into...”*<sup>35</sup>

The courts must merely have regard to such an agreement and it is not binding on the parties to the divorce.

*“The court shall not make an order under a provision referred to in the subsection (1) unless it would be in the interests of justice to do so.”*<sup>36</sup>

The above “list is not exhaustive,”<sup>37</sup> none of these guidelines stand alone<sup>38</sup> and one does not take precedence over another. These guidelines leave substantial discretion to the judiciary as “the relevance and weight of these factors will depend on the circumstances of each individual case.”<sup>39</sup> The discretionary nature of the section was emphasised by McGuinness J in *JD v DD* when she stated “even given these guidelines...the court has a wide discretion, particularly in cases where there are considerable financial assets.”<sup>40</sup> The list is not final and the judiciary may add their considerations where necessary. For example, when considering whether to make an order in connection with a business asset, the courts will often consider the need to protect an ongoing business which is found to be viable and profitable.<sup>41</sup> This

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<sup>33</sup> Moore, ‘The significance of the “home maker” contributions upon divorce’ (2007) 10(1) IJFL 15 at p 17-18.

<sup>34</sup> Section 20(2)(1) of the Family Law (Divorce) Act 1996. See Durcan SC, ‘Divorce, Judicial Separation and Ancillary Relief’ *op.cit.*, at pp 97-98.

<sup>35</sup> Section 20(3) of the Family Law (Divorce) Act 1996.

<sup>36</sup> Section 20(5) of the Family Law Divorce Act 1996.

<sup>37</sup> Martin, above, n.1 at 231.

<sup>38</sup> Shatter, *Shatters Family Law*, *op cit.*, at p 932.

<sup>39</sup> Coveney, above, n.15 at 6.

<sup>40</sup> [1997] 3 IR 64 at 91.

<sup>41</sup> See Chapter 3 p 48-53.

author will, later in this thesis, recommend a series of specific factors, which the judiciary should be directed to consider when dealing with a spouse's business and company assets.

### **Judicial Application of the Proper Provision Criterion**

The judicial separation case of *JD v DD*<sup>42</sup> provides divorce law academics with some insight into the concept of “proper provision” in a situation where generous funds were available for distribution. McGuinness J found that English case law was instructive in cases where there are considerable family assets. She said “the court is not limited to providing for the dependent spouse's actual immediate needs through a periodic maintenance order, but may endeavour, through the making of a lump sum order, to ensure that the applicant will continue into the future to enjoy the lifestyle to which she was accustomed.”<sup>43</sup> McGuinness J felt that the division of the assets should not therefore be based on the dependent spouse's reasonable requirements but rather on her contributions to the family.

In *M.McA. v X.McA.*<sup>44</sup> McCracken J also discussed the concept of “proper provision.” He noted that the applicant in this case had made some contributions to the running of the husband's business but also considered that the wife was, at the time this case came to court, managing her own business which “shall now be carried on by her solely for her own benefit.”<sup>45</sup> McCracken J highlighted that the husband had £2 million worth of assets and an income of £120,000 per annum but found that the poor prognosis for the husband's business in the future had to be factored into the valuation of his business. In this case, the wife owned £1.2 million shares in the husband's business which she had sold. McCracken J took this into consideration in granting the wife a lump sum of £300,000 and £4,500 per month periodic maintenance. He also transferred the family home and the apartment in Tenerife to the wife. As Coveney submits, this judgment “steered a middle ground between the wife's reasonable requirements and an equal division of the assets, since the provision made, although generous, fell short of equality.”<sup>46</sup> As shall be discussed in more detail in chapter three, the judge's orders in this case did not interfere with the husband's continuing business and he noted that it was not in the interests of either party to jeopardise this business.

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<sup>42</sup> [1997] 3 IR 64 at 91.

<sup>43</sup> *Ibid* at 93.

<sup>44</sup> [2000] 2 ILRM 48.

<sup>45</sup> *Ibid* at 54.

<sup>46</sup> Coveney, above, n.15 at 9.

*T v T*<sup>47</sup> perhaps provides us with the most detailed discussion of the “proper provision” criterion and this judgment has helped to resolve some of the lingering uncertainty in the area. This case has been said to represent the “most current and thorough attempt of the Irish judiciary to consider the principles applicable to property division in the event of marital breakdown.”<sup>48</sup> The counsel for the applicant attempted to rely on older English authorities<sup>49</sup> and asserted that the court should try to establish the “reasonable needs” of the dependant spouse. Counsel urged the court not to adopt more recent English authorities such as *White v White*<sup>50</sup> where the “yardstick of equal division” was used. Counsel argued that the words “proper provision” were not mentioned in the *White* case and these words are central to our divorce law. They also pointed out that Irish divorce legislation differed from English divorce legislation in a number of other ways.

In the High Court Lavan J noted that proper provision is the crux of the matter and awarded the respondent a lump sum of £5 million. This sum represented approximately 38% of the assets. He noted that the wife had made a very special contribution to the marriage. This decision was appealed to the Supreme Court. All four judges in the majority agreed with Chief Justice Keane who found that Lavan J was within the range of his discretion in granting the lump sum that had been awarded. Denham J noted that the respondent would have personal autonomy and financial security in the form of a capital sum. It was emphasised in the court that our Constitution requires provision as opposed to division. Denham J stated:

The scheme established under the Act of 1996 is not a division of property... It is not a question of dividing assets at the trial on a percentage or equal basis.<sup>51</sup>

As Gerard Durcan SC submits, the principle of “proper provision” rather than “equal division” is one of the few areas where there would appear to be consistency of approach right through the five judgments of the court.<sup>52</sup> Buckley argues “there is no meaningful practical distinction between ‘provision’ and ‘division’... ‘Provision’ also amounts to ‘division,’ since the assets of the provider are necessarily being divided when he or she is required to confer property benefits on the other spouse.”<sup>53</sup> Durcan SC also submits that he finds it difficult to see the reason for the emphasis on the distinction because while Irish

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<sup>47</sup> [2002] 3 IR 334.

<sup>48</sup> Buckley, above n.29 at 8.

<sup>49</sup> *Duxbury v Duxbury*, [1987] 1 FLR 5.

<sup>50</sup> [2001] 1 All ER 1.

<sup>51</sup> [2002] 3 IR 334 at 383.

<sup>52</sup> Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’ *op.cit.*, at p 5.

<sup>53</sup> Buckley, above n.29 at 16.

legislation requires the courts to seek “proper provision,” he states “surely in many cases the practical application of the requirement will involve the division of assets.”<sup>54</sup> It is submitted that while this argument may be valid in relation to the common meaning of “provision” and “division,” both words have a particular and important meaning in divorce law. While on divorce you must “divide” to “provide” for the spouse, it is submitted that the word “division” as used by the English Courts (and mentioned by *T v T* above) suggests a percentage divide, or an equal divide, or the adoption of a certain ratio. This “division” will not always amount to “provision” in the Irish context as the percentage division required for “proper provision” will vary from case to case. Thus it is argued that the Supreme Court judges were simply stating that they did not wish to confine themselves to any set rule or rules of division as this may impair the constitutional criterion of “proper provision”.

It should be noted that Denham J did to some extent in this case endorse the figure of one-third of the assets as a benchmark of fairness. However, she then emphasised that the Section 20 factors may affect this benchmark in a positive or a negative way.<sup>55</sup> On the other hand Keane CJ felt that the idea of a one third benchmark was “questionable”.<sup>56</sup>

After analysing the case law regarding proper provision in this jurisdiction certain conclusions can be drawn. It is clear in this jurisdiction that the main aim is to properly provide and not “divide” on any percentage basis. In addition, it is apparent that substantial discretion has been given to the judiciary to achieve this. Furthermore, the “reasonable requirements” limitation, which was enforced in England in the past, has been rejected outright in the Irish courts. It is submitted that based on these aforementioned traits within our Irish matrimonial property law, it is impossible to rule out the possibility of a property adjustment order or order for sale in relation to a spouse’s business assets, especially in circumstances where it is the most effective way to properly provide for the dependent spouse. Nonetheless, the absence of legislative guidance clearly gives rise to judicial uncertainty on this issue. Even given the importance of the proper provision requirement in this jurisdiction, it remains unclear whether business assets can be taken into consideration for this “provision” and even if they can be considered and availed of there are no guidelines for the judiciary as to when this may be appropriate. Thus even if the 30% benchmark suggested by Denham J was to be accepted, it is uncertain whether it would be inclusive of

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<sup>54</sup> Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’ *op.cit.*, at p 5.

<sup>55</sup> [2002] 3 IR 334 at 384-385.

<sup>56</sup> *Ibid* at 369.

business assets or merely other matrimonial assets. The distinction between “division” and “provision” is important in the business assets debate, as to divide you need to specifically state in the jurisdiction what is to be included for division, however where “proper provision” is the goal it seems that what is proper can vary from case to case and thus, whether it is appropriate to include business assets in such division will also vary from case to case.

### ***The Importance of the Section 20 Factors***

Coveney notes the importance of this section stating:

the legislation has specifically enjoined the courts to have regard to the factors set out in section 20, to ensure that they will consider the wide variety of circumstances which should in the interests of justice, be weighed in the balance when determining ‘proper provision.’<sup>57</sup>

The section 20 guidelines must be kept in mind by the judiciary in reaching a decision on ancillary relief. *MK v SK*<sup>58</sup> may be considered as a warning to any judge who decides to disregard them. In this case the Supreme Court found that a family court’s failure to have any due and sufficient regard to the statutory criteria was a gross error of law. The Court said the judge “must have regard to all factors set out in section 20, measuring their relevance and weight according to the facts of each individual case...”<sup>59</sup> In this case Lavan J in the High Court failed to refer to the existence of a Deed of Separation. However, O Neill J, upon re-hearing in the High Court, noted that the Deed of Separation fell short of making “proper provision” and, while the husband had acquired much wealth since the time of separation, O’Neill J found “the basis for his ultimate success was in place from the time the marriage broke up... To disconnect those ultimate fruits from the hard work, forbearance, endurance and even at times, the hardships of earlier years of the marriage would be to do an injustice to the Applicant.”<sup>60</sup> Maintenance was therefore awarded in the sum of €40,000 per annum. In addition, an order for a pension adjustment was made in respect of 100% of the husband’s first pension and a lump sum payment of €450,000 was ordered.

O’Neill J also made some interesting comments in relation to section 20(2)(a), which refers to the present and future income and earning capacity of the spouses.<sup>61</sup> He said the section:

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<sup>57</sup>Coveney above n.15 at 5. See also Shannon, *Divorce Law and Practice op.cit.*, at pp 78-93.

<sup>58</sup>Unreported, Supreme Court, 6 November, 2001.

<sup>59</sup>*Ibid* at 16-17.

<sup>60</sup>[2003] 1 IR 326 at 353-354.

<sup>61</sup>“The income, earning capacity, property and other financial resources which each of the spouses concerned has or is likely to have in the foreseeable future.”

in no way delimits the property or the financial resources which should be taken into account nor does it limit in any way a time period outside of which assets are to be ignored... Thus, it seems clear that all property to which a spouse is beneficially entitled and all income and other financial resources which are currently enjoyed or which are likely to become available must be taken into account.<sup>62</sup>

Thus as Shannon submits, the “‘marital cake’, which must be divided up...includes anything which is capable of being owned, such as farms, livestock... businesses...”<sup>63</sup> Although *MK v SK* did not involve a family business O’Neill J’s comments suggest that business assets should be taken into account in applying the Section 20 factors to achieve proper provision.

### **Criticisms and Possible Future Developments**

Section 5 of the Act, which sets out the requirement for proper provision, has already been discussed above and while legislative guidance for its application is limited, the judiciary must consider some vague and discretionary factors which are outlined in section 20 of the Divorce Act. While the importance of proper provision resounds throughout the case law it is difficult to define proper provision, or identify its boundaries with any certainty. However, this uncertainty seems to be one of the unfortunate traits of divorce law. Dewar notes:

[i]ts ultimate disadvantage is that it possesses little or no black-letter law comparable or equivalent to contract law which at least has an organisational legal concept at the centre of the subject.<sup>64</sup>

Some interesting arguments have recently been put forward by Crowley. She notes the “reasoning that underpins such extensive discretionary powers is grounded in the desire of the legislature to protect and guarantee, as much as possible, the rights of dependant spouses and children,” however, “the lack of guiding legislative principles results in a failure in any way to embrace the value and importance of certainty in a contentious area of law.”<sup>65</sup> Thus Crowley has outlined the competing values; the need for discretion to protect the dependent spouse and the need for consistency and coherency in the law. She argues that establishing a regime that provides for the dependent spouse without allowing for the creation of an adequate and consistent body of case law, in fact restricts the court’s ability to protect the

<sup>62</sup> [2003] 1 IR 326 at 326.

<sup>63</sup> Shannon, *Divorce Law and Practice, op.cit.*, at p 78.

<sup>64</sup> Dewar, “Concepts, Coherence and Content of Family Law” in Birks P.B.H., *Examining the Law Syllabus: Beyond the Core* (Oxford University Press, 1993) pp81-82.

<sup>65</sup> Crowley, “Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part One” (2007) 10 (1) *IJFL* 19 at 19. See also Crowley, “Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part Two” (2007) 10(2) *IJFL* 12.

dependent spouse.<sup>66</sup> The problem identified by Crowley comes to the fore in the context of business assets. The absence of legislative guidelines for the judiciary with regard to dealing with this specific class of assets has led to an obvious reluctance amongst the judiciary to interfere with business assets in any way whatsoever. Chapter three which discusses the caselaw in this area clearly illustrates that legislative guidance is particularly required in this unique and complex area.

Another striking feature of Irish divorce legislation is that it does not allow for a “clean break” between divorcing spouses. The parties are allowed to return to the courts over and over again to seek a new order or a variation of an existing order made by the court. Section 22 of the Divorce Act specifically allows for this variation where there is “any change of circumstance” or “any new evidence.” Section 18 even allows an order to be made from a deceased spouse’s estate, where the court is satisfied that proper provision was not made during the spouse’s lifetime. Irish divorce law therefore contrasts with other jurisdictions which encourage a “clean break.” For example in England, in an appropriate case, the Family Law Court will aim to achieve a “clean break” between the parties by way of lump sum payment or fixed term payments so that the parties will eventually be relieved of their obligations to one another.<sup>67</sup> Section 25A (1) of the Matrimonial Causes Act 1973 states:

[I]t shall be the duty of the court to consider whether it would be appropriate to exercise those powers so that the financial obligations of each party towards the other will be terminated as soon after the grant of the decree as the court considers just and reasonable.

Some may argue that the absence of a “clean break” in Ireland means that there is less justification for interfering with business assets at the divorce stage, because if the owning spouse was to sell the company or its assets in the future, or, if it was to suddenly prosper, the dependent spouse may apply for a new order or a variation of an existing order based on a change in circumstances. In practice however, such an outcome is not always produced. In the case of *WA v MA*,<sup>68</sup> after an increase in the success of the husband’s business, the court did not vary the orders that were made at the time of separation because “the wife contributed to the husband’s state of prosperity in no way whatsoever.” Thus, if the husband’s circumstances change, the wife must be seen to have contributed to this change, she must

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<sup>66</sup> *Ibid*

<sup>67</sup> Authorities for a clean break occurring over a period of time include; *McFarlane v McFarlane* [2004] 2 All ER 921 and *Parlour v Parlour* [2005] 2 FLR 893 (explained in further detail at n.82)

<sup>68</sup> [2005] 1 IR 1 at 20.

have contributed in some way, either financially or otherwise, to the start up of the business which has suddenly prospered. This shall be discussed in greater detail in chapter three.

It is acknowledged that strong arguments exist for the introduction of clean break divorce in certain circumstances and since *T v T*,<sup>69</sup> it appears that elements of clean break divorce are indeed creeping into this jurisdiction. As discussed already in this chapter, in *T v T*, Lavan J in the High Court, decided that a lump sum of € million was appropriate and this was upheld by the Supreme Court. The absence of periodic maintenance payments meant that there was some element of finality between the parties. Both the High Court and Supreme Court in making their judgments emphasised the importance of proper provision but were confident that such had been achieved, even in the absence of periodical maintenance payments. Academic support for the adoption of some elements of the clean break divorce in this jurisdiction appears to be widespread.<sup>70</sup> O'Halloran feels the parties to a divorce “should be encouraged to make arrangements regarding their property and finances which enable them to finalise entitlements, put the past behind them and avoid future litigation.”<sup>71</sup> As will be further discussed in chapter three, if this judicial endorsement of certain aspects of the clean break approach continues it will become even more important to effectively deal with all the spouses' assets, including their business assets, at the divorce stage.

To develop a more principled approach to marital property distribution, Crowley has suggested that Ireland look to some jurisdictions which apply the “community property” approach for guidance. This approach requires that all matrimonial property be divided equally between the spouses upon divorce. Cooke, Barlow and Callus recently considered the introduction of a Community Property Regime in England and Wales.<sup>72</sup> They noted that in England and Wales currently marriage has no effect on the status of the property of the spouses, but rather each of them holds their property separately. Should the couple divorce,

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<sup>69</sup> Keane CJ stated that Irish law should be capable of accommodating those aspects of clean break which are clearly beneficial. He argued that finality and certainty are as important in divorce law as in other areas of law (at [2002] 3 IR 334 at 364).

<sup>70</sup> See Byrne, (1999) “Forward in Shannon (ed), *The Divorce Act in Practice*, (Dublin: Round Hall) ii-ix, Power, “Maintenance: No Clean Break with the Past” (1998) 1(1) *IJFL* 15 and Shannon, *Divorce Law and Practice op.cit.*, at pp. 330 to 343 and pp 66-73. Martin, above n.1 at 223 argues there “is an inherent illogicality and inconsistency in allowing parties to avail of divorce while at the same time stipulating continued financial obligation” He feels that a more realistic approach to divorce is required in this jurisdiction and says prohibiting clean break in all circumstances is unjust and inequitable. Byrne, however, refers to the fact that the Irish people ascribe a very high value to the institution of marriage and notes that in reality a clean break is only possible for those who have substantial assets to be sold.

<sup>71</sup> O'Halloran, *Family Law in Northern Ireland* (Dublin: Gill and MacMillan, 1997) 566.

<sup>72</sup> Cooke, Barlow and Callus, *Community Property: A Regime for England and Wales?* (London: The Nutfield Foundation, 2006).

divorce legislation and trust principles will intervene to re-distribute the property. This is similar to the system that which currently operates in this jurisdiction.<sup>73</sup> Buckley notes the “move towards a full community of property” was “apparently considered desirable by the legislature at the passing of the 1965 and the 1976 Acts.”<sup>74</sup> However, the legislature moved away from this approach in the Family Law Act 1995 and the Family Law (Divorce) Act 1996, where “the focus shifted to the equitable redistribution principles which had already been enacted in the context of judicial separation” introduced in 1989.<sup>75</sup> Cooke, Barlow and Callus, like Crowley, acknowledge that the type of system that currently exists in the English, Welsh and Irish jurisdictions, does not aid the development of coherency and consistency in this area of law.<sup>76</sup> However, under the Community Property Regime the system is clear; there is a metaphorical empty pot which will be filled during the marriage and any property in this pot at the time of the parties’ divorce will be divided on a 50:50 basis.<sup>77</sup> Community property regimes generally have strict requirements for determining whether a particular asset has become a matrimonial asset which is to be divided on divorce. Often, inheritance and gifts will be excluded from the pot even if they are received during the marriage. The main disadvantage associated with certain community property regimes, however, is the inflexibility of approach and the complete absence of judicial discretion when it comes to distributing matrimonial assets.

As outlined above, Crowley feels that a balance needs to be struck between, on one hand, allowing an element of judicial discretion to ensure that fairness prevails in the divorce court, but on the other hand, ensuring coherency and consistency in order that the parties to the divorce and their lawyers can enjoy some degree of certainty in relation to the outcome of any given case. Crowley submits that the Family Law (Scotland) Act 1985<sup>78</sup> seems, to a certain extent, to strike the appropriate balance in this regard. Crowley feels the 1985 Act has adopted a “dual approach” “which represents a more reasonable marrying of the contrasting rule-based practice of a rigidly applied equal division and more discretionary based concept

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<sup>73</sup> *Ibid* at p. 1.

<sup>74</sup> Buckley, above n.29 at 9. Buckley is referring to the Succession Act 1965 and The Family Home Protection Act 1976.

<sup>75</sup> *Ibid*

<sup>76</sup> Cooke, Barlow and Callus, above n.72 at 2.

<sup>77</sup> For further discussion see Cooke, Barlow and Callus above n.72 pp. 3-5. See also Crowley, part 1 and 2 above at n.65 and her discussion of the community property regime in both California and Scotland and Barlow, “Community of Property – the logical response to Miller and McFarlane” (2007) 39 *Bracton Law Journal* 19.

<sup>78</sup> See part 1 and 2 of Crowley’s article above at n.65 which discusses the Scottish and the Californian Community Property Regime.

of equitable division.”<sup>79</sup> In considering an application for ancillary relief under section 8, the court is directed to the five fundamental principles listed in section 9. The first principle is that the net value of the matrimonial property should be shared fairly between the parties to the marriage but the court is also directed to take account of a number of other factors in so doing. These are outlined in section 9(b) to (e) as follows; any advantage derived by either party from contributions by the other, and of any economic disadvantage suffered by either party in the interests of the other party or of the family;<sup>80</sup> any economic burden of caring, after divorce, for a child of the marriage under the age of 16 years should be shared fairly between the parties;<sup>81</sup> a party who has been dependent to a substantial degree on the financial support of the other party should be awarded such financial provision as is reasonable to enable him to adjust, over a period of not more than three years from the date of the decree of divorce, to the loss of that support in divorce;<sup>82</sup> a party who at the time of the divorce is deemed likely to suffer serious financial hardship as a result of the divorce should be awarded such financial provision as is reasonable to relieve him of hardship over a reasonable period.<sup>83</sup> However, section 10 goes on to presume fair sharing where the matrimonial assets are shared equally or in such other proportions as are justified by special circumstances.<sup>84</sup> Interestingly for the purposes of this research, the Act requires the court to consider whether

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<sup>79</sup> *Ibid* (Part One) at p.28.

<sup>80</sup> Section 9(1)(b). Section 11 of the 1985 Act lists a number of other factors to be taken into account in considering the principles under section 9. In relation to 9(1)(b) it provides that the court must have regard to the extent to which (a) the economic advantages or disadvantages sustained by either party have been balanced by the economic advantages or disadvantages sustained by the other party, and (b) any resulting imbalance has been or will be corrected by a sharing of the value of the matrimonial property or otherwise.

<sup>81</sup> Section 9(1)(c). Section 11 provides in relation to this section the court shall have regard to (a) any decree or arrangement for aliment for the child; (b) any expenditure or loss of earning capacity caused by the need to care for the child; (c) the need to provide suitable accommodation for the child; (d) the age and health of the child; (e) the educational, financial and other circumstances of the child; (f) the availability and cost of suitable child-care facilities or services; (g) the needs and resources of the parties; and (h) all the other circumstances of the case.

<sup>82</sup> Section 9(1)(d). Section 11 provides in relation to this section the court shall have regard to (a) the age, health and earning capacity of the party who is claiming the financial provision; (b) the duration and extent of the dependence of that party prior to divorce; (c) any intention of that party to undertake a course of education or training; (d) the needs and resources of the parties; and (e) all the other circumstances of the case.

<sup>83</sup> Section 9(1)(e). Section 11 provides in relation to this section the court shall have regard to (a) the age, health and earning capacity of the party who is claiming the financial provision; (b) the duration of the marriage; (c) the standard of living of the parties during the marriage; (d) the needs and resources of the parties; and (e) all the other circumstances of the case.

<sup>84</sup> Crowley, above n.65 at p.26 (Part One). The special requirements are listed under section 10(1) of the 1985 Act and include: the terms of any agreement between the parties on the ownership or division of any of the matrimonial property; the source of the funds or assets used to acquire any of the matrimonial property where those funds or assets were not derived from the income or efforts of the parties during the marriage; any destruction, dissipation or alienation of the property by either party the nature of the matrimonial property; the use made of it (including use for business purposes or as a matrimonial home) and the extent to which it is reasonable to expect it to be realised or divided or used as security; the actual or prospective liability for any expenses or valuation or transfer of property in connection with the divorce.

the property was used as a business asset and if this is the case, it must be regarded as a special circumstance which may require the unequal division of this particular asset.

As Crowley notes, in Scotland “the legislature has deliberately enacted detailed guidelines with an underlying presumption of equal sharing to direct the court in a variety of circumstances, thereby providing quite predictable solutions to many, as yet, unheard cases.”<sup>85</sup> The legislation also limits the period of economic dependence between the parties. Under section 13 of the 1985 Act periodic maintenance is not automatically allowed and the legislature require that the court attempts to provide for the spouse using all other means, for example by transferring property or by granting a capital sum to the dependent spouse. If periodic maintenance is absolutely necessary, it must be justified under the section 9 principles and the payments must last no longer than three years after the granting of the divorce decree.<sup>86</sup> This is known as rehabilitative alimony and seems to be growing in popularity in a number of jurisdictions, for example, in England, which operates under a clean break divorce system. Section 25A(2) of the Matrimonial Causes Act 1973 obliges the courts to consider, whether it would be appropriate to make an order for a fixed term only of sufficient length, to enable the spouse in whose favour the order is made, to adjust without undue hardship to being financially independent of the other party.<sup>87</sup> Rehabilitative maintenance seems to be inextricably linked with the notion of clean break and there is at least some academic support for this type of maintenance in this jurisdiction. Power has stated he supports the English clean break approach as it allows for rehabilitative maintenance which involves “a continuing obligation for a certain period to enable a heretofore dependent spouse to get back on her feet.”<sup>88</sup>

After applying the principles laid down in section 9 of the 1985 Act, the decision in the divorce court must be reasonable, having regard to the resources of the parties.

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<sup>85</sup> Crowley, above n.64 at p. 26 (Part One).

<sup>86</sup> There have, however, been some exceptions in the case law. For example in *Johnstone v Johnstone* [1990] SLT 79 the court ordered a weekly periodical allowance order of £100 until the death or remarriage of the applicant wife.

<sup>87</sup> See Black, Bond, Bridge and Gribben, *A Practical Approach to Family Law* (8<sup>th</sup> edn., Oxford: University Press, 2007) p. 296. In *McFarlane v McFarlane* [2004] 2 All ER 921 and *Parlour v Parlour* [2004] 2 FLR 893 the court ordered that a clean break between the parties must be achieved but stated that it should take place over a period of 5 years, in which periodic maintenance should be paid to allow the parties to adjust. However in the former case it was held on appeal in the House of Lords that the period of 5 years was unlikely to be sufficient and the Lords stated that the onus should be on the payer to seek a variation as the circumstances changed.

<sup>88</sup> Power, above n.70 at 21. Power feels that this type of clean break can be described as a “clean break with a cushion” and is perhaps most the most appropriate type for adoption in this jurisdiction.

Reasonableness and fairness are at the centre of the 1985 legislation in Scotland and it is submitted that this, combined with the various useful guidelines, allows the judiciary to strike the balance between the desire for consistency and predictability and the all important desire for fairness and justice between the parties.

The Scottish legislation represents an interesting example of the benefits of a community property approach. In chapter five of this thesis this author will examine the community property regime which operates in British Columbia, Canada, and in particular how the British Columbian courts deal with the business assets of spouses upon divorce. Although Crowley is probably correct in arguing that such regimes could provide us with guidance in this jurisdiction, it should be noted that any move towards a community property regime in this jurisdiction may not be possible without a referendum due to the entrenchment of the “proper provision” requirement in our Constitution. However, it is submitted that even if a community property regime is not adopted in this jurisdiction, the criteria used in British Columbia to determine whether a business asset constitutes a matrimonial asset and the circumstances justifying an unequal distribution of such an asset may indirectly provide significant guidance in this jurisdiction as they can influence the formulation of specific guidelines on this particular issue.

This chapter has outlined the background to Irish Divorce legislation. It has discussed its principal objective and its discretionary nature. This chapter also outlined some of the criticisms and possible future developments in the area of matrimonial property law, more generally. The legislature undoubtedly had a difficult task in drafting the Divorce Act, as it had to strike a balance between the many important and competing interests involved in any divorce proceedings. However, divorce has been in existence in Ireland for well over a decade and it is time for some modernisation and improvement. We do not have a “clean break” divorce option in Ireland, we cannot define “proper provision” with any certainty, the judiciary has not been provided with any definite or helpful guidance with regard to the effective application of the section 20 factors, and ultimately, excessive discretion remains with the judiciary, giving rise to an unpredictable and incoherent body of case law. Legislative intervention is now required to curtail judicial discretion and increase coherency in this area of law. It is beyond the scope of this thesis to consider whether a community property approach or a clean break policy should be adopted in Ireland. This thesis is solely concerned with the treatment of business assets on divorce. However, it is clear that the Irish judiciary after *T v T* may be more inclined to implement some elements of a clean break

divorce, in particular, in an ample resource case. This development makes it imperative that we effectively deal with a spouse's business and company assets at the time of divorce. The most appropriate way to deal with these assets will be discussed in later chapters but some guidance will be taken from the experience of British Columbia, Canada, which operates a Community Property Regime.

It is clear from the legislation outlined above that the judiciary have, to date, been provided with very little guidance in relation to business assets and this area is in urgent need of legislative clarification. It is not entirely clear whether a property adjustment order or order for sale in relation to company or business assets is permissible, or when it will be appropriate. On the one hand, the above sections certainly do not prohibit such an order and given the emphasis on "proper provision" such an order may be necessary where it was required to make this provision. However, on the other hand, the principles of company law may prevail. The fly in the ointment of the treatment of company assets on divorce, is the doctrine of separate legal entity which shall be discussed in the next chapter and cases such as *McA v McA* suggest that the court will try to protect the ongoing business of a spouse. Interfering with the business assets of a spouse may in fact be counterproductive for both spouses, as it is not in anyone's interest to cause harm to the business, particularly where it is the main source of income for the family. This matter will be discussed in more detail in chapter three.

## Chapter Two - Company Law and the Doctrine of Separate Legal Personality

Chapter one of this thesis outlined the Irish law governing the provision of ancillary relief on divorce and set out the principles and factors which govern decision-making in this area of the law. The aim of this thesis is to examine the manner in which the courts treat business assets on divorce and, more particularly, assets owned by a company which is operated by one of the spouses to a divorce. It focuses on the point at which matrimonial property law and company law intersect. Valuable assets may not be held in the name of the spouse who runs the family business; instead they may be owned by a company – hence the difficulty in determining whether they can be re-distributed on divorce. To interfere with such assets would infringe a key principle of company law, that of separate legal personality. This chapter begins with an introduction to the doctrine of separate legal personality and an examination of the *Salomon*<sup>1</sup> case, which greatly broadened this concept. It explains the origin of the principle and the key justifications for its existence. A number of exceptions to this doctrine which emerged at common law will also be outlined, and most importantly for the purposes of this thesis, an attempt is made to place and rationalise the treatment of company assets on divorce within these exceptions, or indeed to justify the creation of a new exception, specific to the divorce context. It is submitted that although the lifting of the corporate veil can be justified in the divorce context by the ‘avoidance of legal obligations’ exception, but, given the uncertainty over whether future obligations are covered by this exception it would be advisable to specifically provide for such an exception in the Divorce Act 1996.

### Separate Legal Personality

As McCormack notes “it is a fundamental principle of company law that a company is a distinct entity, separate from its shareholders.”<sup>2</sup> Separate legal personality means “[a] body corporate ... is more than a mere aggregation of individual units: it constitutes a juristic or legal person with a legal identity separate and distinct from that of its individual shareholders

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<sup>1</sup> [1897] AC 22.

<sup>2</sup> McCormack, “Judicial Application of Salomon’s Case in Ireland” May 1984 Gazette 97 at 97. See also Von Wachter, “The Corporate Veil...” (2007) 157 NLJ 990 who stated: “the sanctity of the legal integrity and identity of companies has been protected with vigour by the courts which have a strong disinclination for anyone, let alone them, peering under the skirts of a company to examine its linen (dirty or otherwise).” (at p.990)

or members.”<sup>3</sup> It is a legal person, capable of suing and being sued, making profits and losses of its own and of holding property. It seems, “[a]s far as the law is concerned, a person is something which is capable of being the subject of rights and duties, regardless of its physical form.”<sup>4</sup>

It is clear, however, that a company can never truly think, act or function like a human being and it is here Courtney notes, “we encounter one of the fundamental idiosyncrasies of corporate dealings – they may only ever be carried out by human intervention...”<sup>5</sup> Thus, this company law rule cannot run consistently throughout all areas of law and while a company is a legal person in the commercial law context this is not true for the company in a criminal or a constitutional context. The company is not a natural person “and is consequently itself incapable of manifesting the morality or humanity which is integral in many crimes and constitutional rights.”<sup>6</sup> Courtney notes that there has been a marked reluctance to afford constitutional rights to the company,<sup>7</sup> however, he states, “[w]hatever a corporation’s constitutional rights, there is no doubt at all that the corporation as a creature of positive law, is obliged to observe constitutional duties.”<sup>8</sup> In the case of *Meskill v CIE*<sup>9</sup> the breach of such a duty gave rise to compensation in damages. The defendant company made membership of a trade union a condition of employment and the court held that the company had breached the plaintiff’s constitutional right of dissociation. For the purposes of this thesis, it could be argued that making proper provision in the context of a divorce must be viewed as a constitutional duty, but it is questionable whether such a duty can be enforced by a dependant spouse against a company for the obvious reason that the company has not married the dependant spouse.

It is also interesting to note that when a court is assessing whether a company is guilty of a criminal offence it will often go behind the corporate veil to find the true culprit and whether this “culprit” can be described as the brains of the company.<sup>10</sup> Thus a breach of criminal law

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<sup>3</sup> Courtney, *The Law of Private Companies*, (2<sup>nd</sup> edn, Dublin: Tottel Publishing) p 162.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

<sup>6</sup> *Ibid* at 163.

<sup>7</sup> *Ibid* at 190.

<sup>8</sup> *Ibid* at 191.

<sup>9</sup> [1973] IR 121

<sup>10</sup> *HL Bolton (Engineering) Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159 at 173. Lord Denning “Some people of a company are mere servants or agents....[o]thers are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by the law as such.” In *R v ICR Haulage Ltd* [1944] KB 551 the company

gives rise to a unique situation in company law where the separate legal entity of a company can be disregarded. The question which this thesis considers is whether divorce law could, particularly considering the fact that proper provision has constitutional footing, also give rise to a unique situation where the corporate veil may be avoided.

### **Consequences of Separate Legal Personality and Salomon**

Numerous consequences flow from the concept of separate legal entity. One such consequence is that a shareholder has no proprietary interest in the company.<sup>11</sup> As Hicks notes, if a shareholder “insures the company’s assets in his own name he cannot make a claim on the insurance policy as he has no insurable interest in them.”<sup>12</sup> One of the most significant advantages of incorporation and one of the main reasons that companies incorporate is the availability of limited liability. This aspect of incorporation has allowed for economic growth and the development of many industries and businesses which otherwise may never have been established.<sup>13</sup> The Limited Liability Act was passed in 1855 and it brought innumerable advantages and support to companies and has gone a long way in encouraging entrepreneurship. This doctrine, however, can lead to injustice and unfairness in particular for the creditors of the company in question.

The doctrine of separate legal personality was expanded by the English House of Lords in *Salomon v A Salomon & Co Ltd*.<sup>14</sup> Since the case of *Salomon v Salomon*,<sup>15</sup> a company may be a “one man company” with one shareholder (and nominees) and still avail of all of the advantages of the doctrine of separate legal personality. In this case Aron Salomon held 20,001 of the issued shares and the remaining six shares were held by family members as nominees for Salomon. Therefore, the company was *de facto* a “one man company.” The company was confronted with a number of difficulties and, in order to help keep the company

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and nine other persons were convicted of common law conspiracy to defraud. It was found that the criminal acts of the managing director were the criminal acts of the company. In *R v Kite and OLL Ltd* Winchester Crown Court, 8<sup>th</sup> December 1994, the one man in the “one man company” was convicted of manslaughter and so the company was found to be liable. Also see *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 and McCarthy J in *Taylor v Smyth* [1991] IR 142.

<sup>11</sup> See Pedley, “Hints for Hungry Litigators” (2005) 155 NLJ 702 for discussion of the characteristics of the doctrine of separate legal personality and its consequences.

<sup>12</sup> Hicks and Goo, *Cases and Materials on Company Law*, (6<sup>th</sup> edn, New York: Oxford University Press, 2008) p 100. See also the case of *Macaura v Northern Assurance Co.* [1925] AC 619, where the plaintiff transferred his business to a company but left the insurance policy on the company’s stock in his own name. The stock was destroyed in a fire. It was held that he could not claim on the insurance policy because he did not have the requisite insurable interest in the stock. The stock belonged to the company and not the plaintiff.

<sup>13</sup> See Courtney, *The Law of Private Companies, op.cit.*, at 194-196 for further discussion.

<sup>14</sup> [1897] AC 22.

<sup>15</sup> *Ibid.*

afloat, Salomon arranged a loan for the company which was secured by a further mortgage. The mortgage interest subsequently fell into arrears and the company went into liquidation. The company's liabilities exceeded its assets by £7,733. When the company went into liquidation Salomon was its only secured creditor and held a number of debentures securing this debt. If the debenture holder was to be paid the unsecured trade creditors would get nothing.

At first instance Vaughan Williams J<sup>16</sup> held that the company was an agent of Aron Salomon and that was the purpose of transferring his business to the company. He felt therefore that Aron Salomon himself should have to indemnify the creditors of the company. In the Court of Appeal Salomon was again found personally liable, as the three presiding judges were of the opinion that the company in question was a wholly unwarranted perversion of the Companies Act.<sup>17</sup> Aron Salomon appealed to the House of Lords, which was to set a very famous and long lasting precedent, one which was to be the subject of much debate amongst academics, lawyers and the judiciary for many years, decades and even centuries into the future.

Lord Halsbury refuted the agency claims of the Court of Appeal stating:

I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence – quite apart from the motives or conduct of individual corporators.<sup>18</sup>

He concluded that individuals could organise their affairs as they wish and they were entitled to all the benefits of limited liability. He stated that in the instant case all requirements of the Companies Act 1862 had been complied with including the requirement under the Act that the company have at least seven members. He went on to note that there may be exceptions to the rule against lifting the corporate veil saying:

... I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed...<sup>19</sup>

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<sup>16</sup> Reported *sub nom Broderip v Salomon* [1895] 2 Ch 323 at 323.

<sup>17</sup> *Ibid.*

<sup>18</sup> [1897] AC 22 at 30.

<sup>19</sup> *Ibid.*

He also rejected outright the submissions of the Court of Appeal saying:

I am wholly unable to follow the proposition that this was contrary to the true intent and the meaning of the Companies Act. I can only find the true and intent and meaning of the Act from the Act itself; and the Act appears to me to give a company a legal existence with, as I have said, rights and liabilities of its own, whatever may have been the ideas or schemes of those who brought it into existence ... Either the limited company was a legal entity or it was not. If it was, the business belonged to it and not to Mr Salomon. If it was not, there was no person and no thing to be an agent at all; and it is impossible to say at the same time that there is a company and there is not.<sup>20</sup>

His Lordship, with the agreement of Lord Hershell and Lord MacNaghton, therefore absolved the appellant of any personal liability. Lord Davey acknowledged “any jury” would find that the other shareholders in question could be described as dummies.<sup>21</sup> However, he said that there was nothing in this case to suggest that the company in question was a sham. The appeal was allowed, priority was given to Salomon’s debentures and the principle that a “one man company” is entitled to all of the benefits of separate legal personality was born.<sup>22</sup>

The de facto “one man company” was specifically recognised shortly afterwards in the Companies Act 1907. As Courtney notes the legislation does not insist “that the subscribers must be independent of one another or that one of the subscribers should not be a nominee to the other.”<sup>23</sup> This was a highly significant development in company law and as noted by Gower it “opened new vistas to company lawyers and the world of commerce.”<sup>24</sup> Incorporation would now be available to both the sole trader and the partnership which was a drastic expansion of the law. As Hicks notes the *Salomon* case “has never since been seriously questioned or reviewed by the legislature and has been vigorously reaffirmed by the courts as an invariable principle, even where the sole shareholder is a company and the subsidiary undercapitalised.”<sup>25</sup> As Keane notes *Salomon’s* case established a general principle of company law, stating the “control of a company, however extensive, cannot

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<sup>20</sup> *Ibid* at 31.

<sup>21</sup> *Ibid* at 55.

<sup>22</sup> Gower has noted the effect of the introduction of this doctrine and stated, “[t]he case of *Salomon v A. Salomon and Co* ... laid down the corporate entity principle with such rigor that English judges have found much greater difficulty than their American colleagues in piercing the corporate veil when public policy so demands.” See Gower, “Some Contrasts Between British and American Corporate Law” (1956) 69 Harv. L. Rev. 1369 at 1379.

<sup>23</sup> Courtney, *The Law of Private Companies, op.cit.*, at 165.

<sup>24</sup> Gower, *Principle of Modern Company Law*, (5<sup>th</sup> edn, London: Sweet and Maxwell, 1992) at 87.

<sup>25</sup> Hicks and Goo, above n.12 at 101.

justify the inference that the company and the shareholder are to be treated as one legal entity.”<sup>26</sup>

Since this case the courts have rigorously applied the *Salomon* rule. It has been applied by English courts in *Lee v Lee’s Air Farming Limited*<sup>27</sup> and by an Irish court in *Irish Permanent Building Society v Registrar of Building Society and Irish Life Building Society*<sup>28</sup> and the Irish Supreme Court in *Re Fredricks Inn*.<sup>29</sup>

Gower describes the case of *Lee v Lee’s Air Farming Limited*<sup>30</sup> as “[p]erhaps the most extreme illustration of the refusal to lift the veil.”<sup>31</sup> In this case Lee had formed a company to carry on his business. He was the beneficial owner of all of the shares in this business and he was the “governing director” of the company. He caused the company to insure against liability to pay compensation under the Workmen’s Compensation Act. He was later killed in a flying accident. The Court of Appeal held that his wife was not entitled to compensation as Lee could not be described as a “worker” within the meaning of the Act. The Privy Council reversed the decision, however, finding that Lee and the company were distinct legal entities and therefore the ruling of the Court of Appeal could not stand.

## Exceptions

Since *Salomon*, many have argued that a strict application of the principle may be harsh and unjust in certain circumstances. Howell notes that a balance must be struck between the competing interests of the company and its creditors. She says:

A separate corporate legal entity is seen as a desirable foundation for company law, inducing investment, encouraging trade and therefore stimulating wealth creation. Creditors may be exposed to the transferred risk but, on balance society

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<sup>26</sup> Keane, *Company Law*, (4<sup>th</sup> edn, Dublin:Tottel Publishing, 2008) p 122. See cases such as *Roundabout v Beirne* (1959) IR 243, *Lee v Lee’s Air Farming* [1961] AC 12 and *Macaura v Northern Insurance Co.* [1925] AC 619 which adopt a very strict application of the *Salomon* principle. See also Scanlon, “The Salomon Principle” (2004) 25(7) Comp. Law 196 for a discussion of some of the positive and negative aspects of this principle. He argues that limited liability should be regarded as a privilege rather than a right and the law needs to go further in providing protection for the unsecured creditors of a company.

<sup>27</sup> [1961] AC 12.

<sup>28</sup> [1981] IRLM 242.

<sup>29</sup> [1994] 1 IRLM 387. McCormack above.2 at 97 notes that the doctrine has “received forthright judicial recognition in this jurisdiction.”

<sup>30</sup> [1961] AC 12.

<sup>31</sup> Gower, *Principle of Modern Company Law*, *op-cit.*, at p 124.

will gain. If however, the veil of incorporation is used to facilitate wrongdoing this behaviour will not result in a benefit for society.<sup>32</sup>

Other academics have also expressed their concern for the innocent creditor. Moore notes, “the wide scope for exploitation of the companies legislation resultant upon strict adherence to *Salomon* has forced the courts to forge a limited range of exceptions.”<sup>33</sup> However, Moore notes, “[o]ne of the most uncertain and, as a result, disputed issues in English Company law is the circumstance in which the court will be justified in disregarding the autonomous legal personality of a registered company”<sup>34</sup> This author will now outline some of the common law exceptions and discuss the uncertainty that pervades this area of law. A discussion of these exceptions is necessary as it will provide some understanding of the type of situation in which the court is willing to lift the corporate veil. While these examples may not be directly relevant within the divorce context, they provide us with an insight into the importance of the corporate veil in the company law courts. The exceptions highlight both the courts’ reluctance to lift the corporate veil but at the same time provide examples of the types of rights and obligations which may take priority over the corporate veil. It is also worth mentioning that a number of statutory exceptions have been set out by the Company Act 1963 and 1990 mainly to deal with company officers who have engaged in fraudulent or reckless trading or other reckless activities.<sup>35</sup>

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<sup>32</sup> Howell, “Salomon Under Attack” (2000) 21(10) Comp. Law, 312-314. See also Kahn-Freund, “Some Reflections on Company Law Reform” (1944) 7 MLR 54 for criticisms regarding the operation of the corporate veil.

<sup>33</sup> Moore, “A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of *Salomon v Salomon*” (2006) JBL 180 at 181. See also Fairclough, “Company Law: lifting the veil of incorporation” (1992) 3(10) JIBL 192-193.

<sup>34</sup> Moore, above n. 33 at 180.

<sup>35</sup> Section 297 of the Companies Act 1990, created a situation where an officer of a company such as a director can be declared personally responsible, without limitation of liability, for all or part of the debts of the company, where it appears that, while he was an officer, he was knowingly a party to the carrying on of the business of the company in a reckless manner or where a person was knowingly party to the carrying on of any business of the company with intent to defraud its creditors or for any fraudulent purpose. Section 114 of the Companies Act 1963 provides that where an officer of the company or any other person on the companies behalf signs any bill of exchange, promissory note, cheque or order for money or goods “wherein its name (that of the company) is not mentioned... he shall be liable to a fine ... and shall be further personally liable to the holder of the bill of exchange (etc) ... for the amount thereof unless it is duly paid by the company. Section 202 of the Companies Act 1990 requires that every company will keep proper books of account. Section 204 provides for personal liability if the directors fail to do this. Section 256 of the Companies Act 1963 allows for the separate legal entity to be disregarded where the directors make an unreasonably inaccurate declaration of solvency. Section 251 of the Companies Act 1990 allows the numerous remedies provided for in the Acts, for example the reckless trading remedy, to be invoked by creditors and members even where the company is not being wound up.

### *Common Law Exceptions to the Salomon Principle*

Despite the mass of judgements dedicated to the strict application of the *Salomon* principle, a number of exceptions to the principle also began to emerge in the courts in its aftermath. In the 1970s and 1980s the courts began to disregard the separate legal personality of companies “on the basis that the ‘justice of the case’ so required.”<sup>36</sup> Even as recent as 1985 in *Re A Company Ltd*<sup>37</sup> the English Court of Appeal stated:

In our view the cases ... show that the court will use its power to pierce the corporate veil if it is necessary to achieve justice irrespective of the legal efficacy of the corporate structure.<sup>38</sup>

As Courtney notes, “[t]hough the courts were cautious in the application of this approach, it gave the impression that *Salomon’s* case was losing importance.”<sup>39</sup> This very general exception set out in *Re A Company Limited* was rejected outright in the case of *Adams v Cape Industries plc*.<sup>40</sup> The Court of Appeal held that the courts were not generally free to disregard the separate legal entity of a company on what Courtney describes as the “vague and elusive ‘justice of the case’ criterion.”<sup>41</sup> This decision was inevitable as the “justice of the case” exception was too general and left too much discretion to the judiciary, thus making it difficult to create a consistent body of case law and guidelines for a future presiding judge.

Keane refers to the exceptions that now exist and argues “it is not easy to extract any general principle underlying the cases.”<sup>42</sup> Keane therefore does not provide us with a single general principle but rather a series of principles for lifting the veil that the courts have generally followed in the last number of years. The veil will be lifted in circumstances where an agency relationship can be inferred<sup>43</sup> or where a number of companies constitute a single economic entity.<sup>44</sup> These exceptions are unlikely to be relevant in a divorce context.

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<sup>36</sup> Courtney, *The Law of Private Companies, op-cit.*, at 202-203.

<sup>37</sup> [1985] 1 BCLC 333.

<sup>38</sup> *Ibid* at 337-338.

<sup>39</sup> Courtney, *The Law of Private Companies, op-cit.*, at 202.

<sup>40</sup> [1990] Ch. 433.

<sup>41</sup> Courtney, *The Law of Private Companies, op-cit.*, at 203.

<sup>42</sup> Keane, *Company Law, op-cit.*, at 129.

<sup>43</sup> See *Smith Stone and Knight v Birmingham Corporation* [1939] All ER 116 and *Adams v Cape Industries* [1991] 1 All ER 116.

<sup>44</sup> See *DHN Food Distributors Ltd v Tower Hamlet London Borough Council* [1976] All ER 462, *Power Supermarkets Limited v Crumlin Investments Limited and Dunnes Stores (Crumlin) Ltd* Unreported, High Court, 22<sup>nd</sup> June 1981 and *The State (McInerney & Co. Ltd) v Dublin County Council* [1985] IRLM 513.

Keane also notes that the veil can be lifted in circumstances of fraud or impropriety.<sup>45</sup> It is interesting that divorce legislation specifically confers powers on the court to interfere with dispositions which were intended to fraudulently avoid the jurisdiction of the court to make ancillary relief. Clearly if a spouse sought to avoid a property adjustment order by transferring an asset into the name of a company the court would intervene and set aside the transaction. This anti-avoidance jurisdiction is set out section 37 of the Divorce Act.

Keane also submits that the veil may be lifted where incorporation took place to avoid contractual or other legal obligations. This exception is sometimes referred to as the “sham” exception, as the newly formed company is regarded as a “sham” which is formed to avoid existing legal obligations. It is submitted that this exception is more interesting for the purposes of this research as, although it appears to be very narrowly construed, it comes closest to forming the basis for legislative intervention in the divorce context.

#### *Avoidance of Contractual or other Legal Obligations*

As noted by Gallagher<sup>46</sup> it seems that the courts draw a distinction between the avoidance of existing legal obligations and the avoidance of future legal obligations. In the former case they are inclined to lift the veil while in the latter situation they are not. This distinction creates particular difficulties in the context of divorce as shall be discussed below.

In *Cummins v Stewart*<sup>47</sup> the defendant attempted to escape his legal obligation to pay his royalties to the plaintiff under a licence agreement by transferring the licence to a company. Meredith MR stated:

[I]t would be strange indeed, if that code could be turned into an engine for the destruction of legal obligations and the overthrow of legitimate and enforceable claims.<sup>48</sup>

In *Gilford Motors Co Limited v Horne*<sup>49</sup> the defendant entered into an agreement with his employer company which prevented him from canvassing their customers for business in the event that he left the company. He left the business and a week later his wife and son set up a

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<sup>45</sup> See for example *Re Bugle Press* [1961] Ch 270. When the minority shareholder in the company refused to sell his shares, the majority shareholders in a company transferred their 90% shareholding in the company to a new company so that they could compulsorily acquire the 10% shareholding from the minority shareholder. This was regarded as fraudulent behaviour, the veil of the new company was lifted and the transaction set aside.

<sup>46</sup>Gallagher, “A Company’s Separate Legal Personality – Lifting the Corporate Veil” (2005) 23 ILT 167 at 168.  
<sup>47</sup>[1911] 1 IR 236.

<sup>48</sup> *Ibid*

<sup>49</sup> [1933] Ch 939.

company to carry on business in competition with the plaintiff. Horne was neither a registered shareholder, nor a director of the company; however he controlled the company and used it as a vehicle for canvassing. The court held that he could not be allowed to do this. Lord Hanworth commented that the new company:

... was formed as a device, a stratagem in order to mask the effective carrying on of the business of Mr. Horne. The purpose of it was to try to enable him under what is a cloak or a sham to engage in business in respect of which he had a fear that the plaintiffs might intervene and object...<sup>50</sup>

In *Jones v Lipman*<sup>51</sup> a similar scenario came before the court. The defendant had contracted to sell his house to the plaintiff and subsequently tried to avoid a decree of specific performance by transferring the house to a company which had been formed by him. Russell J granted a remedy of specific performance to the plaintiff stating that the company was “the creature of the first defendant, a device and a sham, a mask which he holds before his face in an attempt to avoid recognition by the eye of equity.”<sup>52</sup>

The case of *Re H*<sup>53</sup> concerned a group of family companies and orders obtained by the Customs and Excise under section 77 of the Criminal Justice Act 1988 to restrain dealings in certain properties as a result of the defendants supposed involvement in tax fraud amounting to £100 million. The defendants applied to the court to restrain the receiver from disposing of the properties in question. They contended that the property was owned by the two family companies and was not realisable property of the defendants under the 1988 Act. The Court of Appeal found however that given the nature of the companies, ie. the fact that they were run by the defendants as a family business, it was appropriate to regard their property as property of the defendants. The orders were therefore upheld. This is an interesting judgment, as it begs the question as to whether the veil is more likely to be lifted in the case of a family company than another type of incorporation.

This author finds it difficult to reconcile the findings of the above cases with the following case. In *Roundabout Ltd v Beirne*<sup>54</sup> a new company was set up to prevent the picketing of a licensed premises. A trade dispute is defined by the Trade Disputes Act 1906 as “a dispute between employers and employees.” The picketing staff who had been dismissed had never

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<sup>50</sup> *Ibid* at 956.

<sup>51</sup> [1962] 1 All ER 442.

<sup>52</sup> *Ibid* at 445. These principles were recently applied by Murphy J in the Irish case of *Mastertrade (Exports) Ltd and Others v Phelan* [2001] IEHC 171.

<sup>53</sup> [1996] 2 All ER 391.

<sup>54</sup> [1958] IR 423.

been employed by the newly formed company and thus the picketing couldn't be defined as a trade dispute for the purposes of the Act. The defendants urged the court to look behind the corporate veil and see the realities of the situation that the same family continued to own and control the business. Dixon J described the creation of the new company as a "legal subterfuge" but a successful legal subterfuge. He stated:

The new company is in law a distinct entity, as is the old company. Each company is what is known as a legal person. I have to regard the companies as distinct in the same way as I would regard two distinct individuals. I must, therefore, proceed on the basis that a new and different person is now in occupation of the premises and carrying on business there.<sup>55</sup>

It seems that the owners in this case were successful in using the benefits of incorporation to prevent others enforcing what are supposed to be their legal rights. Thus it is submitted that Moore was correct in stating, "the general reasoning of the courts in this area has been confusing, and at times, contradictory."<sup>56</sup>

The above exception does not apply however where incorporation takes place to avoid *future legal obligations*. This was clarified by the House of Lords judgment in *Adams v Cape Industries plc*.<sup>57</sup> The defendant company presided over a group of companies which were involved in the mining of asbestos in South Africa. They marketed the asbestos in the US and other countries. At one point, Cape had a supply subsidiary in America which went into liquidation after a settlement for asbestos related injuries. It was then taken over by CPC, which was not a subsidiary of Cape but did receive financial assistance from them along with instructions from Cape's agent from time to time. A large number of employees brought actions in a Texas Court claiming that the mining of asbestos had damaged their health. After being awarded more than \$15 million they sought to have the judgment enforced in the English Courts. The plaintiffs contended that Cape had done business in America through CPC which they argued was controlled indirectly by Cape (even if it was not an actual subsidiary of Cape). However the Court refused to "lift the veil" in this case. Slade J said:

We do not accept as a matter of law that the court is entitled to lift the veil as against the defendant company which is the member of a corporate group merely because the corporate structure has been used so as to ensure that legal liability (if any) in respect of particular future activities of the group (and correspondingly

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<sup>55</sup> [1958] IR 423.

<sup>56</sup> Moore, above n.33 at 183.

<sup>57</sup> [1991] 1 All ER 929.

the risk of enforcement of that liability) will fall on another member of the group rather than the defendant company.<sup>58</sup>

Slade LJ continued, “save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v Salomon* merely because it considers that justice so requires.”<sup>59</sup> Thus, even in this case where the court was reinforcing the importance of the *Salomon* case, it acknowledged that other contracts and statutes could take precedence over the rule. The case set a very high standard for lifting the veil under this exception. The judges acknowledged that the company in question was “clearly a façade”<sup>60</sup> but declined to lift the veil. Moore notes that this exception has now been narrowed substantially as a result:

It is suggested that the test for piecing the corporate veil propounded by Slade LJ in *Adams*, allowing the independent legal existence of a corporate entity to be disregarded by a court only in a narrow and arbitrarily defined range of cases, is doctrinally unsustainable. The authorities underpinning what has become known as the ‘sham’ exception to *Salomon* suggest, rather, a wider ambit of possible cases in which the separate legal personality of a company may be disregarded so as to expose opportunist usages of the corporate veil by individual or corporate traders.<sup>61</sup>

Moore suggests that this exception should be availed of in any case where the incorporator incorporates with the ultimate purpose of shielding him/herself “from actual or potential legal reproach, without concern for any wider or longer strategic goal of the business enterprise of which it is part.”<sup>62</sup> While the current caselaw indicates that future legal obligations will not be sufficient to justify lifting the veil, there appears to be a call for a broader exception to the rule. Although Moore specifically mentions both “actual” and “potential” obligations as a justification for lifting the veil, he suggests that it must appear to the court that there is an absence of a “wider or longer strategic goal of the business enterprise.” This may be difficult to prove in any case as incorporation brings many advantages to a business which

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<sup>58</sup> *Ibid* at 1026.

<sup>59</sup> *Ibid* at 1019.

<sup>60</sup> *Ibid* at 1025.

<sup>61</sup> Moore, above n.33 at 203. The courts have put a further limitation on this exception. As Courtney notes “Where the controllers of a company have been guilty only of *mismanagement*, it appears that the court will not disregard the separate legal personality of the company so as to make them personally liable for the company’s obligations.” See Courtney, *The Law of Private Companies, op-cit.*, at p 221. This was illustrated in the case of *Dublin County Council v Elton Homes Limited* [1984] ILRM 297. Barrington J stated: “If this case were one of fraud, or if the directors had siphoned off large sums of money out of the company, so as to leave it unable to fulfil its obligations, the court might be justified in lifting the veil of incorporation and fixing the directors with personal responsibility. But that is not the case... The worst that can be imputed against them is mismanagement.”

<sup>62</sup> Moore, above n.33 at 203.

subsequently incorporates. For example, there are significant tax advantages, ownership becomes easily transferable and it is easier for a company to raise finances and to obtain a loan.

It is submitted, however, that this exception could form the basis for legislative intervention in a divorce context which would specifically authorise the lifting of the corporate veil where necessary and appropriate to prevent a spouse from using a corporate body to avoid their future obligations or to minimise the extent of these obligations under divorce legislation.

### **The Application of Salomon Elsewhere**

This thesis will examine the treatment of business assets on divorce by the English Courts and those in British Columbia. It is important therefore to outline the position in relation to separate legal personality in both of these jurisdictions. As the Irish law on separate legal personality has evolved from the English law in this area, it is unnecessary to discuss in further detail the operation of the doctrine in the latter jurisdiction. As is the case in Ireland and England, in general the Canadian courts have strictly applied the *Salomon* principle and Canadian corporate legislation<sup>63</sup> now expressly permits the creation of a separate legal entity. This author will now examine some of the case law relating to the exceptions to the doctrine of separate legal entity in British Columbia.

Similar to other jurisdictions there seems to be a considerable amount of uncertainty in relation to the common law exceptions. In British Columbia in *B.G Preeco I (Pacific Coast) Ltd v Bon Street Holdings Limited*<sup>64</sup> the plaintiff entered into negotiations for the sale of land to Bon Street Developments Ltd. Bon Street Developments Ltd subsequently changed its name to Bon Street Holdings Ltd. The name Bon Street Developments Limited was adopted by a shell company, which had no assets. In both companies directors Kaplan and MacDonald, were directors and beneficial owners of the shares of each company. The above contract for the sale of land was then concluded with the new Bon Street Developments Ltd. The court explains the agreement as follows:

In May, an interim agreement was entered into by the new company offering a \$100,000 deposit and a \$4,200,000 price. If accepted by the plaintiff, the property would not be available for sale to others during the “Expo window.” Therefore, the plaintiff was anxious that the sale be firm and required Ort to ensure that this was a “recourse purchase.” That meant that it was to a buyer who was bound to

<sup>63</sup> Section 15(1) Canada Business Corporations Act 1985.

<sup>64</sup> (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258.

buy and who had sufficient assets so that it would either complete the contract or be able to bear the loss that would flow from a breach of the contract.<sup>65</sup>

The company defaulted as they had no assets with which they could purchase this particular property and the plaintiffs succeeded in getting a judgment against Bon Street Developments Ltd for breach of contract and against Kaplan and McDonald for fraud.

The defendants appealed and the plaintiffs cross appealed for a larger sum against Kaplan, MacDonald and Bon Street Holdings Ltd. The British Columbian court found that the defendants were liable for the tort of deceit, but despite this did not find that it was an appropriate case to justify lifting the veil. Farrar clarifies the findings stating: “[W]hile the court showed a willingness to find the tort of deceit, it rejected a broader-based argument that company law does not protect principals of a company who act fraudulently or dishonestly and in such cases will lift the corporate veil to fix liability on the principals.”<sup>66</sup> Seaton JA referred to the allegations of the plaintiffs that the company was a sham but then referred to the submissions of the trial judge where he stated:

Furthermore, the fact that the principals of the company may have intended even at the time of undertaking the obligation on behalf of the company to take advantage of the limited liability of the company if it suited their purposes does not per se make the company a sham, i.e. does not expose its principals to liability for the company’s obligations.<sup>67</sup>

Seaton JA noted the cases submitted by the plaintiff’s counsel to support their argument that the company was a sham, but Seaton JA stated that while the cases used corporate veil language, they were unhelpful as, in essence, they were based on holding out, estoppel or agency.<sup>68</sup> Seaton JA said that he did not believe in applying the “Deep Rock Doctrine”<sup>69</sup> which permits the corporate veil to be lifted in circumstances where it would be unfair to do otherwise.<sup>70</sup> He felt that this doctrine and the principles of the *Salomon* case cannot co-exist.<sup>71</sup> The facts of this case, on its face at least, seem to come very close to the facts of the aforementioned English case of *Jones v Lipman*<sup>72</sup> in which the defendant sought to avoid his contractual obligations to sell a house. In that case the veil was lifted and specific

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<sup>65</sup> *Ibid* at para 10.

<sup>66</sup> Farrar, “Fraud, Fairness and Piercing the Corporate Veil” (1989-1990) 16 Can. Bus. LJ 474 at 474-475.

<sup>67</sup> (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258 at para 32.

<sup>68</sup> *Ibid* at paras 34-35. See also the following cases, which were relied on by the plaintiff: *Covert v. Minister of Finance of N.S.*, [1980]. 2 S.C.R.774, (sub nom. *Re Jodrey; Covert v. Minister of Finance (N.S.)*) 8 E.T.R. 69, [1980] C.T.C.437, 41 N.S.R. (2d) 181, 76 A.P.R. 181, 32 N.R. 275,

<sup>69</sup> Named after the case reported at (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258 at para 37.

<sup>70</sup> See *Pepper v. Litton*, 308 U.S. 295, 84 L. Ed.281 (1939)

<sup>71</sup> (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258 at para 37.

<sup>72</sup> [1962] 1 All ER 442.

performance of the contract was granted. Seaton JA cited the above English case with approval<sup>73</sup> but said that the present case could be distinguished. He stated:

In this case the plaintiff knew it was dealing with a company. The fraud found by the trial Judge caused the plaintiff to believe that the company had assets that it, in fact, did not have. That has nothing to do with the corporate veil. The use of a company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil... In my view, the proper remedy is not to lift the corporate veil, but to award damages for fraud against the individuals and the company that committed the fraud. That is what the trial Judge did.<sup>74</sup>

He continued to state: “Lifting the veil is no help – when it is lifted the old company is not to be seen. Neither company had shares in the other.”<sup>75</sup> While this case does seem to have very unique and specific circumstances, it is argued that nonetheless it seems to be quite a strict application of the *Salomon* principle. The individuals in the case committed a fraud in misrepresenting the assets which their company held. They had to have been aware upon creating this “shell company” that it would not have sufficient assets to complete the purchase that it was contractually obligated to complete.

In *Goldman, Sachs & Co v Sessions et al.*<sup>76</sup> the British Columbian Court of Appeal again refused to lift the corporate veil. The plaintiff put forward the “alter ego” plea in relation to the companies Kerdos and AWS. The court cited the case *Ian J Ward & Co. v Gilbert*<sup>77</sup> where it was stated:

Inroads into the corporate entity principle are few compared with examples of its application... In general the courts regard themselves as precluded by *Salomon*’s case from treating a company as the agent, trustee or nominee’ of its members... However they are prepared to recognise that a company is an alias of its members when corporate personality is blatantly used as a cloak for fraud for improper conduct...

Thus quite a restrictive view prevails in British Columbia in relation to lifting the corporate veil. Perhaps it could be said that a stricter approach is applied in British Columbia than that adopted in Ireland and England. However, it is certainly clear that similar to the UK and Ireland the “law is in a state of flux.”<sup>78</sup> The available exceptions seem to be limited to the

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<sup>73</sup> (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258 at para 43.

<sup>74</sup> *Ibid* at para 49-50.

<sup>75</sup> *Ibid* at para 51.

<sup>76</sup> (1999) CanLII 5749 (BCSC).

<sup>77</sup> Vancouver No. CA012064 (9 November 1990) BCCA at p 3-4.

<sup>78</sup> Farrar, above n.66 at 479.

“fraud” exception and, even at that, there must be a very clear and definite case of fraud. Nicholls notes: “When Canadian courts – in rare instances- stand ready to disregard the corporate entity, they are often at some pains to show how the case at hand falls outside the teaching of *Salomon*.”<sup>79</sup> Despite this, it shall become clear in chapter five that the courts are willing to make exceptions in the family law context. The similarities between British Columbia and Ireland in their strict application of the doctrine of separate legal personality renders a comparison between how both jurisdictions deal with company assets on divorce more valuable.

### Criticisms of *Salomon*

In 1897 the House of Lords were faced with the interpretation of a relatively new statute. Whether the above interpretation in the *Salomon* case was exactly what was intended by the legislature is unknown. Some argue that the doctrine of separate legal personality has been expanded to a dangerous extent. In saying that, over a century later the legislature has yet to legislate against this decision. Hicks has defended the Lords in *Salomon* to a certain degree:

In defence of the courts, it was perhaps for the House of Lords to interpret the law as expressed by Parliament without anticipating the long-term consequences of its decisions... The primary policymakers responsible for reviewing the overall impact of the law are of course governments and the legislature.<sup>80</sup>

It is submitted that the opinions of Kahn-Freund are of particular interest and cannot go unmentioned in this debate. He firstly acknowledges the economic advantages of separate legal personality. He notes

The privileges of incorporation and of limited liability were originally granted in order to enable a number of capitalists to embark upon risky adventures without shouldering the burden of personal liability. There was, in the second half of the nineteenth century, a definite commercial need for those measures which the various Companies Acts introduced.<sup>81</sup>

They succeeded in making the starting of a new and risky business, more appealing and more achievable for many entrepreneurs in a time of economic uncertainty. Indeed it should be

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<sup>79</sup> Nicholls, “Beyond the Veil: *Wildman v Wildman*” (2007) 44 Can. Bus LJ 448 at 450.

<sup>80</sup> Hicks and Goo, above n.12 at 101. He further states at p.96, “[T]he *Salomon* case was a struggle between form and substance; whether to interpret the law literally or whether to consider more its presumed spirit and intention.”

<sup>81</sup> Kahn-Freund, “Some Reflections on Company Law Reform” (1944) 7 MLR 54 at 54. See also Courtney, *The Law of Private Companies, op-cit.*, at 196-196. He states, “Limited liability is an extremely significant consequence of incorporation, and one of the principle reasons why most businesses incorporate in the first place.”

noted that the limited liability which attaches to private companies is still an important and fundamental aspect of company law that will be particularly important while our economy attempts to crawl out of recession.

However, Kahn-Freund refers to *Salomon* as a “calamitous decision” arguing that the courts have failed to see through “the rigidities of the “folklore” of corporate entity in favour of the legitimate interest of a company’s creditors.”<sup>82</sup> He submits the “metaphysical separation between a man in his individual capacity and his capacity as a one-man company can be used to defraud his creditors”<sup>83</sup> Essentially he is arguing in his article that the courts have taken the application of this principle too far and this extensive application has been and will be to the detriment of creditors. The main issue with the *Salomon* decision is that the company in question was owned and controlled by one person, who had the freedom and decision making power of a sole trader and the benefit of the lower risk environment associated with the private limited company. It should be noted at this point that this author feels that to allow the application of the doctrine without exception in the divorce context would lead to a further, unjust and excessive application of the doctrine.

Although the *Salomon* decision shows that the courts are keen to apply the protection of limited liability, even where such a ruling will leave significant losses to the innocent creditor, Kahn Freund notes that they have no problem in allowing “the veil of incorporation” to be lifted where it affects the application of other types of law such as tax law. He argues

It is not as if the Courts have been unable to look behind the curtain of “corporate personality” when they are minded to do so. In the law of income tax, the paramount needs of the national exchequer have induced the Parliament to tear to shreds the veil of corporate entity where it was used as a cloak for tax avoidance or evasion.<sup>84</sup>

It may be argued that a tax evasion case may come under the now well accepted fraud exception; however, there have been some tax related cases where the actions of the parties may not be regarded as fraudulent.<sup>85</sup> If the courts allow for an exception where tax payments

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<sup>82</sup>*Ibid* at 55.

<sup>83</sup>*Ibid* at 56. See also Moore, above n.33. See also Hicks, “Limiting the rise of limited liability” in Hicks and Goo, *Cases and Materials on Company Law*, (New York: Oxford University Press, 2008) at p 101 where he refers to the opinions of W.S. Gilbert who “was of the view that incorporation with limited liability tended to have the adverse effect of transferring uncompensated trading risks to creditors.”

<sup>84</sup>*Ibid* at 55

<sup>85</sup> For example in *Canada Rice Mills v R*<sup>85</sup> the court refused to regard a transaction between a parent company and its subsidiary as a “sale” for the purposes of Canadian statute.

are at issue or where some criminal offence is involved, perhaps the courts could consider spousal support as being equally worthy of an exception.

Although Keane outlines what he suggests are the five<sup>86</sup> accepted exceptions to the principle in this jurisdiction it appears that the scope of these exceptions remains uncertain. As McCormack notes the principle of separate legal entity,

is not universally adhered to as an absolute rule. The doctrine...is relaxed in certain exceptional circumstances where it tends towards an inequitable conclusion. It is not easy to discern any unifying set of guidelines among this wilderness of single instances. Cases are decided on a fairly *ad hoc* basis... The approach breeds uncertainty...<sup>87</sup>

As stated by Hawke and Marson, “such uncertainties of approach do nothing to help either the development of a coherent policy attitude, through statute or otherwise, or the development of a consciousness of the need to make provision for difficulties that may arise.”<sup>88</sup>

## Conclusions

As has been already mentioned in this chapter, this research spans two areas of law with different aims and objectives. In the divorce context, proper provision prevails, it is the master of the divorce court, it is demanded by the constitution and by the legislature and must be achieved before a divorce decree can be granted. In the company law context, the *Salomon* principle stands and will continue to stand. One man companies will continue to avail of the doctrine of separate legal entity despite the criticisms that exist. The *Salomon* case and the company as a vehicle for enterprise have gone from strength to strength. The one man company has become commonplace and has been accepted without question<sup>89</sup> and presently the Law Commission of England and Wales and the Scottish Law Commission have

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<sup>86</sup> Keane, *Company Law, op-cit.*, at p.145. Keane’s fifth exception which is not yet mentioned in this thesis is that the rule in *Salomon’s* case does not prevent the court from looking at the individual members of the company in order to determine its character and status and where it legally resides. This exception is of little assistance for the purposes of this thesis and thus it is unnecessary to discuss it in greater detail.

<sup>87</sup> McCormack, above n.2 at 101. However, see also Nakajima, “Lifting the Veil” (1996) 17(6) *Comp. Law* 187 where she stated: “The courts have repeatedly emphasised the public interest in preserving the strict rule in *Salomon v Salomon* and have resisted attempts to lift the veil simple in cases of possible injustice let alone mere convenience.” See also Kahn-Freund, above n.81 at 56 who states “in many cases it is a matter of guesswork whether the court will allow the parties to “draw the veil” or force them to lift it.”

<sup>88</sup> Hawke and Marston, “Company Law – Facades and Corporate Veils” (1989) *LS Gaz*, 3 May, 86 (32) at 35.

<sup>89</sup> Kahn-Freund, above n.81 at 57. See cases such as *Lee v Lee’s Air Farming Ltd* [1961] AC 12 where the plaintiff’s deceased husband held all but one of the company’s shares and the court refused to lift the corporate veil.

submitted proposals to extend the principle of separate legal personality to partnerships.<sup>90</sup> If these proposals are to be introduced, it is submitted that legislative guidance will be more urgently required. It can be assumed, given the numerous advantages, that many partnerships would avail of this opportunity. Thus, it is likely that the divorce court will be presented with this company law principle in substantially more divorce cases.

The question now arises as to how these well established principles are to be reconciled in the divorce court. Can an exception to the *Salomon* principle be created in the divorce context? Should the veil be lifted to provide for a spouse where necessary on divorce? Should the constitutional requirement of proper provision take precedence over the common law rules and legislative requirements which apply in the company law context? It is submitted that matrimonial property law and its ever growing body of cases may soon pose a more direct challenge to the sacred “corporate veil.” Whether the veil should be lifted and in what circumstances forms the central research question of this thesis. While matrimonial property law would not have been as prominent in 1944 when Kahn-Freund wrote his article, he does acknowledge the problems that the *Salomon* principle may bring for other unnamed bodies of law. He feels “[e]nough has been said to prove that the surfeit of companies introduces into many branches of law an element of caprice incompatible with the certainty which is the life-blood of commercial law.”<sup>91</sup> This thesis argues that it is imperative that legislative guidance be provided to the judiciary regarding their dealings with business assets on divorce.

Chapter three will examine the current status of business assets in the Irish divorce court. It will outline some of the factors which the judiciary currently consider in dealing with the business assets of divorcing spouses. This author will seek to ascertain whether the court can pierce the corporate veil to provide for a spouse on divorce or whether the corporate veil exists in the divorce court. In many jurisdictions and especially in our own jurisdiction the answer to this question is very much evolving and uncertain. It will become apparent that in the absence of effective legislative guidance, the judiciary’s responsibility to appropriately divide these assets becomes increasingly onerous. Chapter four examines the status of business assets in the English divorce courts and chapter five examines their status in the

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<sup>90</sup>Morris explains that the Law Commission of English and Wales and the Scottish Law Commission issued a joint report on partnership law in 2003 and recommended a number of significant changes to the present legislation, in particular that a partnership should be allowed the privilege of separate legal entity. This is already the position in Scottish law but not in England and Wales. This led the Government to carry out a further consultation on partnership law in 2004 outlining a number of proposals. See Morris, “Proposed Changes to Limited Partnerships” (2008) 32 CSR 95 for further details regarding these proposals.

<sup>91</sup> Kahn-Freund, above n.81 at 56.

British Columbian courts for the purposes of comparison. This thesis seeks to establish whether Ireland can learn from both jurisdictions in relation to this issue.

## **Chapter Three: Ireland, Business Assets and Divorce**

Chapter one of this thesis sets out the current legislative framework and highlighted the uncertainty governing the granting of ancillary relief in Ireland. Chapter two discussed the metaphorical “corporate veil” and the concept of separate legal entity. It is apparent that the main priority of the divorce courts is to properly provide for the dependent spouse and the children of the marriage. It is also clear that company law is concerned with the interests of the business and the finances and well-being of those involved in it, but also the rights of and duties to creditors dealing with the separate legal entity. Thus when a spouse seeks to claim a share in the other spouse’s business or company, these competing aims and objectives must be considered and the court must decide which of them should take priority in any given case. The judicial approach to such conflicts is incredibly unpredictable, particularly in Ireland. There are no specific legislative guidelines for the judiciary to consider in relation to such a claim and thus extensive discretion lies solely with the judiciary. The English case law which will be discussed in the next chapter seems to be somewhat further developed than the Irish law on this issue, but this is unsurprising as divorce is a much newer concept in Irish family law. In this chapter Irish judicial and academic commentary regarding the treatment of business assets on divorce will be discussed. The potential for conflict where the interests of the business and the interests of the dependent spouse fail to coincide will be highlighted. The uncertainty in this area of law and the consequent need for legislative clarification will be demonstrated.

### **Business Assets and the Family Law (Divorce) Act 1996**

Sections 5, 14, 15, 19 and 20 of the Family Law (Divorce) Act 1996 may be relevant where business assets become the focus of the divorce court. Section 5 which has been discussed in detail in chapter one makes it clear that achieving proper provision for the dependent spouse upon the granting of a divorce is essential. Some of the factors listed in section 20 which must be considered by the court in granting ancillary relief will be discussed in greater detail in this chapter. The significance of section 20(f)<sup>1</sup> in particular will be highlighted. It has been stated:

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<sup>1</sup> Section 20(f) of the Family Law (Divorce) Act 1996 provides as follows: “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

This provision is particularly important as it allows the court to recognise the value contributed to a family, during the course of a marriage, of different types of contributions and to take account of these when determining applications for ancillary relief, in particular in relation to property adjustment orders.<sup>2</sup>

All contributions must be considered. As has been emphasised by Buckley:

[T]he marital partnership is akin to a joint enterprise where the contributions of both parties, though different, are equally essential to the success of the venture and should be valued equally...An emphasis on financial contributions alone devalues the contributions of the non-earning spouse.<sup>3</sup>

Section 20(1) is also an important factor to be considered in the context of business assets as it requires to the court to consider any third parties which might be affected by the orders made.<sup>4</sup>

Section 14 of the Divorce Act confers jurisdiction on the court to make a property adjustment order on the granting of a divorce decree. It is often presumed that such an order can only affect the family home; however the wording of the section imposes no such limitation. As has been pointed out by one academic:

[A] property adjustment order may be made on separation or divorce in connection with livestock, businesses, investments, savings, holiday homes, commercial properties and cars or boats.<sup>5</sup>

An order pursuant to section 14 of the Divorce Act may provide for one or more of the following matters:

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financial resources of the other spouse and any contributions made by either of them by looking after the home or caring for the family.”

<sup>2</sup> Ó hUallacháin, ‘*Recent Developments in Irish Family Law – Ancillary orders in Judicial Separation and Divorce*’ (Dublin: Trinity College Dublin, Saturday, 8th October 2005) p 6. See also Shannon, *Divorce Law and Practice* (Dublin: Thomson Round Hall, 2007) pp 85-88 and Coveney, ‘Proper Provision in Matrimonial Breakdown: The Debate Continues in the Aftermath of T v T’ (2003) 6 (1) IJFL 3 at pp 5-7.

<sup>3</sup> Buckley, ‘“Proper Provision’ and ‘Property Division’: Partnership in Irish Matrimonial Property Law in the Wake of T v T’ (2004) 3 IJFL 8 at 8. See also Nestor, *An Introduction to Irish Family Law* (Dublin: Gill and Macmillan, 2007) at p 128. See *White v White* [1998] 2 FLR 310 and [2000] 2 FLR 981 for a discussion of the importance of spousal contributions in the English jurisdiction. See also Ellman, ‘Financial Settlement on Divorce: Two Steps Forward, Two to Go’ (2007) 123 LQR 2-9 and Miles, ‘Equality on Divorce?’ (2001) 60(1) CLJ 46.

<sup>4</sup> See Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’ (Dublin: Thomson Round Hall Annual Family Law Conference, 24<sup>th</sup> November 2007) at pp 97-98 and See also Shannon, *Divorce Law and Practice, op.cit.*, at p 92.

<sup>5</sup> Shannon, *Law Society of Ireland – Family Law* (Dublin: Oxford University Press, 2003) p 67.

- (a) The transfer by either of the spouses to the other spouse, to any dependent member of the family or to any other specified person for the benefit of such a member of specified property, being property to which either the first-mentioned spouse is entitled either in possession or reversion,
- (b) The settlement to the satisfaction of the court of the specified property, being property to which either of the spouses is so entitled as aforesaid, for the benefit of the other spouse and of any dependent member of the family or any or all of those persons,
- (c) The variation...of any ante-nuptial or post nuptial settlement made on the spouses,
- (d) The extinguishment or reduction of the interest of either of the spouses under any such settlement.

This power was regarded by Mary O’Toole SC, in her assessment of the 1989 Act, which confers jurisdiction on the courts to make identical orders in the context of Judicial Separation, as “by far the most radical provision of the Act.”<sup>6</sup> Section 14 is supplemented by section 15 which provides specifically for orders relating to the sale or occupation of the family home. Section 19 of the Act allows the judiciary to order the sale of any property of either spouse and, as is the case with section 14, does not limit the property in question except to state that the section does not include the family home, as such is governed by section 15 of that Act. Thus, this section too can be described as unhelpful to the judiciary in considering whether to make an order in relation to the business assets of a spouse and it will become apparent in the case law below that the lack of guidance in this regard has led to a judicial reluctance to interfere with such assets in any direct manner.

As noted by Buckley and the Supreme Court in the seminal case of *T v T*<sup>7</sup> the legislature has not made any mandatory requirements regarding the division of assets in divorce and judicial separation cases.<sup>8</sup> It is clear that there is no requirement of equality but rather a strict requirement of “proper provision.” What is not clear, however, is the extent to which business assets of the spouse can be used to make this

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<sup>6</sup> O’Toole, “An Introduction to the Judicial Separation and Family Law Reform Act 1989” (1990) 6 Fam. LJ. See also Shannon, *Divorce: The Changing Landscape of Divorce in Ireland* (Dublin: Round Hall Sweet and Maxwell, 2001) at pp 41-42, Shannon, *Law Society of Ireland – Family Law op.cit.*, at pp. 65-68 and Monaghan, “The Slicing of the Material Cake – The Relevance of Separation Agreement to the Making of Property Adjustments Orders” (1999) 2(2) IJFL 8.

<sup>7</sup> [2002] 3 IR 334.

<sup>8</sup> Buckley, above, n.3 at 11. She notes “[d]iscretion has been left to the court to consider what would be the best and most just resolution in any given case.” Nonetheless she states “the Constitution and the legislation provide for ‘provision,’ rather than the ‘division’ of property; there is therefore no question of dividing the assets on a set basis.” (at p.11).

crucial proper provision for the dependent spouse and, more specifically, whether the business assets of the earning spouse can be transferred, via property adjustment order, to the other, financially weaker spouse. In addition, it is unclear whether they can form the subject matter of an order for sale if they are required to make provision for the dependent spouse. Proper provision is demanded by the Constitution and it is arguable therefore that adequately providing for the spouse should take precedence over business aims and company law principles. Irish legislation and common law principles are generally subject to Constitutional requirements and there is no reason why an exception should be created in this particular instance.

This chapter attempts to address these issues by examining the Irish case law in this area. As highlighted in chapter one, “proper provision” can perhaps be described as the master of the Irish judiciary in family property cases. However, they have wide discretion in making this provision as there is no community property regime or clean break requirement. Fennelly J has recently commented:

[A]ny property, whenever acquired... is, in principle available for the purposes of provision... On the other hand, not all such property is automatically available either. It is easy to think of cases where such a result would not be just...<sup>9</sup>

Thus business assets may, in theory, be part of the marital cake but fairness must prevail. It is very difficult to define “fairness” in relation to business assets as there is an absence of in depth judicial discussion and legislative guidance in relation to such assets and the circumstances in which it would be appropriate and fair to transfer or sell such assets on behalf of the non-owning spouse.<sup>10</sup> The dearth of caselaw dealing with business assets makes it difficult to discern a clear judicial pattern. This will become apparent in the review of the case law which follows, which focuses on cases where the judiciary considered disputes involving business assets. However, certain issues have, on a number of occasions, been highlighted by the judiciary as relevant in such a context: the potential of the business as a source of future income and the absence of a “clean break” approach to marital breakdown, the extent to which the non-owning spouse contributed to the business and the origin of the business. More recently, the concept of separate legal personality of a company has been discussed.

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<sup>9</sup> [2002] 3 IR 334 at 416.

<sup>10</sup> See Shannon, *Law Society of Ireland – Family Law*, op- cit, at 67 where he states there “are very few reported judgments concerning the issue of property transfer orders”

## Case Law

### *The Potential of the Business as a Source of Future Income and the Absence of Clean Break Divorce*

In *JD v DD*<sup>11</sup> McGuinness J referred to section 9 of the 1995 Act (which replicates section 14 of the Divorce Act) and was adamant that there was no limit to the number of occasions on which a spouse can seek and the court can grant, if appropriate, a property adjustment order. This is consistent with the “anti-clean break” regime in Ireland. In this case the family had a number of valuable assets including real property, art, antiques and a business. The court commented that all of the husband’s financial assets would be taken into account in granting ancillary relief. It should be noted that full disclosure is essential upon divorce and in this case McGuinness J criticised the husband’s failure to honestly disclose all of his assets. She stated, “[i]t is very difficult for the Court to rely fully on any of the husband’s statements with regard to his assets or his income.”<sup>12</sup> Shannon has also noted “justice can only be assured where full disclosure is made by both parties.”<sup>13</sup>

McGuinness J asked a number of questions relating to how exactly the assets of a couple should be divided on divorce. She questioned whether the court should seek to simply provide for the actual day to day needs of the dependant spouse or should it endeavour to divide the family assets in a more equal way by the operation of a lump sum and/or property adjustment order?<sup>14</sup> She then acknowledged that there is very little case law available in this jurisdiction to answer such questions.<sup>15</sup> She commented on the extent of judicial discretion with regard to the section 20 factors and stated that even given these guidelines the court has a wide discretion, particularly in cases where there are considerable financial assets.<sup>16</sup> McGuinness J discussed the husband’s business assets in her judgment but refrained from making any property

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<sup>11</sup> [1997] 3 IR 64.

<sup>12</sup> *Ibid* at 80.

<sup>13</sup> Shannon, *Divorce Law and Practice op.cit.*, at p 80.

<sup>14</sup> [1997] 3 IR 64 at 91. See Chapter one at pp13-14 where this author discussed the differences between “provision” and “division” between spouses in the divorce court. See also Durcan SC, *‘Divorce, Judicial Separation and Ancillary Relief’ op.cit.*, at p 5, Buckley, above n.3 at 16, Crowley, “Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part One” (2007) 10 (1) IJFL 19 and Crowley, “Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part Two” (2007) 10(2) IJFL 12.

<sup>15</sup> [1997] 3 IR 64 at 91.

<sup>16</sup> *Ibid*. See also Martin, “Judicial Discretion in Family Law” (1998) 16 ILT 168.

adjustment orders in relation to these assets. She noted that the husband needs to have capital available to him to continue to run the business and that the main capital assets of the business are held in three bank deposit accounts. She stated “[t]his sum together with any of his own money which is at present held in client accounts should be left to the husband for the purpose of running his business.”<sup>17</sup>

The court in this case considered the contributions of the parties and in particular the non-financial contributions of the wife. The wife remained in the home while the husband built his business. McGuinness J noted that they had been married for thirty years and referred to the marriage as a “partnership of complementary roles.”<sup>18</sup> On this basis McGuinness J ordered “... a reasonably equal division of the accumulated assets...”<sup>19</sup> The wife received €200,000 in lump sum maintenance and the husband was ordered to finance his wife’s accommodation requirements. He was also ordered to pay €20,000 per annum in periodic maintenance and to transfer into her name approximately one half of the family’s non-business assets. The wife in this case did not receive any of the business assets or any interest in the business and this may highlight the judiciary’s general reluctance to interfere with the ownership of such assets. However, it is submitted that an order for half the family’s assets was generous and may provide evidence that the court considered the business assets of the husband when making this order even if they were not directly required to properly provide for the wife. As there is no clean break policy in Ireland, McGuinness J felt compelled to make a periodical payment order in addition to the generous provision made by the other orders. She stated:

Given that the whole tenor of the Act of 1995 is against the concept of finality, I do not consider in making financial orders in this case I should fly in the face of the clear policy of the legislature and endeavour to create a “clean break” which cannot in any event be achieved. I make this decision with some regret, since the concepts of certainty and finality of litigation are indeed important. I propose... to make both a lump sum order and an order for periodic maintenance.<sup>20</sup>

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<sup>17</sup> [1997] 3 IR 64 at 94.

<sup>18</sup> *Ibid* at 95.

<sup>19</sup> *Ibid*.

<sup>20</sup> *Ibid* at 90. See Shannon, *Divorce Law and Practice op.cit.*, at pp 338-339 who discusses the absence of clean break divorce in this jurisdiction. See also Coveney, above n.2 at p 8.

In *C.O'R v M.O'R*<sup>21</sup> the husband owned a company in which the wife owned a 1% share. The company had been a wedding present from Mr O'R's parents. Mrs O'R admitted that she knew very little about the company in question but she was aware that the company had a considerable amount of borrowings. Mr O'R argued that in order to provide for his wife some of his assets must be liquidated and he felt that the family home should be sold, the current mortgage discharged and a new house should be purchased for the wife. Apart from the sale of the family home "he was somewhat ambivalent as to which of his assets ought to be disposed of."<sup>22</sup> The court stated:

the Company is nothing more than a property rental company. Moreover, the company has never made an annual profit because the entire income realised from renting the industrial units has been applied towards repaying the Bank loans.<sup>23</sup>

There was some controversy as to the value to be applied to the company and the issues surrounding the valuation of companies in the divorce context is discussed in detail in chapter six of this thesis. The important aspect of the above judgment to note at this point is that court was willing to sell the company to help to provide for the wife. The court concluded on this point:

In this regard, in light of Mr. O'S's view that the two industrial units in question were in poor condition and Mr. O'R's own concession that the company has 'probably hit its peak' because the units are now so old, it seems to me that if any of Mr O'R's assets have to be disposed of to enable him to make proper provision for his wife and children, that company should be the first to go.<sup>24</sup>

Crucially, the spouses in this case were the sole shareholders and no third party would be affected. The court ultimately made this order<sup>25</sup> noting that the sum received from this would go a long way to discharge the mortgage on the family home. O'Donovan J also discussed a partnership in which the husband was involved with Mr. H. He was mainly concerned with the valuation of the 28 containers involved in this partnership. O'Donovan J acknowledged that a third party was involved in this business and that Mr.H probably would not want to sell these containers. He therefore avoided making such an order.<sup>26</sup>

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<sup>21</sup> Unreported, High Court, 19<sup>th</sup> September 2000.

<sup>22</sup> *Ibid* at 8.

<sup>23</sup> *Ibid* at 11.

<sup>24</sup> *Ibid* at 12.

<sup>25</sup> *Ibid* at 18-19.

<sup>26</sup> *Ibid* at 20.

The most significant feature of this case was that the business in question was not capable of sustaining ongoing maintenance payments. We shall see that in other cases such as *McA v McA* the courts are far more reluctant to contemplate the sale of business assets where such an asset is part of a successful and profitable business capable of sustaining ongoing maintenance payments. It is submitted that this is one important factor which should be assessed and analysed by the judiciary in all cases before interfering with the business or company assets of the owning spouse. It is not in the interests of either party that a viable and successful business be interfered with to a detrimental extent.

Although the decision of the court in *M.McA v X.McA*<sup>27</sup> was discussed in chapter one, it is necessary in this chapter to highlight the court's approach to the business assets involved. The court again considered the wife's contributions to both the home and the business. The judge took account of the value of the husband's business and directed that the wife was to get £1,200,000 in respect of her 15% shareholding in the family business. By ordering the husband to purchase the shares, the court was interfering with the ownership of the business as it was clear that it would be unsatisfactory in the circumstances that both spouses remain part owners of the company. It should be noted that in the area of company law, a dispute between the majority and a minority shareholder is often dealt with in this manner<sup>28</sup> and thus the court may have been looking to the rules of company law rather than the rules of divorce law for direction in this regard.

However, the court clearly did not wish to interfere any further with the husband's continuing business. McCracken J stated in deciding whether to grant a further lump sum to the wife: "It would not be in the interests of either party to undermine the respondent's business potential."<sup>29</sup> He said therefore that the lump sum must be "fairly limited" to ensure the ongoing liquidity of the business. In addition to a lump

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<sup>27</sup> [2000] 2 ILRM 48.

<sup>28</sup> See for example under Section 205 Companies Act 1963. See also cases such as *Greencore Trading Co. Ltd*, Unreported, High Court, 28 March, 1981 and *Re Westborne Galleries Ltd*, [1970] 3 All ER 134 for examples of the application of this section in the courts.

<sup>29</sup> [2000] 2 ILRM 48 at 56.

sum of €300,000, the wife was awarded periodic maintenance of €4,500 a month,<sup>30</sup> thus preventing a clean break between the parties. The company in this case was viable and profitable; the court wished to protect its viability and was confident that the business would be able to provide for both spouses into the future.

In *RG v CG*<sup>31</sup> the husband conducted his business through a private limited company and Justice Finlay Geoghegan made some interesting comments in relation to the husband's business assets stating:

I have concluded that in considering the capital assets of the parties I should not attribute any value to the business of the husband. Undoubtedly, it is relevant to his earning potential but I have concluded that its capital value is significantly dependent upon the earning ability of the husband and better to have regard to it in considering the approximate maintenance payable rather than any transfer of capital assets.<sup>32</sup>

Thus no property adjustment orders were made in relation to the husband's business assets and its existence was only relevant in relation to the order for the purchase of the wife's shares and in the context of the maintenance award.

It is submitted that the judicial reluctance to interfere with business assets is inextricably linked with the absence of "clean break" divorce in this country as the dependent spouse can come back for an increase in maintenance should the business suddenly prosper. However, as seen in the case of *WA v MA*,<sup>33</sup> discussed in chapter one, the court did not vary the orders that were made at the time of separation because between the time of separation and the time of the divorce the wife had not made any further and significant contributions to the husband's prosperity. This may highlight a need to more effectively consider such issues in the original divorce proceedings. Once the spouses have been divorced and a certain amount of time elapses, it gradually become more unlikely that the court will identify the necessary connection between the dependent spouse's contributions and the other spouse's company or business. In addition, in this jurisdiction there appears to be more recent judicial willingness to facilitate a clean break in so far as possible. The movement towards a

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<sup>30</sup> *Ibid* at 58.

<sup>31</sup> [2005] 2 IR 418.

<sup>32</sup> *Ibid* at 432.

<sup>33</sup> [2005] 1 IR 1.

clean break divorce was supported by Chief Justice Keane in *T v T*.<sup>34</sup> He felt that unless the Constitution precluded the courts from so holding, Irish law should be capable of accommodating those aspects of the “clean break” approach which are clearly beneficial. He argued,

certainty and finality can be as important in this as in other areas of the law... I do not believe that the Oireachtas, in declining to adopt the “clean break” approach to the extent favoured in England, intended that the court should be obliged to abandon any possibility of achieving certainty and finality and of encouraging the avoidance of further litigation between the parties<sup>35</sup>

These recent judicial comments, supporting a move towards a form of clean break in this jurisdiction, indicate that it is becoming even more important that the judiciary adequately deal with all assets, including the business assets, if any, of the spouses at the divorce stage. In order to ensure that such assets are effectively dealt with the legislature will be required to provide some guidance to the judiciary with regard to business and company assets in the near future. In providing such guidance it is advised that the legislature demand that the judiciary consider the viability of the business or company in question and investigate its predicted continued success into the future. If the company is profitable the courts should look at other, more favourable methods of providing proper provision before interfering with a successful business to its detriment. On the other hand should the judiciary decide the business is unprofitable, as seen in *C'OR v M'OR*, the judiciary should be directed to consider a sale of the business as it may be the best option for all parties.

### ***Spousal Contributions to the Business***

The importance of such contributions has been highlighted in a number of cases. *JC v CC*<sup>36</sup> was a judicial separation case in which Barr J refused to make a property adjustment order in respect of the husband’s business premises. The future ownership of two properties was being disputed before the court. The first property was the

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<sup>34</sup> [2002] 3 IR 334. See also Abbott, “Child support and clean break once a parent’ (1994) 144 NLJ 244, Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’ (Dublin: Thomson Round Hall Annual Family Law Conference, 24<sup>th</sup> November 2007), Martin, “From Prohibition to Approval: The Limitations of the “No Clean Break” Divorce Regime in the Republic of Ireland” (2002)16 IJLPF 223, Power and Shannon, “Practice and Procedure: Clean Break Settlements” (2005) 8(2) IJFL 28 and Power, “Maintenance: No clean break with the past” (1998) 1(1) I.J.F.L. 15.

<sup>35</sup> [2002] 3 IR 334 at 364.

<sup>36</sup> [1994] 1 Fam LJ 22.

family home, which was purchased by the husband shortly before the marriage for £10,000 and was in his sole name. The house was worth €120,000 at the time of the judicial separation and was subject to a €22,000 mortgage. The judge found that the wife was entitled to a one half beneficial interest in the family home. However in relation to the second property, which was the husband's business premises and the property in which he resided at the time of judicial separation, the court found that the wife made no contribution to and had no connection with the husband's business and on this basis she should not be entitled to any interest in the business premises. As a result of this, Shannon has argued the "concept of 'connection' to properties acquired by one of the parties throughout the marriage may be of some guidance to the courts in deciding whether or not to make a property adjustment order."<sup>37</sup> However, this discussion and the requirement of a "connection" has been the subject of some criticism. Shatter<sup>38</sup> has submitted:

Whether she had a "connection" or not with the property should not have been of principle relevance to the decision made. Having regard to the fact that the husband's gross earnings amounted to £60,709 per annum leaving him with a net sum of £35,339 as compared with the wife's net income, exclusive of maintenance, of £2,500 per annum, it would have been expected that application of the various specific factors prescribed as applicable to the determination of an application for ancillary relief would have resulted in the husband's entire beneficial interest in the family home vesting in the wife, leaving him with the property in which he was residing.

He stated that the manner in which Barr J dealt with the property was "inconsistent with the approach statutorily prescribed."<sup>39</sup>

Shatter's point may be a valid one and it may be argued that the courts are reverting to purchase money resulting trust principles in seeking to establish a connection to the business. As explained by Delaney: "This type of trust has traditionally been employed to give relief to a party who has no legal interest in the property but nevertheless contributed financially either directly or indirectly to its purchase."<sup>40</sup> It is submitted that the courts may be on shaky ground in basing a decision to grant a

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<sup>37</sup> Shannon, *Law Society of Ireland – Family Law, op.cit.*, at 68.

<sup>38</sup> Shatter, *Shatters Family Law* (4<sup>th</sup> edn, Dublin: Butterworths, 1997) p 937.

<sup>39</sup> *Ibid* at 936.

<sup>40</sup> Delaney, *Equity and the Law of Trusts* (4<sup>th</sup> edn, Dublin, Thomson Roundhall) p.15. See also Durcan SC, 'Divorce, Judicial Separation and Ancillary Relief' *op.cit.*, at pp 29-31 where he discusses the proper approach to the work of a spouse within the home. See also cases such as *Pettitt v Pettitt* [1970] AC 777 and *Gissing v Gissing* [1971] AC 886.

property adjustment order solely on such considerations. Under section 20 of the Divorce Act, there is no specific requirement that such contributions be “connected” to the business. Thus it is submitted that the connection requirement, set out by the court in this case, should be regarded with care. As outlined above, Shatter argues that in the above case, consideration of the section 20 factors justified vesting the husband’s whole beneficial interest in the family home in the wife as opposed to the one half beneficial interest which she received in the case.<sup>41</sup> Therefore, it was unnecessary to interfere with the ownership of the business to make proper provision for the wife and this was the only justification which the court needed to provide in refusing to make a property adjustment order.

The requirement of some form of contribution to the business has also been discussed in more recent cases such as *D v D*.<sup>42</sup> The wife in this case did not work outside the home and was financially dependent on the respondent. The respondent was a solicitor in a very successful business partnership. The court emphasised its duty to make “proper provision for the parties rather than [an] equal division of the assets.”<sup>43</sup> The net value of the assets in this case was over €6 million including early partnership investments of the husband worth €2.5 million. The judge stated that it was necessary to look at the relationship between the wife’s contributions and the husband’s business assets. O’Higgins J in this High Court case referred to the judgment of Thorpe LJ in *Parlour v Parlour*<sup>44</sup> where he quoted from Lord Nicholl’s judgment in *White v White*:<sup>45</sup>

If a husband and wife by their joint efforts over many years, his directly in the business and hers’ directly at home have built up a valuable business from scratch, why should the claimant wife be confined to the court’s assessment of her reasonable requirements, and the husband left with a much larger share? Or, to put the question differently...where the assets exceed the financial needs of both parties, why should the surplus belong solely to the husband? On the facts of a particular case there may be a good reason why the wife should be confined to her needs and the husband left with the much larger balance. But the mere absence of financial need cannot, by itself, be a sufficient reason. If it were, then discrimination would be creeping in by the back door. In these cases, it

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<sup>41</sup> Shatter, *Shatters Family Law, op.cit.*, at 936.

<sup>42</sup> [2006] IEHC 100.

<sup>43</sup> *Ibid.*

<sup>44</sup> [2004] EWCA (Civ) 892.

<sup>45</sup> [2001] 1 AC 596 at 608.

should be remembered, the claimant is usually the wife. Hence the importance of the check against the yardstick of equal division.

O'Higgins J then went on to comment on the importance and the relevance of this passage in this jurisdiction saying:

This passage is of but limited assistance in this jurisdiction where there is no “yardstick of equal division.” However, it is of course correct that proper provision must be assessed on the basis of the assets and that the concept of proper provision cannot be assessed without taking into account the assets.<sup>46</sup>

Thus O'Higgins J, while most definitely rejecting that there is any “yardstick of equal division” in this jurisdiction, does accept that proper provision must be based on the assets available and the main asset discussed in *White*, to which he refers, was in fact a joint business undertaking. Thus, it is arguable that O'Higgins J is highlighting that all assets must be considered including the business assets of the parties. However, as previously stated, in the *White* case the business undertaking in question was a joint business partnership to which the wife made substantial contributions which contrasts with the present case where the wife did not work outside the home or make any direct contributions to the husband's business. This might therefore explain O'Higgins J's decision not to give the wife a portion of the business assets. It may be stated, therefore, that while O'Higgins J argues that all assets must be considered, the various contributions of the parties to the specific assets will influence the judiciary in deciding how the property should be redistributed.

The judge granted the applicant wife sole ownership of the family home, he ordered that she transfer her interest in their Dublin house to the respondent, he ordered the respondent to pay the applicant €10,000 per month in maintenance for the children and he ordered that the applicant was to be bought a new car every three years. The respondent was also to be responsible for the children's education and for the health insurance of all the parties. Any property adjustment order in relation to business assets was unnecessary in this case, as proper provision could be made from the other assets. These were substantial orders which pay tribute to the importance of domestic contributions.

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<sup>46</sup> [2006] IEHC 100 at 110.

O'Neill J in *F v F*<sup>47</sup> noted that the wife had assisted her husband in the administration of the business in its early days. He transferred the family home to the wife which was worth approximately half the family's assets. Thus he considered her involvement in the business but made proper provision for her without interfering with the husband's business.

*S.J.N. v P.C.O'D*<sup>48</sup> is also a judgment worth noting. In this case the wife was in a better financial position than the husband. When they married, the husband was a wholesaler in the food business and she was a tour operator in England. She moved to the family home in Ireland and her travel business became very successful. However the husband introduced the wife to some very important business contacts which were significant in the ultimate success of the business. He claimed that the parties' separation settlement prevented him from making his business more successful. On the other hand, after the settlement, a restructuring of the wife's companies took place making her business even more successful. The net assets of the wife were approximately €5.5 million and the net assets of the husband were approximately €3 million.

As Abbott J stated "it is axiomatic that those who bear the most risk should enjoy the greater reward in economic terms..." He noted that the wife in this case held most of the risk laden assets and the husband most of the "gilt-edged" assets at the time of the separation settlement. However, he then referred to the husband's contributions to the wife's business and said that such contributions were more than what could be expected from your average newly-wed husband. Abbott J felt that the under-provision and the maintenance obligations placed on the husband at the time of separation were probably as a result of the wife's non-disclosures. The husband was awarded a lump sum of €2,148,800 and a nominal maintenance order at €7,000 per annum. While this was clearly an improvement on the original settlement, which was unsatisfactory and overly burdensome on the husband, it could not be described as an

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<sup>47</sup> Unreported, High Court, December 2, 1999.

<sup>48</sup> Unreported, High Court, November 29<sup>th</sup> 2006. See English articles such as Zipp, "Divorce Valuation of Business Interests: A Capitalization of Earnings Approach" 23 Fam. L.Q. 89 (1989-1990) at 90 and Rosettenstein, "Big Money Divorces and Unequal Distributions: Value, Risk, Liquidity and Other Issues on the Road to Unfairness" (2005) 19 IJLP&F 206 with regard to the issue of risk. These articles analyse the importance of taking account of the risk associated with the company or business in question.

equal division of the total assets. In making these orders it seems likely that Abbot J was influenced by the risk that the wife had to bear in the start up of her business. This case therefore provides us with another consideration for the presiding judge in such cases and it is submitted that the court must consider which spouse bears the most risk in respect of their assets and business ventures. Once this is examined, the judiciary must make some allowances for the associated risk. This case highlights the courts reluctance to interfere in too great a manner with a business that was run solely by one of the parties, even if they are willing to make allowances for “special contributions” by the dependent spouse.

*L v L*<sup>49</sup> was an “ample resource” case where the net assets of the marriage amounted to approximately €12 million. The assets of a private limited company made up a substantial proportion of these assets. Sheehan J in the High Court considered at length the varying contributions of the parties to the divorce:

It is clear from the evidence that husband has built a successful building company which is the principal asset in this case. The wife undoubtedly assisted and encouraged the husband in his development of this company...[his] wife has always worked outside of the home and for much of the time a housekeeper was employed. The husband was always involved in the care and upbringing of the children and in a particular way from January 1999 onwards. It is significant that notwithstanding the fact that the wife has not been working in recent years, that the children spent 50% of the time with their father...<sup>50</sup>

He continued: “There was no doubt that the wife’s income was an important factor as it enabled them to save and invest in building land.” He found however that while her role was significant in the early stages of the business it had “ceased to be of significance” since the parties separated in 1998.<sup>51</sup> Although the wife sought 50% of the assets, Sheehan J noted that it was not in the interests of the business or its employees that she received an interest in the business.<sup>52</sup> He did, nonetheless, make substantial orders in her favour. He granted her a lump sum of €1.8 million, 70% of the husband’s pension, €5,000 maintenance per child per annum, and sole ownership of seven properties or sites including the family home. It is apparent that the judge was influenced by third party interests, but it is also clear that interfering with the

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<sup>49</sup> [2007] IEHC 438.

<sup>50</sup> *Ibid* at para 5.2 to 5.11.

<sup>51</sup> *Ibid* at para 5.12.

<sup>52</sup> *Ibid* at para 6.4. See section 20(1) of the Family Law (Divorce) Act 1996.

business in any way was not necessary to properly provide for the dependent parties in this case.

In *MY v AY*<sup>53</sup> Budd J criticised the husband's failure to properly disclose his assets and his earnings saying "[t]he husband's discovery was entirely inadequate and the accounts which he produced and other documents were works of fiction."<sup>54</sup> He considered the wife's work in the husband's business assembling gaming machines and bookkeeping. The wife was seeking, in addition to a number of other orders, a share of the business and assets which the husband and wife had built up. He concluded stating "there was an intention on both their parts that she should be entitled to a share in the assets and the profits of the business." The fact that she contributed to the business was enough to show this intention. Budd J ordered that the husband pay the following:

£26,000 in respect of arrears of maintenance... and £85,000 in respect of the purchase of a house and the fees in respect thereof and the necessary furnishings...and...[p]ayment of £89,273...to be in satisfaction of the Plaintiff's interest in the business assets of the Plaintiff and the Defendant and in respect of her contribution to the acquisition of those assets...<sup>55</sup>

This was a special case in that the husband had abandoned his wife and child and failed in his responsibilities to them. Thus the wife had contributed over and above her fair share if one was to consider both the financial and domestic obligations. It could be argued that as the wife had made substantial and direct contributions to the business the orders made were in recognition of a beneficial interest under a purchase monies resulting trust and not strictly speaking an exercise of the court's adjustive discretion.

Thus it is clear from the above case law that spousal contributions to the business are significant when the possibility of a property adjustment order is being considered in any case. However, to date, contributions in the home have not appeared to justify a transfer of the husband's business assets to a wife. Clissman and Hogan argue, such orders should be made in that context:

Where a wife works in the home, thereby allowing her husband to concentrate on building up a successful family company, it is often only

<sup>53</sup> Unreported, High Court, December 11, 1995.

<sup>54</sup> *Ibid* at page 6.

<sup>55</sup> *Ibid* at page 10.

through a continuing stake in the company that she will get to taste the fruits of their partnership. The courts could retain the power to craft safeguard-clauses to avoid boardroom or shareholder disputes in the aftermath of such awards.<sup>56</sup>

### *Inherited Family Businesses*

The courts seem to consider the origin of the business assets in considering whether an order should be made. In *N v N*<sup>57</sup> Abbott J considered a family farm which was owned by the husband. He placed a value of €1.5 million on the lands and held that the value of the total assets amounted to €1,757,500. The respondent submitted that special weight should be given to the fact that he had inherited the lands and they were brought by him into the marriage. The wife in this case said that she had carried out a lot of work on the farm as well as looking after the children and the home. Justice Abbott said that the wife's "continuous work in the farm and in the home means that it would be unjust to deal with her on any basis less than the equivalent of equality..."<sup>58</sup> However he then went on to say:

I consider that the input of the Respondent in relation to the larger contribution to the capital assets of the family should be recognised by ensuring insofar as it is possible by court order that the business and family name of the Respondent survives in the area so as to reap the recognition and local goodwill that flows from it by giving the Respondent an opportunity to raise a lump sum equivalent to equality...and to incorporate into the sale order in default of payment of such sum a provision for sale of part only of the inherited farm being the Church Field for the purposes of enforcing such a claim and to permit the Respondent to retain any sum in excess of the lump sum after sale in the event of the proceeds of sale exceeding that estimated by the Court after the deduction of such interest charges as shall be imposed by the Court.<sup>59</sup>

The court placed emphasis on the importance of the business continuing and allowing the husband to continue to reap the rewards from the business which he had built. However the court seems to have struck a balance between the interests of both spouses by going on to consider the contributions of the wife in deciding on the lump sum that should be paid to the wife. The court ordered the husband to pay the wife a lump sum of €50,000 and €50,000 for part payment of costs and ruled that if the

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<sup>56</sup> Clissman and Hogan, 'Trends in Divorce on the Ten Year Anniversary of its Introduction – A Review of Recent Case Law' (2007) Bar Review 46 at 48.

<sup>57</sup> Unreported, High Court, December 18<sup>th</sup> 2003.

<sup>58</sup> *Ibid* at 13.

<sup>59</sup> *Ibid*.

husband was to default on the payment, part of the land must be sold facilitate it. The court therefore gave the husband a chance to properly provide without directly transferring or selling his business assets. However, the court protected the wife's interests by allowing access to the business assets in the event of default to ensure "proper provision" was made. Thus an equitable balance seems to have been struck. We will see in chapter five that this approach seems to have been adopted by the Canadian courts in *Wildman v Wildman*.<sup>60</sup> The court preferred first to avoid interfering with the husband's financial assets but upon default of the husband, the court used the husband's corporate assets as security for the maintenance orders.

In *McM v M.McM*<sup>61</sup> Abbott J considered the effect of the Celtic Tiger on the assets since the separation agreement in 1991 but felt that the judiciary should tread carefully when it came to the husband's assets and shares in a family firm referred to as "The Group". Abbott J said:

The settlement should be of influence in ensuring that the shares in the Group in the hands of the husband should not be exploited to disrupt the family and inherited nature of the business or to provide resources by aggressive provisions in the divorce order for realisation or use as security.

Abbott J was considerate of the continuing business of the husband and did not wish to interfere to its detriment. He noted, however, that the husband's assets amounted to €7,245,000 in comparison to the wife's €800,000 worth of assets. He therefore increased the wife's annual maintenance to €90,000 and awarded her a lump sum of €400,000. In addition, he ordered the division of the pension fund by providing the sum of €1.25 million for a retirement fund for the wife. In his judgment, Abbott J went through and discussed the relevance of each of the section 20 factors. It is submitted that this is good practice and is something that should be heeded by other members of the judiciary who preside in the family law courts.

In relation to the husband's shares and interest in the family company, Abbott J ordered that he hold 10% of his shares in the company on trust for his wife so that she could dispose of them by deed or will. She could not call for the vesting of the shares

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<sup>60</sup> (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA)

<sup>61</sup> Unreported, High Court, November, 2006.

but was entitled to dividends and cash proceeds. Clissman and Hogan have described this judgment as:

a novel approach for an Irish Court to take, as the ties between divorcing couples are more usually severed (apart from the case of maintenance awards) and it was frequently deemed inappropriate to give a spouse some shares in and thus an ongoing interest in the others spouse's company. This award could represent a more imaginative approach...<sup>62</sup>

This recent judgment may highlight that the judiciary are more willing to consider adjustments and orders in relation to the business assets of a spouse, provided it doesn't negatively interfere with the spouse's business and provided it helps to properly provide for the spouse.

### **Recent Allusions to Separate Legal Personality**

Perhaps the most in depth and controversial Irish judgment regarding company assets was delivered by McKechnie J in *BD v JD*.<sup>63</sup> This was a judicial separation case in which the wife claimed that she and her husband were de facto partners and on this basis she should be entitled to 50% of the assets. The primary asset in this case was a company which the judge valued at €10 million. McKechnie J did not accept that the wife was "running the business" to use her own expression,<sup>64</sup> however, he directed that the respondent pay the applicant a sum of €2 million on or before the 28<sup>th</sup> February, 2004, €1 million on or before the 28<sup>th</sup> of February, 2005 and a further €1 million on or before the 28<sup>th</sup> of April, 2006.<sup>65</sup> As Durcan SC noted, despite "the Judge's refusal to accept the Applicant's case of a de facto partnership between herself and her husband ...Mr Justice McKechnie was still willing to make an order directing lump sum payments totalling €4 million while also giving the wife the benefit of 50% of the assets other than the business."<sup>66</sup> The judge gave the husband the option of acquiring the family home but if he decided to do so he would have to pay an additional €500,000 to his wife.<sup>67</sup>

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<sup>62</sup> Clissman and Hogan, above n.55 at 48.

<sup>63</sup> Unreported, High Court, 5<sup>th</sup> December, 2003 and *BD v JD* [2005] IEHC 407.

<sup>64</sup> Unreported, High Court, No. 2002 83 M at para. 29.

<sup>65</sup> *Ibid* at para 76.

<sup>66</sup> Durcan SC, '*Divorce, Judicial Separation and Ancillary Relief*' *op.cit.*, at p 40.

<sup>67</sup> Unreported, High Court, No. 2002 83 M at para. 76.

The husband appealed the decision to the Supreme Court, arguing that since it was necessary for him to extract funds from the company to meet his obligations, the cost in “real” terms of realising the sum of €4 million was a substantially greater figure and in excess of one half of the value of the company. Clarification on the following four points was sought from the Supreme Court on appeal:

- (a) Whether it was possible to remove the sums of money in question from the company over a two year period.
- (b) What mechanism could be used for extracting such funds?
- (c) What would be the commercial effects of the extraction of the funds on the viability and future of the business?
- (d) What would be the tax effects of the extraction of the funds?

Hardiman J noted that the orders made in the High Court substantially exceed one half of the value of the company and in deciding whether this was fair the High Court must have regard to tax implications for the company and the impact of the extraction of funds from the company.<sup>68</sup> The case was remitted back to the High Court and McKechnie J for re-hearing of these issues but not before Hardiman J took the time to comment on the “corporate veil” argument. He stated that in this case there was no fear that any third party rights would be prejudiced but he continued:

In the present case, no question arose as to the propriety of equating the value of the companies with the assets of the parties or one or other of them or of the making of provision for the wife, in principle, from the assets or earnings of the company... There was no question, on the evidence, of prejudice to any third party in so doing. But, lest this case be regarded as a precedent for proceeding in this way in other quite different circumstances, I would remark that the interests of the company itself and of other persons interested in it in any capacity might, in a proper case, require consideration. It must not be forgotten that the company is, in law, a person distinct from its shareholders. A case will no doubt arise where this will be the basis of a submission to the Court.<sup>69</sup>

It seems that Hardiman J is reinforcing the doctrine of separate legal personality while at the same time suggesting that a “one man company” is quite different to another type of company in that there are no third parties to be affected. This case was then

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<sup>68</sup> [2004] IESC 101 at p 12-15.

<sup>69</sup> *Ibid*

remitted back to McKechnie J in the High Court who provided us with some insight into the treatment of the “corporate veil” of a company in the family law context.

McKechnie J noted, “the company had adopted a series of measures which considerably restricted what assets could be readily included in any assessment under s.6 of the 1995 Act...”<sup>70</sup> The court also commented that Mr.D, whenever it appeared he so wished, could obtain monies from the company as he did when withdrawing over €900,000 for the purposes of this case.<sup>71</sup> Although the judge acknowledged that the existence of a company as the parties’ main asset may cause problems he went on to state:

Even in the absence of any case law... this court has jurisdiction over all assets of both the applicant and the respondent, including those held by the latter through the medium of a private limited company, and can make use of them in the most appropriate manner feasible so as to make proper provision for the parties to this marriage.<sup>72</sup>

He continued:

This jurisdiction is found in the relevant statutory provisions of the Family Acts and, if necessary, subject only to third parties vested rights, which would take precedence over any business decision made by a corporate entity such as the company in question in this case. I could not under any circumstance accept that this Court could be disabled from performing its constitutional and statutory duties simply by the creation of a private company where its entire affairs are in the exclusive control of one party to the marriage. If there was no other way of achieving proper provision I would not be dissuaded from exercising this jurisdiction and if that involved a company restructure or even a sale then so be it.<sup>73</sup>

He also argued that family and marital proceedings should be regarded as “at least in part *sui generis*.”<sup>74</sup> McKechnie J’s dicta suggests that the constitutional requirement of “proper provision” may take precedence over company law, aims and objectives. The *sui generis* argument seems to require that family law proceedings be treated as above the law.

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<sup>70</sup> [2005] IEHC 407 at para 27.

<sup>71</sup> *Ibid*

<sup>72</sup> *Ibid* at para 28.

<sup>73</sup> *Ibid*.

<sup>74</sup> *Ibid* at para 29.

McKechnie J ordered that the wife be allowed to retain the €900,000 which had already been paid to her, that she be paid a further €500,000 in respect of her interest in the family home and a further €1 million within the next three months. €500,000 was to be contributed to her pension scheme, a further €500,000 paid to her by four equal annual instalments, and the husband was ordered to pay the wife €80,000 a year in maintenance until she reached 65. In relation to the lump sum figure he stated, “[t]here is likewise in my view no question but that the company will be able to accommodate this figure without in any way affecting its affairs or operations...”<sup>75</sup> He continued with reference to the maintenance payments, “[t]he cost to the company will be about €35,000 per annum, again a figure well within its budget capacity.”<sup>76</sup> In conclusion he said the “balance of the assets, including the family home are sufficient to make provision for the respondent husband.”<sup>77</sup> It seems that even after the appeal the lump sum payable to the wife was only slightly lower and McKechnie J also introduced a maintenance payment of €80,000 per annum which is a substantial sum. However the court ensured that the provisions made were not overly burdensome on the company and calculated the exact figure payable per annum from the company.

McKechnie J has implied that the court may lift the corporate veil where such an action is required in order to properly provide for the dependent spouse. While McKechnie J made some references to the fact that family law may be *sui generis*, legislative clarification is required on this rather important point. This case may be used as a precedent in limited situations, where the private company in question is regarded as a one man company and is effectively operated by a sole trader under the guise of the corporate veil. However it should be noted at this point that other businesses are not afforded the protection of separate legal personality, thus, it is more likely that the dependent spouse will obtain a property adjustment order in relation to business assets where the other spouse has not incorporated his or her business.

The current judicial approach to separate legal personality in the family law courts does not sit well with this author. While on one hand to draw a distinction between a “one man company” and other companies seems appropriate in the interests of justice, inconsistencies may result if the judiciary are to rely on separate legal entity in one

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<sup>75</sup> *Ibid* at para 37.

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* at para 39.

instance and not in another. This is due to the fact that the *Salomon* case itself specifically states that the veil cannot be lifted simply because the company in question is a one man company.<sup>78</sup> As already submitted, one of the main questions to consider is whether family law is *sui generis* or whether it must abide by the rules of company law, including the concept of separate legal personality. Once this is decided the legislature needs to formulate an approach which gives guidance to the judiciary and which directs the judiciary to have regard to the rights of third parties, the contributions of the parties, the best interests of the company and the best interests of the spouses. Also important, as discussed above, would be the viability of the company and its ability to sustain maintenance payments into the future. The question of a “one-man company” versus another type of company would remain of relevance but the question of separate legal personality would be removed from the equation providing further clarity. The court would be directed that such assets are available for distribution provided the courts have regard to certain matters which would be relevant to determining whether such an order was fair.

### **Conclusions**

Even before the approaches adopted in England and British Columbia are considered in relation to this matter, it is clear that there is a case for the introduction of legislative clarification stating that the corporate veil can be lifted in proceedings for ancillary relief if such is required to make proper provision and if the court considers that it is in the interests of justice, bearing in mind certain factors which reflect those which have emerged as relevant in the caselaw discussed above. It is submitted that the legislature should formulate a list of factors which must be considered where business and company assets are involved. It is submitted that the contributions of the spouse to the family should be included in this list. Such contributions need not be directly in the business, but nonetheless must be substantial to justify interfering with the business. It should be noted that there is a clear judicial reluctance to grant such orders where the courts are faced with a viable business and it is submitted that this is another important consideration for the court and must be included in the list. It is of

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<sup>78</sup> See Ryan, ‘Interaction of Family Law and Company Law’ (2009) 12 (1) IJFL 3 for further discussion of this issue. He notes that there were no arguments by counsel in relation to lifting the corporate veil. He says that this is probably due to the fact that they were unaware that this would even be considered in matrimonial property proceedings. Ryan hopes that the courts will not lift the corporate veil into the future simply because of a relationship of close control between the spouse and the company, as company case law suggests that his alone will not justify lifting the corporate veil.

no benefit to either party to interfere with a successful and profitable business to its detriment. Where the business is viable the court should first attempt to achieve proper provision without interfering with the business. The interests of all parties, including third parties should be considered, as should the origin of the business and any significant contributions of the spouses. In addition to this, whether the parties had the ability to use company funds whenever they wished for day to day family purposes should be considered by the court, as should the liquidity of the company in question, the risk associated with the company and whether the company or business asset had been used as a family asset (eg. as the family home for part or all of the marriage). All of the above factors must be included in the list for consideration by the court.

The next chapter shall examine the development of English case law in relation to this issue. It will become apparent that despite the longer history of divorce in England confusion nonetheless prevails in relation to this complex issue. Chapter five shall discuss the more orderly process for division of business assets under the community property regime in British Columbia and shall bolster the case made by this thesis for legislative clarification.

## Chapter Four: England, Business Assets and Divorce

In the previous chapter Irish judicial opinion regarding business assets on divorce was discussed. It seems that any real pattern relating to business assets is difficult to discern. While judges like McKechnie J acknowledge that there may be an opportunity to “lift the veil” or make business assets the subject of an order for ancillary relief, the judiciary is reluctant to state what circumstances would justify such an approach and there is no evidence of any significant trend in granting such orders. The present chapter will focus on English case law and the developments in England in this regard. There is some evidence of a more forward-thinking judiciary in England. Coleridge J has recently called for a modernisation of judicial thinking in this particular area. He stated:

I think it must now be taken that those old taboos against selling the goose that lays the golden egg have been laid to rest... Nowadays, the goose may well have to go to the market for sale, but if it is necessary to sell her it is essential that her egg laying abilities are damaged as little as possible in the process.<sup>1</sup>

Although the courts have generally been very reluctant to make ancillary orders in relation to business assets, Rowe agrees with Coleridge J in saying that times might be changing. He notes:

Some years ago it was often argued that the valuation of the family company was irrelevant as it was never going to be sold. It was said it merely represented a source of ongoing income and perhaps a source of liquidity to facilitate a settlement... If this attitude was ever appropriate it was dispelled to a large extent by the decision in *White v White*.<sup>2</sup>

Despite these dicta, the development of the case law in this area has been somewhat confusing, as evidenced in the recent judgments of *Mubarak*<sup>3</sup> and *Hashem*<sup>4</sup> which seem to contradict each other, making it impossible to predict which way judicial thinking will progress into the future. These judgments will be discussed in detail later in this chapter.

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<sup>1</sup> *N v N* [2001] 2 FLR 69.

<sup>2</sup> Rowe, “A Family Affair...” (2006) 156 NLJ 866. See also Sterling, ‘White v White – An Analysis and Update of Recent Cases’ (2002) 166 JPN 184 for a detailed discussion of the White case. She notes “[t]he earlier authorities did limit a wife’s claim to the ceiling of her reasonable requirements but according to *White* were wrong to do so” (at p. 190)

<sup>3</sup> [2001] 1 FLR 673.

<sup>4</sup> [2009] 1 FLR 115.

### **The Matrimonial Causes Act 1973**

Section 24 of the Matrimonial Causes Act 1973 provides that a property adjustment order may be granted on divorce, separation or a decree of nullity where the property is such that either party is entitled to it, either in “possession or reversion.” Such an order can benefit either of the parties to the marriage or the children of the marriage and an order under this section may also extinguish or reduce the interest of one of the parties to the marriage in the property. This section, like section 14 of the Irish Divorce Act, does not limit or specify what “property” this section is to govern.

Section 24 A of the same Act facilitates the sale of property, it provides for:

...a further order for the sale of such property as may be specified in the order, being property in which or in the proceeds of sale of which either or both of the parties to the marriage has or have a beneficial interest, either in possession or reversion.

### **Case Law**

As was stated in *Dart v Dart*,<sup>5</sup> “the essential function of the judge in big money cases is to declare the boundary between the applicant’s reasonable and unreasonable requirements.” Thus, traditionally, a crucial point for consideration was whether the dependent spouse’s claim for some of the other’s business assets was reasonable in the circumstances.

### ***Domestic/ Business Contributions and “Non-Discrimination”***

As already mentioned, *White* brought about changes in English family law and thus one must look to the decision of the Court of Appeal<sup>6</sup> and House of Lords<sup>7</sup> in this seminal case for guidance. In this case the husband and wife ran a farming business in Devon. The marriage and this business partnership lasted 34 years. The combined assets of the couple were worth £4.6 million. The Court of Appeal looked at the contributions of Mrs White as a wife and mother and ordered Mr. White to pay her a lump sum of £1.5 million bringing the value of her assets to £1.69 million, which

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<sup>5</sup> [1996] 2 FLR 286. See Howell, Russell, Newbury, Pannone and Mitchell “Ancillary Relief Update: Winter 2008” (2008) Fam Law 1198, Ellman, ‘Financial Settlement on Divorce: Two Steps Forward, Two to Go’ (2007) 123 LQR 2-9 and Ouazzani, “Ancillary Relief and the Public/Private Divide” (2009) Fam Law 842.

<sup>6</sup> [1998] 2 FLR 310. See also Sterling, above n.2 for an in depth discussion the *White* case. She notes the effect *White* had on big money cases, saying “[w]here assets have come into being during a marriage through the joint efforts of the parties, there is a powerful argument for equal shares.” (at p. 191)

<sup>7</sup> [2000] 2 FLR 981.

represented about 40% of the assets. The wife appealed to the House of Lords, claiming she was entitled to 50% of the assets, however the House of Lords upheld the decision of the Court of Appeal. The House of Lords acknowledged the wife's contributions to the farming business and her contributions to the household. Some of the statements of Lord Nicholls have been outlined in the previous chapter, but what is most significant about the *White* case is that it highlighted the importance of non-discrimination between husband and wife and their roles in the marriage. The court recognised that the source of the assets may be a reason to depart from equality<sup>8</sup> but this importance may diminish over time, with the length of the marriage.<sup>9</sup> Since *White* therefore, one thing is certain, the courts must place the domestic role and the money-making role on an equal footing. Marshall has noted that the tension between family law principles and company law principles is more likely to arise post-*White* "given the increased expectations of both parties to share equally in the available resources."<sup>10</sup>

The importance of the wife's contributions was again highlighted in *C v C*.<sup>11</sup> The husband was a doctor with the Medical Research Council and the wife was a producer with BBC. Together they established a company, PHO Limited, which carried out the first stage of trials on behalf of the pharmaceutical industry. The wife was a director and the husband was chairman of the board and had a 48.1% shareholding in the company. In the 1990s it was very successful and the husband transferred his 48.1% shareholding in the company to a Cayman Islands Trust. Difficulties within the company in 1998 led the board to resign and the husband and wife were no longer directors of the company. The court noted:

The central issue in this application is this. In the overall division of the assets which are available now for division, should the court vary the trust which owns the shares to provide for an actual transfer from the trust to the wife of shares in PHO? Alternatively, should the wife merely receive monetary compensation in lieu of actual transfer of shares...?<sup>12</sup>

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<sup>8</sup> [2001] 1 All ER 1 at 13.

<sup>9</sup> *Ibid* at 14.

<sup>10</sup> Marshall, "Divorce and the Family Business" (2003) Fam Law 407 at 415. See also Parkinson, "The Yarkstick of Equity: Assessing Contributions in Australia and England" (2005) IJPFL 19(163) who discusses the concept of equality in dividing the assets between the spouses and the limitations on the principle of equality.

<sup>11</sup> [2003] 2 FLR 493.

<sup>12</sup> *Ibid* at 494.

The wife wanted to retain some control over the affairs of the company. Coleridge J transferred to her 30% of the husband's shareholding which equated to 15% of the company. He stated:

I think almost as a matter of principle, in a case of this kind where a wife in Dr N's position has played a part and wishes to play a part in the future of a company, that there has to be a compelling reason why she should not be entitled to do so.<sup>13</sup>

In addition to this order she received periodic maintenance payments of £750 a month, the family home was transferred into her sole name and the husband was ordered to pay the outstanding arrears of maintenance.

In *Preston v Preston*<sup>14</sup> the wife who was a successful model, earning far more than her husband until 1963, raised the children practically on her own and also made significant financial contributions to the household expenses which allowed the husband to start his travel business. The travel business was nonetheless in the husband's sole name. Counsel for the wife argued "in view of the husband's devotion to his business a greater than normal burden fell upon her in looking after the home and the children."<sup>15</sup> It was agreed by the parties that the husband's assets were worth £2,300,000 and that he had no liquidity problem as he had just sold his business for £1,562,000. The judge pointed to the importance of the wife's contributions and the fact that such contributions are expressly acknowledged in the relevant statutes. She was granted a lump sum of €600,000 which was upheld by the Court of Appeal. In addition, a house which was worth €100,000 was to be transferred into her name. He said this "in effect, recognises that she has 'earned' a share in the total assets, and should be able to realise it and use it as she chooses."<sup>16</sup>

Ewbank J referred to the wife's contributions as "substantial"<sup>17</sup> and said therefore that while the order was large it was not excessive as the husband was a very rich man. Much of the husband's assets were liquid after their sale, and thus there was no need to make a property adjustment order in relation to the business assets. However, it is

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<sup>13</sup> *Ibid* at 505.

<sup>14</sup> [1982] 1 FLR 17.

<sup>15</sup> *Ibid* at 21.

<sup>16</sup> *Ibid* at 25.

<sup>17</sup> *Ibid* at 21.

possible that similar sized orders may have been made by a court even if the husband had not sold his business, because while the contributions may not be classified as “special” as in the following cases, they were significant and notable contributions to the success of the husband’s business.

***“Special” Contributions and the Source/Nature of the Assets***

*Cowan v Cowan*<sup>18</sup> is authority for the fact that the court will in exceptional circumstances consider the special contributions of either party in deciding to depart from equality. The wife in this case received a lump sum of £4.4 million which was approximately 38% of the total assets worth £11.5 million. The court said that the departure from equality was due to the husband’s “entrepreneurial flare, inventiveness and hard work.” The judge took note of the husband’s exceptional business talents and stated that the wife had no business involvement for about 25 years. This case can, as Sterling notes, be distinguished from *White*, as in *White* the husband and wife were business partners whereas in *Cowan*, they were not.<sup>19</sup> When one views the awards in this context, the wife in *Cowan* seems to have been treated very generously by the court. Like the Irish judiciary, the English judiciary also seem to be influenced by whether the applicant has made any direct contributions to the business.

Most of the husband’s assets were liquid after selling his business and as a result, no property adjustment order in relation to business assets was required. It should be noted however that Thorpe LJ stated:

[H]ad the wife brought her claim to trial shortly after the final separation, the majority of the family assets would have been tied up in the private companies and, in assessing the wife’s entitlement, the judge would have to regard what cash could be withdrawn from the trading companies without jeopardising their continuing trade.<sup>20</sup>

This is an important statement on this issue as it shows that the courts may be willing, where necessary, to use certain funds in the business to provide for the wife, although

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<sup>18</sup> [2002] Fam LJ 97. See also Ouazzani, above n.5 and Parkinson, “The Yarkstick of Equity: Assessing Contributions in Australia and England” (2005) IJPL 19(163) for a discussion of “special contributions” to the marriage. Ouazzani argues that the concept of “special contributions” is detrimental to the homemaker. It is argued in the article that while the entrepreneurial flair of the husband is regarded as “special” in this context, often the contribution of the homemaker in giving up their career to look after the home is not regarded as sufficiently “special.”

<sup>19</sup> Sterling, above n.2 at 198.

<sup>20</sup> [2002] Fam LJ 97 at 121.

there does not seem to be a general willingness to transfer any of the business assets to the wife.

*Lambert v Lambert*<sup>21</sup> was a more recent case to debate the concept of “special contributions” in a business context. The husband in this case bought and expanded a company which produced a free local newspaper and this was regarded as a “special contribution” on the part of the husband by Connell J, the trial judge. However, Thorpe LJ, on appeal, noted his reluctance to see “special contributions” as a justification for departing from equality. He said:

I am much more wary of the issue of special contribution than I was in writing my judgment in *Cowan v Cowan*. Perhaps Nicholson CJ, who seems poised to banish the phenomenon, may have found the better path... I propose to mark time with a cautious acknowledgement that special contribution remains a legitimate possibility but only in exceptional circumstances. It would be both futile and dangerous even to attempt to speculate on the boundaries of the exceptional.<sup>22</sup>

He gave a number of hypothetical examples of “exceptional circumstances” ie. where one spouse is a creative artist or a superstar footballer. He concluded,

[o]nce Connell J had concluded that the husband was not a genius and that the wife could not have done more, he should not have elevated one above the other, given that the two are essentially incommensurable.<sup>23</sup>

These statements are important in the context of this research, as this judgment puts a limitation on the circumstances in which “special contributions” can be considered and thus reduces the likelihood of discrimination in future judgments. It means that a spouse’s business acumen or entrepreneurial flair cannot be seen as more important than domestic contributions and thus such characteristics cannot be relied on by the earning spouse to keep all business assets on divorce.

In *McFarlane v McFarlane*<sup>24</sup> the husband had a net income of £750,000 as a result of running a successful tax advisor business. In this case the court discussed the debates

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<sup>21</sup> [2003] Fam LJ 103.

<sup>22</sup> *Ibid* at 122-123.

<sup>23</sup> *Ibid* at 125.

<sup>24</sup> [2006] All ER 1.

surrounding special contributions in cases such as *Lambert v Lambert*.<sup>25</sup> Baroness Hale stated:

[S]uch debates are evidence of unease at the fairness of dividing equally great wealth which has either been brought into the marriage or generated by the business efforts and acumen of one party.<sup>26</sup>

She asked therefore, whether in big money cases

it is fair to take some account of the source and nature of the assets... Is the matrimonial property to consist of everything acquired during the marriage or might a distinction be drawn between family and other assets?<sup>27</sup>

She referred to Lord Denning's speech in *Wachtel v Wachtel*<sup>28</sup> where he gave a definition for "family assets" stating, they refer to

those things which are acquired by one or other or both of the parties, with the intention that there should be continuing provision for them and their children during their joint lives, and used for the benefit of the family as a whole.

Baroness Hale listed the family home and its contents as a prime example of a family asset. However she then went on to state: "To this list should clearly be added family businesses or joint ventures in which they both work."<sup>29</sup> Thus if both spouses work directly in the business to provide for the family then this perhaps should be seen as a family asset.

However, she then acknowledged "business assets generated solely or mainly by the efforts of one party" are "more difficult."<sup>30</sup> She discussed the various contributions that may be made to a marriage and how each should be valued. She argued that "commercial and domestic contributions are intrinsically incommensurable" and explained it is "easy to count the money or property which one has acquired" but it "is impossible to count the value which the other has added to their lives together. One is counted in money's worth. The other is counted in domestic comfort and

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<sup>25</sup> [2003] 1 FLR 139.

<sup>26</sup> [2006] All FLR 1 at 37.

<sup>27</sup> *Ibid* at 38.

<sup>28</sup> [1973] 1 All ER 829 at 836.

<sup>29</sup> [2006] All FLR 1 at 38.

<sup>30</sup> *Ibid*.

happiness.”<sup>31</sup> This speech highlights clearly the difficulty with distributing business assets on divorce. While the earning spouse’s direct contributions to the business are obvious and clearly worthy of recognition, the homemaker may have no connection to this business and this makes it difficult for the court to justify a transfer of business assets to this spouse. Despite this, it is certain that the role of the homemaker is now well recognised by both the Irish<sup>32</sup> and English courts. The homemaker allows the business to develop by looking after the domestic side of the matrimonial relationship and as Baroness Hale acknowledged:

[I]f the law is to avoid discrimination between gender roles, it should regard all the assets generated in either way during the marriage as family assets to be divided equally between them unless some other good reason is shown to do otherwise.<sup>33</sup>

In this case the judge acknowledged that the main family asset was the husband’s substantial earning power which was generated over a lengthy marriage in a situation where both parties to the marriage decided the wife should stay and work in the home.<sup>34</sup> She found that because of this the wife was entitled to a generous income but stated the wife must:

[C]onsider what she will do in the future. The children will eventually take up much less of her time and energy. She could either return to work as a solicitor or retrain for other satisfying and gainful activity. She cannot therefore rely upon the present level of provision for the rest of her life.<sup>35</sup>

Marshall submits that another factor must be taken into consideration when looking at a small to medium sized business. He says:

The company’s roots may be deeply embedded in the past on one side of the family or the other, or it may have been nurtured from modest beginnings, directly or indirectly by one or more (probably both) of the parties at an early stage in the marriage.<sup>36</sup>

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<sup>31</sup> *Ibid.* See Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’, (Dublin: Thomson Round Hall Annual Family Law Conference, 24<sup>th</sup> November, 2007) at pp29-31 for a discussion of the proper approach to work in the home in this jurisdiction. See also Shannon, *Divorce Law and Practice* (Dublin: Thomson Round Hall, 2007) at pp. 85-88.

<sup>32</sup> See *T v T* [2002] 3 IR 334 where Keane CJ, Denham J, Murray J and Fennelly J agreed that the dependent homemaker and child carer should not be disadvantaged in the distribution of the assets by reason of having a non-economic role. These comments were approved by O’Neill J in *K v K* [2003] 11R 326 at 349 and 350.

<sup>33</sup> [2006] All FLR 1 at 38. See also Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’ *op.cit.*, at pp. 7-9, for a discussion of the concept of discrimination in the Irish jurisdiction.

<sup>34</sup> [2006] All FLR 1 at 40.

<sup>35</sup> *Ibid.*

<sup>36</sup> Marshall, above n. 10 at 406.

He also notes that it is often the case with a small family business that its earnings were used to meet many of the important expenses in the marriage, such as school fees, credit card payments and new cars.<sup>37</sup> In such situations he argues that the business should be required to meet such expenses in the future. As outlined in the previous chapter, similar comments were made by McKechnie J in *BD v JD* where the husband had the freedom to withdraw substantial funds from the company to fund the divorce process.<sup>38</sup>

### ***The Family Home as a Company Asset***

*Nicholas v Nicholas*<sup>39</sup> provides quite a detailed discussion of company assets and highlights the court's reluctance to interfere with the ownership of these assets. In this case the husband was the majority shareholder in two private companies, and one of the properties owned by the companies, "Elmwood," was used partly as the matrimonial home and partly for commercial use. The trial judge made a property adjustment order in relation to this company asset and transferred it to the wife. The appeal court took issue with this order for a number of reasons. Cumming-Bruce LJ stated:

On the facts of the instant case...a question arises whether, having regard to the shareholdings in the two relevant companies...is it proper for the court to pierce the corporate veil with the effect that though the company is the legal owner of the realty the court would disregard the corporate ownership and make an order which, in effect, is an order against the husband, an individual shareholder.<sup>40</sup>

He then went on to state that there is abundant case law showing:

[W]here the shareholding is such that the minority interests can be disregarded, the court does and will pierce the corporate veil...[b]ut in the instant case it is not possible to take the view that the minority interests in either company can thus be disregarded.<sup>41</sup>

The judge noted that the trial judge was therefore wrong in granting a property adjustment order. He did, however, express his reluctance in reaching this decision.

Dillion LJ agreed adding:

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<sup>37</sup> *Ibid* at 407.

<sup>38</sup> [2005] IEHC 407 at para 27.

<sup>39</sup> [1984] FLR 285.

<sup>40</sup> *Ibid* at 287.

<sup>41</sup> *Ibid*.

If the company was a one-man company and the alter ego of the husband, I would have no difficulty in holding that there was power to order a transfer of the property, but not in this case. The evidence shows that the husband only has a 71% interest in this company. The remaining 29% is held by individuals who, on the evidence available to this court, are not nominees but business associates of the husband.<sup>42</sup>

This case is interesting as it was the perfect situation for the courts to justify making business assets the subject of a property adjustment order as the business asset in question was also the family home. Despite the judge's obvious reluctance he refuses to grant such an order. Importantly, Dillon LJ in this judgment lends his support for the idea that the "veil" may be lifted where there are no third parties affected and where the company in question is the alter ego of the spouse. As submitted in the previous chapter, this distinction is not wholly satisfactory and while the reasons for such a distinction in the family law courts are obvious, under company law rules separate legal personality cannot be disregarded simply because the company in question is a "one man company." Thus, it is submitted that the family law courts should not make this simple distinction but rather English law too must decide whether or not family law is above such company law rules. Legislation is required stating whether business assets can be the subject of a property adjustment order and whether the doctrine of separate legal personality applies in the family courts. In addition, the legislation should include third party rights as a standard consideration for every judge in all cases where business or company assets are concerned. It is submitted that a property adjustment order should in fact have been made in this case. The family home was unlikely to have been a crucial part of the running of the business and so it is quite possible that appropriate orders could have been made which had regard to the third parties and which also allowed the wife to keep the family home. Perhaps the husband could have been forced by the court to buy out the other shareholders' 29% share in the property or, if this was seen as oppressive to the minority shareholders, the wife should have been given a right of residence, with the company retaining ownership of the property.

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<sup>42</sup> *Ibid* at 292.

### *Liquidity Issues*

As discussed briefly in *Cowan v Cowan*, the liquidity of the spouse's assets or lack thereof, is something that always must be considered before the courts. Marshall notes "[w]hat is most inevitably certain is that most of the assets owned by the company (for example a factory premises) cannot be sold off and are required to enable it to continue to operate."<sup>43</sup> Thus, there will be a substantial difference in the spouse's case depending on whether the earning spouse has sold his/her business and his/her assets are liquid or whether the earning spouse has most of his funds tied up in the business and his assets are therefore illiquid. Miller has argued:

[A] spouse's business may be the sole source of income for the family. An order which forces a sale of the business may therefore be counterproductive and it is essential to have regard to the question of illiquidity in determining the feasibility of a lump sum payment.<sup>44</sup>

Sterling, like Marshall, acknowledges some problems with using business assets for spousal provision saying:

The company presents a special problem because if it is not about to be sold or floated the inherent value of the shares is not realisable for the time being.<sup>45</sup>

However, she suggests a possible solution for this:

One solution may be to award the wife periodical payments so that she can in due course apply to capitalise her maintenance under the MCA 1973, s.31 (7B), in the event that the company is later sold.<sup>46</sup>

In *Re C*<sup>47</sup> the husband's business premises and the goodwill of his dental practice were valued at approximately £770,000. He argued that these assets should be regarded as illiquid assets as they were not readily realisable and he argued that only the liquid assets should be divided evenly. The wife in this case had quite a significant income as she was a beneficiary under a trust worth a net value of approximately £100,000 per annum. The district judge stated that the needs of the husband could be

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<sup>43</sup> Marshall, above n.10 at 407. Marshall further notes, "liquidity need not, per se, impact upon the quantum of any award made, but would, if at all, impact in the scheme devised to satisfy the result intended by the court," (at p. 413)

<sup>44</sup> Miller, 'Financial Provision and Business Assets' (1992) 1 PCB 49.

<sup>45</sup> Sterling, above n.2 at 190.

<sup>46</sup> *Ibid.*

<sup>47</sup> [2007] EWHC 1911. For further discussion of this case see Douglas, "Case Reports: Ancillary Relief" (2008) Fam Law 505.

met by dividing the matrimonial assets equally between the two spouses. In addition, he awarded the wife a 50% share in the husband's business assets and the husband a £350,000 lump sum as the wife was allowed to keep the matrimonial home.<sup>48</sup>

However, the liquidity of their respective assets was the basis upon which the appeal judge overturned the district judge's decision. The appeal judge noted that the husband's business premises and goodwill were not readily realisable as the husband wished to continue with his occupation and thus they should be considered to be illiquid assets. The appeal judge noted that the district judge failed to take proper account of the wife's trust income and said that it is this income which makes it unfair to divide the illiquid assets on a 50/50 basis.<sup>49</sup> The husband was not seeking any share of her trust income and the appeal court found that the value of his business was not very substantial when compared to the wife's benefits from the trust. The judge allowed him to keep his illiquid business assets and ordered that only the liquid assets of £1,617,115 should be divided evenly. In addition, he made an order for a lump sum of £625,930 in favour of the husband, as the wife was allowed to keep the matrimonial home. This left the wife with 35% of the matrimonial assets plus her trust assets. £350,000 of the aforementioned lump sum had already been paid leaving a balance of £276,000. The judge then considered the husband's extreme extravagance over the previous years and reduced the lump sum to be paid to £250,000.

It has been argued that the complicating factor in this case was the significance to be attached to the wife's non-matrimonial assets (her trust fund income) which allowed the couple to live a lavish lifestyle in the later years of the marriage and, on the other hand, the husband's practice which was built up during the marriage and hence could be regarded as a family asset.<sup>50</sup> Douglas notes that a fair judgment required some adjustment and acknowledgment of the above factors.<sup>51</sup> It is noteworthy however that even the appeal judge didn't dismiss the idea of a property adjustment order in relation to business assets, but instead found that this simply was not an appropriate case to do so as a result of the wife's substantial trust fund.

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<sup>48</sup> [2007] EWHC 1911 at para 18.

<sup>49</sup> *Ibid* at para 29.

<sup>50</sup> Douglas, above n.47 at 505.

<sup>51</sup> *Ibid*.

Another important judgment in this area is *N v N*<sup>52</sup> where the husband had interests in two service companies “X” and “Y” (50.5% and 40% respectively). The judge valued these interests at £4 million, but there were significant liquidity problems as only £200,000 of the assets were liquid. The wife took credit for part of the original idea for the company. The husband was also chartered accountant and had a very secure income from the accountancy firm in which he worked. Coleridge J referred to the aims set out in *White* (to ensure equality between the spouses) but said:

the actual practicalities involved in valuing, dividing up, and/or realising certain species of assets make the attaining of the *White* objectives sometimes either impossible or only achievable at a cost that may not overall be in the family’s best interests... I am sure the House of Lords did not intend to exercise their far-reaching powers to achieve equality on paper, if doing so, they...brought down or crippled the whole of the family’s financial edifice.

The husband was ordered to sell his shareholding in company “X” which was the most valuable asset in the case. The court noted that a sum of £650,000 would be paid to the wife upon the sale of the husband’s interest in the “X” or the “Z” company (the “Z” company was an arm of the “X” company and was incorporated after the separation of the parties.) The husband was given several years to sell the company. The former matrimonial home would also be transferred to the wife. The judge felt that the wife should further be entitled to a lump sum of £1 million, noting the orders would be closer to 40% rather than 50% of the assets. It was noted in the case that there is no requirement that the courts make all things equal, if it will involve harsh and unnecessary interference in the family business. The court must weigh up all interests and decide on the best approach. However the judge in this case clarified that this does not mean the “goose that lays the golden egg” can never be sold.<sup>53</sup>

This is an important precedent in the area and highlights that the English courts may be more willing than the Irish courts to interfere with business and company assets. However, it is difficult to see why such an order was made in this case and not in the *Nicholas* case, where the property in question was the family home and where the

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<sup>52</sup> [2001] 2 FLR 69.

<sup>53</sup> Coleridge J states, “I think it must now be taken that those old taboos against selling the goose that lays the golden egg have largely been laid to rest; some would say not before time. Nowadays the goose may well have to go to market for sale, but if it is necessary to sell her it is essential that her condition be such that her egg laying abilities are damaged as little as possible in the process. Otherwise there is a danger that the full value of the goose will not be achieved and the underlying basis of any order will turn out to be flawed.” *Ibid* at 80.

husband owned 71% of the company. The comparison between these two cases highlights the absence of coherency and consistency in this jurisdiction and supports the suggestion that there is a need for legislative clarification in this regard.

Another interesting case is *Parra v Parra*<sup>54</sup> where the non-business assets of the spouses amounted to a mere £25,000 and where the value of the business assets and a plot, which was bought for future company activities, amounted to £2.5million and £3.5 million respectively. The matrimonial home had recently been sold and the proceeds of that sale were used to rehouse the wife and children. Each party owned half shares in the company and they had worked together to create the company and build the company from scratch. At first instance, Charles J ordered that the husband pay the wife a sum of £925,000 in return for her half share in the company and its premises on the basis that he could borrow £1 million over a 20 year term. The overall division of the entire assets would be 54.3% to the wife and 45.7% to the husband. The husband appealed to the Court of Appeal arguing that if anyone should receive a greater share it should be him, as the wife was receiving liquid assets and he had to maintain the illiquid company assets.

Thorpe J concluded in the Court of Appeal:

I am struck by the fundamental simplicity of this case... There were only two obvious solutions: either the business assets were sold to enable each to make a fresh start or the husband bought out the wife so that she could make a fresh start. If the parties agreed on the first option equal division of the proceeds of sale was the natural if not the inevitable consequence. If the price for the buy-out could not be agreed the court was there to fix it.<sup>55</sup>

He then went on to comment on the reasons for the appeal and noted:

The husband has the advantage of the going concern but the disadvantage of having to shoulder and carry a long-term debt burden approximately equal to half his net asset value after transfer. The wife has the challenge of starting afresh but she has the advantage of nearly £1 million of liquid funds... However, the simple virtue of equality outweighs sophisticated arguments for adjustment one way or the other.<sup>56</sup>

He stated, “[i]f the husband did not raise the necessary borrowing to pay off the lump sum within the period agreed, the business assets must be sold and the net proceeds

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<sup>54</sup> [2003] 1 FLR 942.

<sup>55</sup> *Ibid* at 949.

<sup>56</sup> *Ibid* at 950.

divided.” Thorpe J remarked in the case: “Unusually, each owned half the issued shares in the company.”<sup>57</sup> However other cases may not be as straightforward, there may be an unequal division in percentage ownership in the business, one party to the divorce may have no direct interest in the business or there may be third party interests or minority shareholders to consider. In the end, Thorpe J decided that he would not interfere with the decision of the trial judge.

One example of a forward thinking decision is *D v D*<sup>58</sup> in which the judge awarded the wife 53% of the assets in the form of a lump sum but adjourned payment due to an expected increase in the husband’s capital under his share incentive scheme. Such an approach obviates the need to order an immediate interference with the husband’s business interests. A similar approach could be taken where the court expects that the husband will sell his business in the near future.

### **Recent Judicial Statements Regarding the Corporate Veil**

In *Mubarak v Mubarak*<sup>59</sup> Bodey J attempted to clarify how a family court should deal with the “corporate veil” or the separate legal identity of a company. He outlined a number of family law authorities in this area, most of which have already been discussed in this chapter, but went on to highlight the difficulties in reconciling these areas of law:

the fact remains that different considerations do frequently pertain: the company approach, on the one hand, being predominantly concerned with parties at arm's length in a contractual or similar relationship; the family approach, on the other hand, being concerned with the distributive powers of the court as between husband and wife applying discretionary considerations to what will often be a mainly, if not entirely, family situation.<sup>60</sup>

In relation to the corporate veil he added:

At the end of the day, both companies are bona fide trading companies incorporated well before the matrimonial difficulties of the husband and wife... It is not suggested that they are as such being used as a sham or

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<sup>57</sup> *Ibid* at 949.

<sup>58</sup> [2001] 1 FLR 633.

<sup>59</sup> [2001] 1 FLR 673. For further discussion of this case see Bailey-Harris, “Case Reports - Ancillary Relief” (2007) Fam Law 13 and Burrows, “Judgment Summons: Standard of Proof” (2001) LS Gaz, 20 Apr, 31.

<sup>60</sup> [2001] 1 FLR 673 at 682.

device, albeit that their existence is very convenient to the husband. In my judgment, there do exist genuine third party rights and interests which ought to be respected, namely the interests of bona fide commercial creditors and the position of directors who have fiduciary duties and who oppose the seizure of stock in trade...<sup>61</sup>

While this case did not allow for the “veil to be lifted,” Marshall argues that Bodey J left us with a good understanding of when and in what circumstances the veil could be lifted. After this case, Marshall summed up the position on business assets at the time saying that the “corporate veil” could be lifted where one spouse is the owner and controller of the company and there is no adverse effect on third parties. He clarifies this saying, “third parties would include those who have real minority interests in the company...” He stated lifting the veil is “most likely to be acceptable where the asset concerned is, perhaps, the former matrimonial home or other similar assets owned by the company other than for day-to-day purpose.”<sup>62</sup>

In relation to the sale of such property Lowe and Douglas provide further guidance saying:

In the case of property belonging to one spouse and a third party the court is directed that, before it decides whether to order a sale, the third party must be given the opportunity to make representations, and any such representations are then to be included in the circumstances to which the court must have regard under section 25 of the 1973 Act.<sup>63</sup>

Lowe and Douglas also discuss the Court of Appeal case of *Thomas v Thomas*<sup>64</sup> and suggest:

[T]he court should look at the reality of the situation; it ought not to disregard the potential availability of wealth from sources owned or administered by others. In appropriate circumstances the judge may frame his order to afford “judicious encouragement” to third parties to provide a spouse with the means to comply with the court’s view of the justice of the case.<sup>65</sup>

Rowe has also acknowledged the difficulties that may arise here when the spouse does not own all shares in the company:

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<sup>61</sup> *Ibid* at 685-686.

<sup>62</sup> Marshall, above n.10 at 416. For further discussion of the corporate veil issue see Bamber, “Impropriety and the Corporate Veil” (2009) Fam Law 130 and Chandler, “The Boundaries of Ancillary Relief: *A v A* and *Whig v Whig*” [2008] Fam Law 128.

<sup>63</sup> Lowe and Douglas, *Bromley’s Family Law*, (9<sup>th</sup> edn, London: Butterworths, 1998) p. 801.

<sup>64</sup> *Thomas v Thomas* [1995] 2 FLR.

<sup>65</sup> Lowe and Douglas, *Bromley’s Family Law*, *op.cit.*, at 797.

[D]irectors need to act in the interests of the company, not just one shareholder. Essentially the spouse would require the agreement of all shareholders to use the company assets to fund a matrimonial settlement... Even if this is forthcoming there may be difficulties in extracting the funds, as a dividend will be paid to all shareholders thus diluting the funds available for the divorce proceedings.<sup>66</sup>

Rowe issues a word of caution to spouses who attempt to rely on this line of argument to prevent the dependent spouse from obtaining business assets saying:

[T]his may result in all the other assets passing to the other spouse to try to match the value of matrimonial assets and may also result in the judge making an award for part of the shareholding to be transferred to the other spouse to achieve an equitable settlement.<sup>67</sup>

The above opinions of Bodey J in *Mubarak* seem to echo the earlier opinions of Dillon LJ in *Nicholas*, however it seems that there has been a substantial change of opinion regarding this particular issue in the last year. *Hashem v Shayif and Another*<sup>68</sup> is the most recent matrimonial property law case to provide an insight into the status of the corporate veil in English family law. The divorcees in this case married in 1998 and separated in 2004 without any kids; however the husband had four kids from his three previous marriages. The husband stayed in Saudi Arabia and the wife came to live in London in a property which was owned by Radfan Ltd. The company was owned by the husband and his children, the husband owning 30% of the shares and the remaining 70% divided between his four kids.

When the wife issued divorce proceeding seeking £7,061,570 plus the transfer of the only two English properties still owned by the company, the husband refused to participate in any meaningful way in the divorce process. The wife argued that the court should:

- (a) Treat all the company's assets as beneficially owned by the husband, or
- (b) Treat the company itself as beneficially owned by the husband, or
- (c) Pierce the veil of incorporation.

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<sup>66</sup> *Ibid* at 870.

<sup>67</sup> Rowe, above n.2 at 867.

<sup>68</sup> [2009] 1 FLR 115. For further discussion of this case see Bailey-Harris, "Case Reports - Ancillary Relief" (2008) Fam Law 1179.

The wife based her above arguments on two grounds; she noted that the children did not themselves fund the purchase of their shares in the company and their shareholdings are subject to resulting trusts in favour of the husband.<sup>69</sup> The company was established in 1988 and the entire share capital was put forward by the husband and therefore she argued the “husband and the company are one and the same, that the company is simply the husband by another name...”<sup>70</sup>

In response to the wife’s counsel, Miss Parker, Munby J referred to his own judgment in *A v A*<sup>71</sup> where he stated:

the court will not allow itself to be bamboozled by husbands who put their property in the names of close relations in circumstances where, taking a realistic and fair view it is apparent that the recipient is a bare trustee and where the answer to the real question – Whose property is it? – is that it remains the husband’s property.

He went on to state: “But this does not mean, and I am sure that Coleridge J did not intend to suggest, that the court can simply ride roughshod over established principles, least of all where there are, or appear to be, third party interests involved.”<sup>72</sup> He continued:

In deciding whether or not, and, if so, in what manner, these principles operate in any particular case, the court will of course have regard to the particular context and to the particular factual matrix. Thus it may be easier, for example to ‘pierce the corporate veil’ in the context of a small family company than in some larger-scale or more purely commercial context.<sup>73</sup>

He concluded:

But what is important to appreciate is that the relevant legal principles which have to be applied are precisely the same in this division as in the other two divisions. There is not one law of “sham” in the Chancery Division and another law of “sham” in the Family Division... There is but one set of principles, again equally applicable in all three divisions, determining whether or not it is appropriate to ‘pierce the corporate veil.’<sup>74</sup>

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<sup>69</sup> [2009] 1 FLR 115 at 136.

<sup>70</sup> *Ibid* at 138.

<sup>71</sup> [2007] 2 FLR 467 at para 18-19.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid* at para 20.

<sup>74</sup> *Ibid* at para 21. See chapter two of this thesis for a discussion of these principles.

He felt therefore, “the court cannot grant relief merely because the husband’s arrangements appear to be artificial or even “dodgy.”<sup>75</sup>

Munby J provided an in depth discussion of the *Salomon* case<sup>76</sup> and went on to consider whether he should concede to Miss Parker’s arguments and proceed to lift the veil. He concluded, “[t]he blunt truth, at the end of the day, is that the wife’s case is founded on an implicit assumption as to the relevant legal principles, which assumption, common, I suspect, to much thinking in this division, is simply not well founded.”<sup>77</sup> He then outlined the well accepted exceptions to the *Salomon* principle.<sup>78</sup> He concluded: “In the first place ownership and control of a company are not themselves sufficient to justify piercing the veil. This is, of course, the very essence of the principle in *Salomon v Salomon & Co Ltd.*”<sup>79</sup> This is precisely why the “one man company” distinction made by Bodey J in *Mubarak* and Dillon LJ in *Nicholas* is not satisfactory. The *Salomon* case expressly allows for a “one man company” and therefore the family courts cannot apply the separate legal entity doctrine in one situation and not in another.

Munby J made specific reference to *Mubarak v Mubarak*<sup>80</sup> and stated that while this has been relied on in the family courts to justify “lifting the veil,” Bodey J himself acknowledged in that case that to use ownership and control as the sole reason to lift the veil is inconsistent with the *Salomon* principle. He quotes Bodey J where he stated, “it is quite certain that company law does not recognise any exception to the separate entity principle based simply on a spouse having sole ownership and control.”<sup>81</sup> However it is argued that Munby J has taken Bodey J’s comments out of context and thus the significance of the above sentence has been distorted. Bodey J looked at the “lifting the veil” concept from both a company law and a family law perspective. He said, in relation to the company law approach that ownership is, of course, not enough to justify lifting the veil as this would completely contradict the

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<sup>75</sup> *Ibid* at para 17. The aforementioned principles were emphasised by him in *Whig v Whig*. [2008] 1 FLR 453 at para 57-60.

<sup>76</sup> See chapter 2 of this thesis for an in depth discussion of this case.

<sup>77</sup> [2009] 1 FLR 115 at 154.

<sup>78</sup> See chapter 2 of this thesis for a discussion of the accepted exceptions to the *Salomon* principle.

<sup>79</sup> [2009] 1 FLR at 155.

<sup>80</sup> [2001] 3 All ER 673.

<sup>81</sup> *Ibid* at 682.

principles laid down in *Salomon*. However under the family law approach he quoted<sup>82</sup> Dillon LJ in *Nicholas v Nicholas*<sup>83</sup> who stated: “If the company is a one-man company and the alter ego of the husband, I would have no difficulty in holding that there was power to order a transfer of the property, but that is not the case.” He also cited a number of other judgments stating the same principle.

Munby J set out a list of principles that the family courts must be aware of in deciding whether to lift the veil.

In the first place, ownership and control are not themselves sufficient to justify piercing the veil... Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought to be necessary in the interests of justice... Thirdly, the corporate veil can be pierced only if there is some ‘impropriety’... Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability... Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis)use of the company by them as a device or façade to conceal their wrongdoing... Finally...a company can be a façade even though it was not originally incorporated with any deceptive intent...<sup>84</sup>

Thus, it is apparent that Munby J required the wife to establish both control and impropriety. He doubted that the company was the “alter ego” of the husband and then said “[e]ven if I am wrong ... (there is) no relevant impropriety”<sup>85</sup> He stated:

But in the present case there is no anterior or independent wrongdoing. All that the husband is doing in the circumstances with which he is now faced...is to take advantage, in my judgment legitimately to take advantage, of the existing corporate structure and, if one chooses to put it this way, to take advantage of the principle in *Salomon*. That does not involve any impropriety.<sup>86</sup>

Munby J discussed Miss Parker’s contention that in *Mubarak* impropriety was not considered to be an essential requirement for piercing the veil but he did not accept that this was what Bodey J held in *Mubarak* “[a]nd if it was – which, to repeat, I do not accept – then Bodey J, with great respect, would have been wrong to take that

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<sup>82</sup> *Ibid* at 681.

<sup>83</sup> [1984] FLR 285 at 292-293.

<sup>84</sup> [2009] 1 FLR 115 at 155-156.

<sup>85</sup> *Ibid* at 167.

<sup>86</sup> *Ibid* at paras 199 and 200.

view.”<sup>87</sup> He held that the wife was entitled to the £7,061,570 that she requested but not to the ownership of the English properties which were in the company’s name. It is clear that Munby J has reaffirmed the importance of the *Salomon* principle in the family court, thus setting a high threshold for any spouse wishing to lift the corporate veil.

Some academics have serious issues with the approach that has been adopted by Munby J. Bamber asks, “if the corporate veil cannot be pierced in this case, in what case might such a wife be successful? The wife here has been faced by as obstructive an approach as could be imagined, adopted with enormous wealth.”<sup>88</sup> He says, “[i]f the company is properly set up, and a legitimate purpose is evinced, then if Munby J’s analysis is followed it will be all but impregnable, notwithstanding the manifest injustice that might be done to a wife in that situation.”<sup>89</sup> Bamber does however acknowledge that it is important to have a consistency of approach between the divisions but says “the difficulties which this creates in achieving justice for wives are of very real concern.”<sup>90</sup> The reason for this is that those “advising companies and trusts are acutely aware of the robust views adopted by some judges in the Family Division, and are working to make those structures ‘divorce proof’.”<sup>91</sup>

It is clear that business assets have been the subject of greater judicial and academic discussion in England. However, it appears that two of the main judgments in the last few years are in complete contradiction with one another. Perhaps Bodey J’s approach is superior in that he acknowledged that the law needs to be applied differently depending on the context. In addition, it is submitted that Bamber made some valid points in arguing that Munby J has put an excessive burden on dependent spouses who wish to gain a stake in the other spouse’s business assets. Bodey J felt that he was justified in making a distinction between a “one man company” and other types of company. However, even if this distinction was to be accepted it has led to quite unjust results in the past, for example the *Nicholas* case shows that judicial reluctance

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<sup>87</sup> *Ibid* at 171.

<sup>88</sup> Bamber, above n.62 at 130.

<sup>89</sup> *Ibid* at 130.

<sup>90</sup> *Ibid* at 131.

<sup>91</sup> *Ibid*.

or judicial uncertainty can be detrimental to achieving the fairest outcome. In this case the aforementioned distinction was applied to prevent the transfer of the matrimonial home to the wife.

### **How relevant is English case law in Irish Divorce Law?**

Because English case law is somewhat further developed than the Irish law discussed in the previous chapter, it is important to discuss its relevance in our jurisdiction. Coveney argues that perhaps the best way to deal with the authorities from other jurisdictions in Ireland is to draw upon them “in the application of the section 20 criteria, without following them uncritically.”<sup>92</sup> This helpful suggestion is reflected in some judicial commentary on the of relevance of English case law, in particular by the Irish Supreme Court in *T v T*.<sup>93</sup> The judges in this case specifically referred to English authorities such as *White v White*<sup>94</sup> and *Cowan v Cowan*.<sup>95</sup> Chief Justice Keane stated that he did not have a problem with adopting a similar approach in Ireland provided that judges remain aware that there are some significant differences in the legislation and equal division is not actually directed by the legislation. He said to a limited extent “the court might be justified in treating, in “ample resource” cases, one-third of the net assets as a yardstick at the lower end of the scale.”<sup>96</sup> However, as recently observed by Durcan SC, Keane CJ “is careful to limit that acceptance to certain defined parts of the judgment and he does not in any sense endorse the general approach set out in those judgments for adoption in this jurisdiction.”<sup>97</sup>

Murphy J was of the opinion that because the wording of the Constitution is the master of the Irish Courts, English case law can be of little assistance.

As a matter of law I would merely add that I believe that the decision in *White v White* and the observations contained therein would be of very little assistance in interpreting the Irish Act of 1996 notwithstanding the many similarities between the United Kingdom and the Irish legislation.<sup>98</sup>

<sup>92</sup> Coveney, “Proper Provision in Matrimonial Breakdown: The Debate Continues in the Aftermath of *T v T*” (2003) 6 (1) *IJFL* 3 at 8.

<sup>93</sup> [2002] 3 IR 334.

<sup>94</sup> [2001] 1 All ER 1.

<sup>95</sup> [2001] 2 FLR 1 CA.

<sup>96</sup> [2002] 3 IR 334 at 369.

<sup>97</sup> Durcan SC, ‘*Divorce, Judicial Separation and Ancillary Relief*’, *op.cit.*, at p.16.

<sup>98</sup> [2002] 3 IR 334 at 400.

In *JD v DD*<sup>99</sup> McGuinness J stated:

Apart from its emphasis on the “clean break” much of the English legislation covering ancillary relief on marriage breakdown is very similar to that in this jurisdiction and includes the same breadth of judicial discretion.

She then referred to some English case law and noted that they were decided on “clean break” principles and therefore are “not directly applicable to the situation in this jurisdiction.” Nevertheless, she felt that the approach of the English courts in cases involving wealthy families was both instructive and persuasive.<sup>100</sup>

If one is to look at the above judgments of Guinness J and Keane CJ it is clear that English case law may have some relevance provided that the court acknowledges the significant differences in the legislation when granting a divorce. On this topic, and with reference to chapter two, it is important to note that English law is hugely relevant in Irish company law. In fact *Salomon v Salomon*<sup>101</sup> which outlined the concept of separate legal entity is a House of Lords’ ruling, which has been accepted and developed in Ireland. Thus, it is argued that English case law may be more relevant in relation to this particular issue in divorce law as the company law principle involved developed from the English House of Lords.

### **Conclusions**

It is clear upon reading chapters three and four of this thesis that legislative guidance in relation to ancillary orders dealing with business assets is lacking in both the English and Irish jurisdictions. In Ireland, McKechnie J has expressly shown support for a property adjustment order in relation to such assets where it is necessary to properly provide for a spouse. However, no such orders were made in that case and thus it cannot be said to stand as a very strong precedent. This lack of guidance makes the judiciary’s task extremely difficult. As noted by Shannon: “Of all areas relating to the distribution of marital assets, the area of property is particularly at the mercy of judicial discretion.”<sup>102</sup> The lack of guidance may prove both positive and negative for the dependent spouse who wishes to obtain an order in relation to her spouse’s

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<sup>99</sup> [1997] 3 IR 64.

<sup>100</sup> *Ibid* at 93.

<sup>101</sup> [1897] AC 22.

<sup>102</sup> Shannon, *Divorce Law and Practice, op.cit.*, at 344.

business assets. On the one hand the discretion given to the judiciary under section 14 does not restrict them from relying on business assets. However, on the other hand, due to the lack of guidance in section 14, it is fair to say that a judge may be afraid to interfere to a great extent with a business or to violate principles of company law.

English law has no constitutional requirement of proper provision; nonetheless, it seems that up until recently there was evidence of more willingness to interfere with a spouse's business assets to provide for the other spouse. However, the more restrictive approach recently adopted in *Mubarak* demonstrates the dangers of operating in a legislative vacuum in this respect. In Ireland, where proper provision is central to the division of assets one would think that this constitutional requirement would lead to the development of a more lenient approach. However, this has not been the case in practice. We will see in chapter five that in British Columbia, Canada, a step by step legislative process has been provided for the judiciary to guide them in their dealings with a spouse's business assets. The only way to avoid the doctrine of separate legal personality is for the legislature to make rules which create an exception to the company law principle in the family law context. In addition, the legislature needs to create a list of factors to be considered by the judiciary where business assets, not necessarily company assets, are the subject of that order. The considerations for both types of assets may be similar, for example third party interests and the spouses' interests would be important considerations for both. Business assets require unique treatment and special guidance and as a result legislative amendment is urgently required stating when and how these assets may be the subject of a property adjustment order.

Thus, while there has been some more discussion of the topic in England, both jurisdictions are lacking in guidance from the legislature regarding the factors to be considered when business assets make up a substantial proportion of the assets of divorcing couples. More particularly, a decision must be made regarding separate legal entity in divorce law. Does it exist in a family case or is family law, as McKechnie J suggests, *sui generis*? England operates under a clean break system and thus it is argued that guidance is more crucial in England as spouses may not get a second or third chance to apply for the provision they need.

## **Chapter Five: Canada, British Columbia and Business Assets**

The previous two chapters outlined the current treatment of business assets in matrimonial property law disputes under Irish and English Law. It is apparent that in both jurisdictions the status of business and company assets on divorce is extremely unclear and there is an urgent need for legislative clarification. Chapter two of this research discussed the *Salomon* principle and the metaphorical corporate veil, which provide that the company must be regarded as a separate legal entity which is distinct from its shareholders, even where in reality the company in question can be described as a “one man company.” This author highlighted that Canada and in particular the British Columbian jurisdiction places great emphasis on the application of the *Salomon* principle and in the commercial context the courts are very reluctant to disregard the principle of separate legal personality. The British Columbian courts are perhaps even stricter in their application of the *Salomon* principle than the courts in Ireland and England. In British Columbia, the only true grounds upon which to disregard the corporate veil is the “fraud” exception and even then, the exception is narrowly construed.

This chapter will identify how business assets are dealt with in Canada and, more specifically, in British Columbia. Firstly, this author will discuss the Federal Child Support Guidelines of Canada and the treatment of the corporate veil under such guidelines. Secondly, the operation of the Community Property Regime in British Columbia and how the courts deal with business assets of divorcing spouses shall be examined. Thirdly, this chapter shall examine how the British Columbian divorce courts deal with a spouse’s shares in a company. The main objective of this chapter shall be to ascertain whether British Columbian legislation could be of any assistance to Irish legislators when it comes to clarifying how business assets should be dealt with on divorce in this jurisdiction.

### **Child Support Guidelines and Company Law**

Section 18 of the Federal Child Support Guidelines 1997 provides a mechanism of imputing income to a spouse where this income is earned through a corporation. These guidelines allow the court to use a company’s earnings or assets to provide or secure maintenance payments for children. The Federal Guidelines can be accepted and

applied by each state or each state can choose to write their own. British Columbia has adopted the Canadian Child Support Guidelines. Section 18 provides as follows:

Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16<sup>1</sup> does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17<sup>2</sup> and determine the spouse's annual income to include:

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

In *Baum v Baum*<sup>3</sup> the justification for the aforementioned provision was discussed by the court:

Valid corporate objectives may differ from valid child support objectives. The purpose of s.18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation.<sup>4</sup>

Madam Justice Martinson stated therefore:

Mr Baum is the sole shareholder and only person who provides services to the company. Incorporation did not change the nature of the income earned or who earned it... (and) Jessica is entitled to the benefit of her father's present income earning ability<sup>5</sup>

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<sup>1</sup> Section 16 of the Federal Child Support Guidelines 1997 deals with the calculation of a spouse's income and states as follows: "Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading 'Total income' in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III"

<sup>2</sup> Section 17(1) of the Federal Child Support Guidelines deals with the pattern of income of the spouse. It states, "[i]f the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non recurring amount during those years." Section 17(2) refers to non-recurring losses and states "[w]here a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate."

<sup>3</sup> (1999), 182 DLR. (4th) 715 (BCSC)

<sup>4</sup> *Ibid* at para 28.

<sup>5</sup> *Ibid* at para 43-45.

The judge concluded by applying the aforementioned guidelines in this case. It is important to note that this judgment and in particular the first quotation set out above have been cited on numerous occasions since *Baum*.<sup>6</sup>

In *Wildman v Wildman*<sup>7</sup> the spouse was attempting to avoid paying child support. The court opened by noting that the previous orders made against the husband were aimed at preserving the husband's financial assets but at the same time ensuring that he met his financial obligations to his wife and children.<sup>8</sup> However, as noted by the court, "for more than a year, the appellant displayed almost complete disrespect for the growing number of court orders relating to him and his assets."<sup>9</sup> As a result, the trial judge stated that the payments should be secured against not only him personally but also against the various enterprises which he controlled.

On appeal in *Wildman* the appellant contested the court's disregard for the separate legal personality of a company. However the Court of Appeal upheld this aspect of the trial judgment. Nicholls in a recent critique of the law in this area<sup>10</sup> describes the decision as resting on four planks. As Nicholls summarises:

1. The case does not involve imposing personal liability on a shareholder, and so does not engage the "usual" corporate veil-piercing concerns.
2. The separate legal personality of a corporation is not absolute. It should be disregarded in family law cases where the corporation "is completely dominated and controlled and being used as a shield for improper conduct."<sup>11</sup> Indeed, in family law cases, the court may take a more "relaxed" approach to lifting the corporate veil.
3. The Child Support Guidelines contemplate piercing the corporate veil.<sup>12</sup>

<sup>6</sup> See for example *A.R.J v Z.S.J.*, [2009] BCSC 1662 and *Kowalewich v Kowalewich*, [2001] BCCA 92, BCLR. 7 (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA)

<sup>8</sup> *Ibid* at para 7.

<sup>9</sup> *Ibid* at para 8.

<sup>10</sup> Nicholls, "Beyond the Veil: *Wildman v Wildman*" (2007) 44 Can. Bus LJ 448. See also Turner, "Division of Third Party Property in Divorce Cases" (2003) 18 J. Am. Acad. Matrimonial Law, 375 at 412 for a discussion of the corporate veil in some jurisdictions in the United States. He says that generally the court wishes to be satisfied of the following before piercing the veil: 1) The parties are the only persons with interests in the business; 2) The parties themselves have regularly failed to respect the independent existence of the corporation usually through widespread use of corporate assets for their own personal benefit. (at p.451) These considerations also seem to be similar to those outlined by McKechnie J in *BD v JD*. See also the following cases: *Lytal v Lytal* 818 So. 2d 111 (La. Ct. App.2001), *Medlock v Medlock* 642 NW 2d 113,125 (Neb. 2002), *Colman v Colman* 743 P.2d 111 (La. Ct. App. 2001) and *Carlton v Carlton* 997, P 2.d 1028 (Wyo. 2000).

<sup>11</sup> (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA) at para 25, quoting Sharpe J in *Transamerica Life Insurance Co. of Canada v Canada Life Assurance Co.* (1986), 28 OR (3d) 423 (Gen. Div).

<sup>12</sup> *Arsenault v Arsenault*, (1998) O.J No. 1423 (QL), see Wood J's comments at para 25-30. Wood J noted that there is also a strong public policy argument to be made for a review of closely held corporations in the context of support.

4. The appellant was the sole shareholder of the corporation in question. No third party interests would be affected by having the order attach to the corporation's interests.

The second and fourth justifications outlined above are redolent of McKechnie J's suggestion in *JD v BD*, that family law cases may be regarded as "at least in part *sui generis*" and his finding that it would be more appropriate to lift the veil where the company is effectively a one man company and no third parties are to be affected.<sup>13</sup> MacPherson JA noted in the case: "The crucial question in this appeal is whether the exception to the principle of separate legal personality for corporations set out in (the commercial cases) *Fleischer*<sup>14</sup> and *Transamerica Life Insurance*<sup>15</sup> should be injected into family law."<sup>16</sup> In these commercial cases the courts were prepared to disregard the separate legal personality of a company if it was being used as a shield for fraudulent or improper conduct.

MacPherson JA endorsed the views of Justice Martinson in *Baum v Baum*,<sup>17</sup> outlined above.<sup>18</sup> He then quoted at length from the judgment of Wood J in *Arsenault v Arsenault*<sup>19</sup> who stated that, in general in a commercial context the following circumstances must be present before the "veil" of a corporation can be lifted:

1. The individual exercises complete control of finances, policy, and business practices of the company.
2. That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights.
3. The misconduct must be the reason for the third party's injury or loss.<sup>20</sup>

However, both MacPherson JA and Wood J seemed to acknowledge that there was something unique about lifting the veil in a family law context. MacPherson JA cited Wood J who stated: "I take some comfort in the fact that in the area of family law a somewhat more relaxed approach has been taken by the courts."<sup>21</sup> MacPherson JA noted:

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<sup>13</sup> [2005] IEHC 407 at para 29.

<sup>14</sup> *Ontario Ltd v Fleisher* (2001), 56 OR (3d) 417 at paras. 67-68.

<sup>15</sup> *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co.* (1986) 28 OR (3d) 423 at 433-34.

<sup>16</sup> (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA) at para 25.

<sup>17</sup> (1999), 182 DLR. (4<sup>th</sup>) 715 at para 28 (BCSC).

<sup>18</sup> Above, at n.5.

<sup>19</sup> [1998] O.J. No. 1423 (QL) paras 24-30.

<sup>20</sup> (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA) at para 31, citing Wood J in *Arsenault v Arsenault*.

<sup>21</sup> *Ibid.*

In appropriate cases, piercing the corporate veil of one spouse's business enterprise may be an essential mechanism for ensuring that the other spouse and children of the marriage receive the financial support to which by law, they are entitled.<sup>22</sup>

MacPherson JA summed up the main aim of the law in this area:

This is a matrimonial litigation, not commercial litigation. Importantly, the record establishes that the appellant and his companies are one and the same. No third party has any interest in any of the companies... In the end, although a business person is entitled to create corporate structures and relationships for valid business, tax and other reasons, the law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law.<sup>23</sup>

The court secured the orders for maintenance against the appellant's companies.

Christopher Nicholls finds this decision problematic on a number of different levels. He says that the arguments which led to the conclusion that family law is a very unique situation are somewhat "incomplete."<sup>24</sup> He argues that the creditors in the *Salomon* case<sup>25</sup> would equally have been entitled to repayments of their debts by law and he rejects the argument that the spouse is more deserving of legal protection than other creditors; or that the claims of spouses and children "trump" other "mere" commercial debts.<sup>26</sup> It is submitted, however, that in general spouses and children must be treated as more worthy of protection as they do not chose to deal with a limited company with a view to making a profit. Thus while many creditors are undoubtedly innocent, they are aware of the "worst case scenario" and the possible consequences of their actions. This risk is part, albeit sometimes an unfair part, of the business world. The principles espoused in *Wildman* have recently been accepted in *Lynch v Segal*.<sup>27</sup>

In *Lynch v Segal* the spouse in question was a very wealthy man, but nonetheless was defaulting on his spousal and child support orders. The trial judge, Justice Paisley, found that there was no distinction in law between the appellant corporations and Mr. Segal and that Mr. Segal was the beneficial owner of the farm lands in the Oakville area referred to in the judgment as "the Lands." To satisfy the sizeable lump sum awards for spousal and child

<sup>22</sup> (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA) at para 49.

<sup>23</sup> *Ibid.*

<sup>24</sup> Nicholls, above n.10 at 454.

<sup>25</sup> [1897] AC 22.

<sup>26</sup> Nicholls, above n.10 at 454.

<sup>27</sup> (2006) OJ No. 4810 (QL) (CA).

support that he had made, and which were not challenged on appeal, Paisley J. directed that the Lands be transferred to, and vested in, Ms. Lynch.<sup>28</sup>

The husband appealed as he felt that the court was not justified in making this order. The Court of Appeal judge, Blair JA, cited the judgment in *Wildman* with approval and went on to find that the trial judge was correct in deciding that the “veil” could be lifted in this case. He stated:

In my view, Justice Paisley, like the trial judge in *Wildman*, was correct in recognising that this case is one in which it is appropriate to pierce the corporate veil. During argument he observed that Mr. Segal was not using the appellant corporations for permissible corporate arrangements, but rather “was using the corporate structure for one sole purpose, to disguise his property so that his spouse and children would have no claim against him should he ever have to defend against a claim.”<sup>29</sup>

Blair JA<sup>30</sup> referred to MacPherson JA’s comment in *Wildman* that the *Salomon* principle was an important principle but not an absolute one.<sup>31</sup> He made reference to the court’s willingness to lift the “veil” where Revenue matters are concerned, citing *Kosmopoulos v Constitution Insurance Co*<sup>32</sup> as an example. He quoted from *Kosmopoulos* stating the courts will not enforce the “separate entities” notion where “it would yield a result too flagrantly opposed to justice, convenience or the interests of the Revenue.”<sup>33</sup> Kahn Freund and Keane have also indicated that Revenue matters will often give rise to an exception to the corporate veil.<sup>34</sup> It is submitted that the privileged position of the Revenue further discredits Nicholls’ arguments that the spouse should not be seen as more worthy of legal protection than the regular creditor. If the Revenue can be seen as more deserving, then without doubt, so should the innocent spouse and children.

Blair JA, in this Court of Appeal case, found that a more flexible approach to piercing the veil was also required in the family law context and upheld the findings of the trial courts saying:

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<sup>28</sup> *Ibid* at para 3.

<sup>29</sup> *Ibid* at para 38.

<sup>30</sup> *Ibid* at para 35.

<sup>31</sup> (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA) at para 23.

<sup>32</sup> (1987) 1 SCR 2 at 10, citing LCB Gower.

<sup>33</sup> (2006) OJ No. 4810 (QL) (CA) at para 35.

<sup>34</sup> See Chapter 2.

For the foregoing reasons, and given the circumstances of this case, I would not interfere with the trial judge's discretionary choice to transfer the Lands to Ms. Lynch and to vest them in her in satisfaction of her spousal and child support claims, in the circumstances of this case.<sup>35</sup>

Nicholls however again took issue with such findings; he argued "the corporate law analysis upon which the court purported to base its decision was, with respect, in some ways more troubling than the *Wildman* analysis."<sup>36</sup> He disapproved of Blair JA's disregard of certain commercial authorities which indicated that the veil should not be disregarded lightly.<sup>37</sup> Nicholls pointed out that the actions of the spouse were not fraudulent<sup>38</sup> and therefore the "veil" should not have been lifted. This author is not convinced by Nicholls' arguments and believes that *Lynch* was an example of a case where lifting the "veil" was justified. It is submitted that the judge was correct in acknowledging the differences between the application of the principles in the commercial and the family law courts. The decision was clearly justified from a social justice perspective as the husband was a wealthy man and was nonetheless purposely avoiding his obligations to his wife and children. Such actions should not be acceptable even if it involves lifting the sacred "corporate veil."

Unsurprisingly Irish legislation does not provide adequate guidance in relation to this specific issue. Instead it deals with the maintenance of spouses and children in a far more general manner. Section 5(4) of the Family Law (Maintenance of Spouses and Children) Act 1976 is important in this regard. It states as follows:

The court in deciding whether to make a maintenance order and the amount to be awarded must have regard to all circumstances of the case, and, in particular:

- (a) the income, earning capacity (if any), property and other financial resources of:
  - (i) the spouses and any dependent children of the family, and,
  - (ii) any other dependent children of which either spouse is a parent including income or benefits to which either spouse or any such children are entitled by or under statute, and,
- (b) the financial and other responsibilities of:

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<sup>35</sup> (2006) OJ No. 4810 (QL) (CA).

<sup>36</sup> Nicholls, above n.10 at 459.

<sup>37</sup> See *Transamerica Life Insurance Co. of Canada* (1986) 28 OR (3d) 423 (Gen Div), where it was stated that the veil should not be disregarded lightly.

<sup>38</sup> Nicholls, above n.10 at 459.

- (i) the spouses towards each other and towards any other dependent children, and the needs of any such children including the need for care and attention.<sup>39</sup>

A legislative definition of earnings is provided by Section 3(1) of the 1976 Act as the sums payable to a person:

- (a) by way of wages or salary (including any fees, bonus, commission, overtime pay or other emoluments payable in addition to wages or salary or payable under a contract of service);
- (b) by way of pension or other like benefit in respect of employment (including an annuity in respect of past services, whether or not rendered to the person paying the annuity, and including periodical payments by way of compensation for the loss, abolition or relinquishment, or diminution in the emoluments of any office of employment).

Section 5(4) is a very broad provision and refers to “property and other financial resources” but does not provide any specific guidance with regard to company and/or business assets and whether they come under this general heading. Although company assets are certainly not expressly excluded, the lack of guidance for the judiciary may lead to some reluctance to include such income in order to avoid interfering with well established principles of company law. Similar comments were made by this author in chapter three of this thesis in relation to section 14 of the Family Law (Divorce) Act 1996, which is equally vague and unhelpful.<sup>40</sup> Section 41 of the Family Act Law 1995 allows the courts to secure maintenance payments (Section 13 of the Family Law (Divorce) Act 1996 also provides for such orders). As Shatter notes “the court either at the time of making the order or subsequently may require the maintenance debtor to secure the payments to be made.”<sup>41</sup> Again, however it is unclear whether business or company assets may be used as security. It is clear that legislative clarification would be helpful in this respect.

### **British Columbia and Community Property**

Although the Canadian Divorce Acts of 1968 and 1985 do not include specific provisions relating to the division of assets on divorce, as the provinces legislate themselves in relation to this, in general, some version of the Community Property Regime operates throughout

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<sup>39</sup> As amended by the Status of Children Act 1987. See also discussion in Shatter, *Shatters Family Law* (4<sup>th</sup> edn, Dublin: Butterworths, 1997) 664-665.

<sup>40</sup> See chapter three at p. 46.

<sup>41</sup> Shatter, *Shatters Family Law op-cit* at 694.

Canada. This section will examine British Columbian legislation on the division of assets on divorce and more particularly the approach taken in relation to a spouse's business assets.

The Family Relations Act 1996 ("The Act") governs the division of assets in British Columbia. Section 56(1) of the Act provides for the equal division of assets which are defined as family assets. A family asset is defined in section 58 as "[p]roperty owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose." However this definition is qualified by section 59 which excludes certain business assets. Section 59 states:

(1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

(2) In section 58(3)(e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.<sup>42</sup>

Section 65 of the Act allows for an unequal division of the family assets if an equal division was seen by the judge to be unfair. This section provides a list of factors to be considered by the court when deciding whether a division is fair in the circumstances.<sup>43</sup>

As Farquhar notes, "in many cases the emphasis of inquiry will move away from ordinary use for a family purpose to the question of contribution."<sup>44</sup> It is clear that all business assets are not automatically excluded but only business assets which were acquired without any direct or indirect contributions by the non-owning spouse. Business assets, ventures or shares are capable of qualifying as family assets provided the non-owning spouse contributed either directly or indirectly to their acquisition. It is submitted, therefore, that in order to fully understand the scope of this Act it is necessary to turn to the case law to see how the British Columbian courts have interpreted "direct" and "indirect" contributions.

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<sup>42</sup> Section 59 of the Family Relations Act 1996.

<sup>43</sup> Section 65 (1) of the Family Relations Act refers to the duration of the marriage, the length of time the spouses lived apart, the date that the property was acquired, the extent to which the property was acquired by one of the spouses, the needs of the spouses to enable them to remain financially independent and any other circumstances relating to acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of the spouse.

<sup>44</sup> Farquhar, "Family Assets in British Columbia" (1995) 12 Can J Fam. Law 229 at 263.

***Case Law: Direct and Indirect Contributions to a Spouse's Business***

Firstly, it is important to note the dicta of Catliff LJSC in *Samuels v Samuels*<sup>45</sup> who stated: “[W]hat I think the wife must prove is that her contribution had some connection, albeit in only a general way, with the property in which she seeks an interest.” This concept of “connection” was also applied by the Irish courts in the case of *C v C*,<sup>46</sup> although Shatter felt that proof of a “connection” was unnecessary in the case. The difficulty with this approach is that in the Irish context the requirement for a contribution which connects to the business has generally been interpreted quite restrictively so that work in the home will not suffice.

In *Uram v Uram*<sup>47</sup> the court found that the wife had made sufficient contributions to the husband's business for it to qualify as a family asset. The judge noted that the wife had made direct contributions to the business by guaranteeing a loan which the husband received and loaning the husband \$7,000 for business purposes.<sup>48</sup> In considering whether an unequal distribution was warranted under section 65 the judge fixed Mrs Uram's share in the matrimonial home at one half of the present net equity which amounted to \$121,000<sup>49</sup> bearing in mind the wife's direct and indirect contributions. In relation to the business the judge stated:

Balancing out the competing claims of husband and wife I find it would be fair to make a reapportionment of the Bimini property by awarding the wife 10 per cent of her husband's equity, with the remaining 90 per cent resting in the husband as heretofore. Converting these shares into money, I fix Mrs. Uram's interest in Bimini's at 10 per cent x \$875,000 or \$87,500 and Mr. Uram the remainder.<sup>50</sup>

In *Elsom v Elsom*<sup>51</sup> the British Columbian Supreme Court held “[i]n the first instance, *prima facie* Mrs. Elsom is entitled to a 50 per cent interest in the businesses of the Canadian and English companies, both by virtue of her indirect contributions.”<sup>52</sup> The court explained:

[W]ith the husband shuttling back and forth between England and Canada throughout the whole of the marriage, I cannot see how, particularly after the

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<sup>45</sup> (1981) 30 BCLR 186 at pg 188.

<sup>46</sup> [1994] Fam LJ 22.

<sup>47</sup> (1981) 34 BCLR 99.

<sup>48</sup> *Ibid* at para 14 to 16.

<sup>49</sup> *Ibid* at para 34.

<sup>50</sup> *Ibid* at para 39.

<sup>51</sup> (1983), 37, RFL (2d) 150 (CA).

<sup>52</sup> (1982) 35 B.C.L.R. 293 at para 67.

child arrived, she did not relieve him of ‘concern’ at one place or another. *Prima facie* her share is 50 per cent.<sup>53</sup>

The Court of Appeal upheld the findings of the Supreme Court and dismissed the spouse’s appeal regarding the classification of the business assets as family assets. MacFarlane JA held that except in the most exceptional of cases a spouse who is carrying out child rearing or household duties will be rebuttably presumed to have indirectly contributed to the business for the purposes of making it a “family asset” under section 58 and 59 of the Act. MacFarlane JA stated:

The appellant submits that the wife did not, in fact, make any contribution to the operation of the business in this case. But the situation here is not much different than the usual case. The wife relieved her husband of responsibilities in respect of the home and the child. She supported him in all that he did.<sup>54</sup>

Thus both the Supreme Court judge and the Court of Appeal judge found that the business assets of the husband were to be considered as family assets. They both found, as the law requires, that the wife was *prima facie* entitled to a 50% share in the family assets. However, both courts noted that the percentage share in the assets which the wife is to receive may be reduced upon consideration of the criteria set out by section 65 of the Family Relations Act. The issue of the division of these family assets came before Mr Justice Locke in November 1985 and he ordered that the family assets be apportioned giving 75% to the husband and 25% to the wife.<sup>55</sup>

This finding was appealed to the Court of Appeal in 1987, where MacFarlane JA stated:

In my opinion the facts indicate that a 25 per cent share in the business assets was disproportionate to the wife’s indirect contribution to those assets. I think that a fair share, having regard to criteria contained in s. 51 (now section 65), would be 10 per cent.<sup>56</sup>

However, he continued:

On the other hand, the wife was concerned on a daily basis with the use and management of the domestic assets. In respect of those assets it is difficult to see why it is unfair to award her a 50 per cent interest, particularly having regard to the fact that there are two homes of about the same value... If the reapportionment were made on this basis, then the wife would receive 10 per cent of the business

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<sup>53</sup> *Ibid* at para 70.

<sup>54</sup> (1983), 37, RFL (2d) 150 (CA) at para 7.

<sup>55</sup> (1987) 13 R.F.L. (3d) 231 at para 4.

<sup>56</sup> *Ibid* at para 23.

assets...plus 50 per cent of the domestic assets... It follows that I would reject the cross appeal of the wife for a 35 per cent share of all of the family assets.<sup>57</sup>

It has been submitted that *Elsom* has made it easier for claims of contribution to succeed before the courts and “cases where the claim fails are indeed rare.”<sup>58</sup> While an order for a 10% interest in the business is not incredibly substantial it shows a willingness in the Canadian courts to award an interest in the business assets. The size of the award will depend on the size of the spouses direct and indirect contributions to the business and the other factors outlined in section 65 of the Act.<sup>59</sup> In the above case the spouse’s contributions to the business were not significant enough to entitle her to a 50% interest in those assets.

*Piercy v Piercy*<sup>60</sup> is another case which highlights the low burden on British Columbian wives to prove that they have contributed to the business of their husband. In this case the wife was living in very affluent circumstances and had considerable household help and no children. The question before the court was whether her role in the household could amount to an indirect contribution. Huddart J looked to her role as a society wife “confidante and sounding board”<sup>61</sup> and found, without hesitation, that she had made indirect contributions to the husband’s business. This case confirms Farquhar’s observations that the courts have been anxious not to limit the concept of contribution.<sup>62</sup> In this author’s opinion the courts went too far in this case and lowered the threshold for proving contributions to an unacceptable degree. In *Semkuley v Semkuley*,<sup>63</sup> however, the wife’s claim was answered in the negative. The wife in this case had merely spent four days renovating and repairing the business premises. Allan J held that a minimal amount of work was not sufficient to amount to a contribution under the Family Relations Act.<sup>64</sup>

In considering what amounts to a sufficient contribution under the Act, it is also important to examine the 1993 case of *Komori v Mallins*.<sup>65</sup> The asset in question in this case was a revenue property which the husband acquired before the marriage and renovated into three suites. The upper and lower suites were rented and the revenue from them paid for the house

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<sup>57</sup> *Ibid* at para 24-25.

<sup>58</sup> Farquhar, above n.44 at 263-264.

<sup>59</sup> Above, n.42.

<sup>60</sup> (1991), 31 RFL (3d) 187 (SC).

<sup>61</sup> *Ibid* at 194.

<sup>62</sup> Farquhar, above n.44 at 264.

<sup>63</sup> (1992), 42 RFL (3d) 240 (SC).

<sup>64</sup> *Ibid* at 243.

<sup>65</sup> 1 November 1993, Vancouver No. D66631 (BCSC) and 1996 CanLII 470 (BC CA).

costs such as the mortgage, insurance, taxes and maintenance.<sup>66</sup> One suite was retained as the family home. The wife claimed that the entire building was a family asset as a result of her homemaking role in the family unit.

This question came before the Supreme Court and Justice Hood had to consider whether, as the wife contended, the revenue property must be considered as a whole and as a family asset:

In my opinion, the revenue house need not be considered as a whole because it can be divided both physically and notionally...into separate and distinct elements each of which are independent of the other. The situation is the same as if the house was an apartment block. Common ownership...makes no difference. It is only the property which has been ordinarily used for a family purpose with which we are concerned. However, if the house must be considered as a whole, it is clear that the its dominant use is as a revenue house, that its subordinate use is as a family home, and that it is not as a whole a family asset.<sup>67</sup>

He then went on to consider whether the wife's contributions were sufficient to make the revenue house a family asset. He stated:

In my opinion there has not been enough time or effort on the part of the petitioner to warrant a finding that the petitioner made an effective contribution to the operation of the revenue house business... The business is a *self-fulfilling business* involving the expenditure of little time by the respondent and *no family monies*. The respondent worked during the day running his store as the petitioner worked in the hospital. The revenue house business was not carried on at the expense of the petitioner and there was no nexus between the petitioner's role as an effective mother and the operation of the business within the opinions contained in the leading case of *Elsom v Elsom*... It follows that in my opinion that the revenue house business is an excluded business asset, and not a family asset under s 46(1) of the Act.<sup>68</sup>

Thus, only the part of the Revenue house that was used as the matrimonial home was held to be a family asset. In relation to the other business asset, the retail premises, which was owned by the husband, Hood J first noted that there was a difference between the revenue house and the business, but concluded:

The petitioner did help out in the respondent's store from time to time, and when he was ill or in hospital. She therefore directly contributed to the operation of the business although the contribution was not a substantial one. Further, as I have already found, the petitioner was the primary caregiver... I am prepared to infer

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<sup>66</sup> 1 November 1993, Vancouver No. D66631 (BCSC) at pg 3

<sup>67</sup> *Ibid* at pg 37.

<sup>68</sup> *Ibid* at pg 39. Section 46 of the Family Relations Act was a precursor to the current section 58 of the Family Relations Act which is discussed in detail in the previous section.

that savings have accrued to the benefit of the respondent as a result of the respondent's child rearing efforts and that the savings have advanced the respondent's Stone Pony store business interest. Her effort constituted an indirect contribution to the operation of that business... There is in my opinion, in a general sense, a nexus between the petitioner's role of effective mother and the operations of the respondent's...business and I am satisfied that as a result of that contribution, and the petitioner's direct contributions...the business is a family asset.<sup>69</sup>

Even though the revenue house was not found to be a family asset, it seems that by looking at the wife's contributions to the other business (which were found to be acceptable to the court), the Supreme Court set the threshold for establishing satisfactory contributions to convert a business asset to a family asset at a fairly low level. The Supreme Court distinguished the revenue house on the basis that it was "self fulfilling" and did not use any family monies.

However, the case was appealed to the Court of Appeal on the basis of the classification of the revenue house. The judgment was given by Mr Justice Finch, who noted that the Supreme Court judge had not given any reasons for his finding that the house did not have to be considered as a whole. He cited a number of cases<sup>70</sup> and most importantly *Hollingsworth v. Hollingsworth* which undermined the Supreme Court's findings. In that case, Tysoe J stated:

If the parties themselves could not dispose of the two parts of the asset separately, I would be reluctant to effectively separate the asset by holding that both spouses have an interest in one part of it and the only one spouse has an interest in the other part<sup>71</sup>

Mr Justice Finch agreed with the findings of Tysoe J and found that the learned trial judge in the present case was in error. He stated:

The house was not strata-titled, nor otherwise divided into separate legal entities. It was one house on one lot, in which three individual suites had been created. The parties both before and after their marriage lived in one unit, and when their son was born, he lived there too. The other two units were rented, and part of the rental income was used to pay the mortgage and other costs of the whole house. In that sense the rental units were very much used for a family purpose. Paying the mortgage from rentals permitted the parties' incomes from other sources to be used for expenses other than accommodation. The parties could have used more space in which to live, especially after their son was born, but they chose to live in cramped quarters to maintain the economic benefits of having two units rented out.<sup>72</sup>

<sup>69</sup> 1 November 1993, Vancouver No. D66631 (BCSC) at pg 41.

<sup>70</sup> 1996 CanLII 470 (BC CA) at para 24.

<sup>71</sup> 2 February 1995, New Westminster DO28795 & S-02181 (BCSC).

<sup>72</sup> 1996 CanLII 470 (BC CA) at para 25.

Thus he held that the whole property must be classified as a family asset and the dependent spouse was *prima facie* entitled to 50 per cent of the assets which are found to be family assets. Upon considering Section 65 of the Family Relations Act he concluded:

Taking all factors into account, I would consider that injustice to both sides could be overcome by reapportioning the net equity in the house 75% in favour of the husband, and 25% in favour of the wife, so that her interest in the house would be one-quarter of \$474,000, or \$118,500. I would order reapportionment accordingly.<sup>73</sup>

The factors that the Court of Appeal judge considered included the fact that the husband had always been responsible for preserving and maintaining the property and the fact that the husband had no steady job while the wife had a steady job and a relatively good income. Thus, while the order was a great deal less than 50 per cent, it was still substantial. This decision highlights the willingness of the court to classify an asset that was once a business asset as a family asset. In general the British Columbian Court of Appeal seems to be quite forward thinking in this regard.

### **Shares and British Columbian Legislation**

It is also important to look at the British Columbian legislation on the division of shares. Section 58 of the Act states: “the definition of a family asset includes...if a corporation...owns property that would be a family asset if owned by a spouse, a share in the corporation.” In *Kurcz v Kurcz*<sup>74</sup> the Court of Appeal confirmed that, where shares are the subject of dispute in the divorce court, it is not the corporation’s assets which are family assets but rather the shares in that corporation which are owned by the spouse. The court said that under sections 58(3)(e) and 59 of the Family Relations Act, the question to be asked is whether the corporate assets *would be* family assets if they were owned by the spouse. Whether corporate assets *would* become family assets or not will depend on one of two actions occurring.

1. If the use of the assets can be described as “ordinary use for family purposes,” or
2. As a result of direct or indirect contributions by the other spouse.

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<sup>73</sup> *Ibid* at para 43.

<sup>74</sup> (1989), 20 RFL (3d) 206 (CA).

This concept of shares as family assets was explained further in the more recent case of *Newson v Newson*.<sup>75</sup> In this case the court acknowledged that the wife had made both direct and indirect contributions to the running of the various businesses which the husband had been involved in.<sup>76</sup> The judge also acknowledged the wife's substantial contributions to the home and the family<sup>77</sup> and her business contributions which related to the company, Maison. The Court of Appeal summarised the ruling of the trial judge as follows:

In addition to the nine assets which the parties had agreed were family assets, the learned trial judge concluded that gold bullion owned by the respondent, and three specific assets of Maison, were family assets. The trial judge apportioned the family assets between the parties. As a result thereof, the appellant<sup>78</sup> was held to be entitled to assets worth \$814,000 which represented approximately 60% of the value of the family assets.<sup>79</sup>

The shares in Maison were valued at \$1,655,109.00 and one of the questions on appeal was whether the judge had erred in finding certain assets of Maison (the business) to be family assets rather than the shares that the spouse held in the business. The respondent held all of the issued shares in the company which he then sold to a former employee. The value of the shares which should have been considered by the trial judge far exceeded the value of the assets.

In relation to the above question the Court of Appeal held:

If there is a power under the *Family Relations Act* to segregate assets out of a company into the hands of a shareholder it is a power to be exercised sparingly.<sup>80</sup>

Hinds JA clarified the status of shares in the family courts:

Where a spouse has an interest in the shares in a company which carries on one or more businesses to which the other spouse has made a direct or indirect contribution, thus establishing a claim of a family asset, then, in the absence of exceptional circumstances, the value of the interest in the shares in the company, rather than the value of the business of the company to which the other spouse has made a direct or indirect contribution, should be held to constitute a family asset.<sup>81</sup>

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<sup>75</sup> (1993) 45 RFL (3d) 115.

<sup>76</sup> *Ibid* at paras 5, 6 and 30.

<sup>77</sup> *Ibid* at para 7.

<sup>78</sup> The appellant was the wife in this case.

<sup>79</sup> (1993) 45 RFL (3d) 115 at para 19-20.

<sup>80</sup> *Ibid* at para 29.

<sup>81</sup> *Ibid* at para 28.

In relation to the apportionment of assets by the trial judge, Hind JA stated:

The division by the trial judge which allocated assets to a value of \$814,000 to the appellant was fair and just in the circumstances. However, the segregation of assets out of Maison to achieve that result cannot stand. There will be a reapportionment to secure the same dollar value to the appellant.<sup>82</sup>

Thus the Court of Appeal ultimately upheld the figure granted by the trial court, even if they reached this figure by a different route.

### **Criticisms of the 1996 Act**

Farquhar criticises “the inconclusive wording of the Act,”<sup>83</sup> which he argues raises the following questions:

[w]hat is ‘ordinary use for a family purpose’ and why should an asset be divided on this account? What amounts to a contribution for the purpose of converting a business asset into a family asset, and when will that contribution be inferred? When does an asset become a family asset, and, having become one, can it lose that character?<sup>84</sup>

The 1988 Justice Reform Committee, in *Access to Justice*, also felt that the Act was too ambiguous on a number of issues.<sup>85</sup> However, despite these criticisms it is clear that the guidance given in the Family Relations Act far exceeds the guidance supplied in the Irish Divorce Act<sup>86</sup> in relation to the division of assets and in particular the division of business assets.

### **Conclusion**

While Canadian Divorce Law is not without its flaws, as Farquhar quite forcefully reminds us, it undoubtedly provides us with some very interesting points of comparison. Some of the noteworthy aspects of Canadian law will now be summarised. In Canada and in British Columbia where the Federal Child Support Guidelines are adopted, the corporate veil can be lifted to provide and secure maintenance payments for a child. The legislation in Ireland and in particular the 1976 Act does not make specific provision in this respect. However, as already outlined by this author, the wording of the 1976 Act is very broad and it is arguable that the legislation intended to cover all possible assets and income of the earning spouse.

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<sup>82</sup> *Ibid* at para 33.

<sup>83</sup> Farquhar, above n.44 at 279.

<sup>84</sup> *Ibid*.

<sup>85</sup> Justice Reform Committee, *Access to Justice*, (Ministry of the Attorney-General, 1988), Recommendation 38,

<sup>86</sup> Family Law (Divorce) Act 1996.

Nonetheless, it is submitted that more specific provisions are required in relation to company earnings and assets of a spouse as otherwise the judiciary may be reluctant to interfere with company law principles. Such legislative reform would help to prevent wealthy spouses from avoiding their child maintenance obligations, simply because the company is a separate legal entity.

The four planks (outlined above), upon which the decision in *Wildman* was made, illustrate that there is support, in other jurisdictions, for McKechnie J's arguments regarding the *sui generis* nature of family law and the difference between a one man company and other types of company structures. A substantial body of case law has developed which clarifies how the corporate veil principle is to be applied in the family law context. Before a business asset can be regarded as a family asset in the divorce context, it must be used for family purposes or contributions must have been made by the other spouse. It is submitted that this is a fair basis upon which reclassification of the asset can be made. Although the threshold for establishing such contributions is quite low, this is re-balanced by section 65 of the Family Relations Act which allows the courts to decide whether an equal division of that asset would be unfair. This section, it is submitted, helps the courts to strike a fair balance, as the award will generally coincide with the size of the contributions made. While in *Elsom*, *Komori* and *Piercy* the business asset became a family asset, the size of the award was reconsidered under section 65.

In conclusion, it is submitted that Canadian matrimonial property law provides us with considerable insight into this issue. While Farquhar provides some criticisms of the Canadian legislation, it is submitted that it is superior to Irish legislation in a number of ways. First and foremost it tackles the issue of business assets head on. The Family Relations Act provides the courts with a step by step process which they may follow, firstly by defining a family asset, secondly by identifying the factors to be considered before a business asset may be reclassified as a family asset and finally it sets out the factors to be considered in deciding when the division of the business assets should be unequal between spouses, even where they have qualified as family assets. The case law supplements the legislation by providing in a remarkably consistent fashion examples of the kinds of contributions which are appropriate to convert a business asset to a family asset.

It is submitted that Ireland has valuable lessons to learn from the British Columbian approach to this issue. Although Ireland does not adopt a community property approach to property redistribution, many of the questions poised by sections 56, 58, 59 and 65 are still relevant in an equitable re-distribution context: Was the asset used for family purposes? Did the spouse make direct or indirect contributions to the business (although the use of terminology such as “connection” or “contributions” would have to be clarified in an Irish context to avoid a tendency in the family courts to resort back to trust principles which disregard work in the home)? What share in the assets would be fair and just upon consideration of all the circumstances? This author would like to add one cautionary comment, which is, should legislators formulate such legislation, the Irish courts should be careful to set the threshold for proving contributions at a higher level than in Canada as, it is submitted that the *Piercy* case lowered the threshold to an unnecessary level and such contributions should not be seen as sufficient in the Irish courts.

In conclusion, it is submitted that British Columbian legislation is particularly useful and could be helpful to future legislators in the formulation of statutory guidance which would bring an end to the confusion that currently exists in both England and Ireland in relation to the treatment of business assets on divorce. In this context, it is vital to examine a final difficulty facing the judiciary in this area - the valuation process for business assets in England and Ireland.

## Chapter Six – Valuation of Companies

In previous chapters this author discussed the “proper provision” criterion, which is central to Irish divorce law and the court’s treatment of a spouse’s business and company assets on divorce. English and British Columbian case law were compared in an attempt to identify any prevailing principles. The judiciary in both Ireland and England are incredibly reluctant to grant a property adjustment order, order for sale or any other order in relation to company or business assets which are owned by one spouse. As outlined in chapter three, McKechnie J<sup>1</sup> in this jurisdiction has recently stated that in some circumstances, where third party rights will not be infringed, the corporate veil can and should be lifted to provide for a dependent spouse as the constitutional requirement of “proper provision” should take precedence over other common law principles of company law. He also suggested that family law should be regarded as *sui generis* and above company law principles. However, following appeal to the Supreme Court, Hardiman J, unfortunately, did not take the opportunity to expressly endorse or reject McKechnie J’s approach. The aforementioned judicial reluctance can perhaps be attributed to the lack of legislative guidance in the area. The judiciary are currently torn between the desire to protect the ongoing business of the earning spouse and the need to fulfil their obligations under the constitutional and legislative prerequisite of “proper provision.” To further complicate matters, it is unclear whether the doctrine of separate legal personality applies in the divorce context. As seen in chapter five, the British Columbian courts have been provided with more legislative guidance on how such assets should be dealt with and it is submitted that Ireland and England could learn some lessons from the approach adopted in British Columbia.

Despite the existing uncertainty, it appears that the valuation of businesses and private companies is becoming increasingly important in divorce litigation. It should also be noted that if legislative guidance is provided for the judiciary faced with the prospect of re-distributing business assets on divorce, the valuation of companies would become even more central to the divorce process and thus it is regarded as a central issue for the purposes of this research. The importance of an accurate valuation has been recognised by academics; it has been stated, “the determination of valuation is not incidental to the action but at the very

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<sup>1</sup> *BD v JD* [2005] IEHC 407.

heart. Every aspect of valuation is critical.”<sup>2</sup> The importance of this valuation activity stems from the court’s main objective, which is to achieve a fair division of assets and in this jurisdiction “proper provision” for the parties to the divorce. An inaccurate valuation may lead to unfairness or a failure to make proper provision. As a result valuation methods are constantly becoming increasingly sophisticated and diverse.

This chapter outlines the main valuation techniques used in Ireland and England, in both the company law and family law courts and discusses certain Irish and English case law which focused on this issue. This chapter concludes with a summary of the problems facing the judiciary and lawyers, when the task of valuation is placed before a family law court.

### **The Importance of Accurate Disclosure**

In previous chapters this author has alluded to the importance of a full and accurate disclosure by all parties in divorce cases. For example, in *JD v DD*<sup>3</sup> McGuinness J strongly criticised the husband’s failure to make a full disclosure of his assets stating “it is very difficult for the Court to rely fully on any of the husband’s statements with regard to his assets or his income.”<sup>4</sup> She noted that full disclosure is essential to achieve justice in any case. The problems arising from the lack of disclosure are particularly evident where valuations are concerned. In *Re Marriage of Moffatt*,<sup>5</sup> the failure by one party to disclose the required information resulted in the acceptance by the court of an incomplete and inaccurate valuation of the property by the non-owning spouse.<sup>6</sup>

### **Valuation Techniques used in both England and Ireland**

Before embarking on the task of outlining the valuation methods which are used in the courts, it is important to note an opinion that has been expressly accepted by both the English and

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<sup>2</sup> Cohen and Hennessey, “Valuation of Property in Marital Dissolutions” 23Fam L.Q. 339 (1989-1990) at 340. See also Makin, “Family Values: Expert Witness Supplement” (2003) 153 NLJ 1164. However, the difficulty with such valuations has been outlined by Zipp. He says “[t]he valuation of a closely held business is among the more difficult problems facing the attorney or financial advisor in a divorce case... it is virtually impossible to determine the ‘true’ value of a closely held business” Zipp, “Divorce Valuation of Business Interests: A Capitalization of Earnings Approach” 23 Fam. L.Q. 89 (1989-1990) at 89. See also Mainz, Walker and Wreford, “The Valuation of Assets Post-White” (2001) Fam Law 221 at 225.

<sup>3</sup> *JD v DD* [1997] 3 IR 64.

<sup>4</sup> *Ibid* at 80.

<sup>5</sup> 279 N.W.2d 13 (Iowa 1979).

<sup>6</sup> See *SN v PO’D* [2009] IESC 61 which is discussed later in this chapter. See also Horgan and Daly Jermyn, “Ancillary Relief Applications in Separation and Divorce” [2001] 2 IJFL 2 for a further discussion of the duty to make disclosure.

Irish judiciary.<sup>7</sup> Both jurisdictions regard the process of valuing companies as more “an art than a science.” This opinion was expressed in a recent decision by Coleridge J in the English case of *R v R*.<sup>8</sup> He stated: “At the end of the day the valuation of companies is more an art than a science. It is necessary to stand back and look at all the valuation factors.”<sup>9</sup> Thus, no one method of valuation can be accepted across the board as different factors will be considered depending on the circumstances of the case in question. As Nedas points out:

It is also important to realise that no valuation of a business can be carried out in a financial vacuum. Thus, the state of the economy – possibly both domestic and international – and movements in stock market values will need to be taken into account, together with the level of interest rates....<sup>10</sup>

The current economic climate means that it will be difficult to dispose of assets or obtain a bank loan and such factors must be considered by the divorce courts. This author will now outline some of the different methods which are generally used by lawyers and accountants in finding the most accurate and current valuation of a business.

### ***The Market Value or Willing Buyer Approach***

This is perhaps the most obvious method of valuation in the company law context. Zipp has explained:

[T]he value of property is the price a willing buyer would pay a willing seller where neither is under any compulsion to buy or sell and both have access to all relevant information. This is referred to as the fair market approach to valuation.<sup>11</sup>

This method of valuation however is fraught with difficulties, particularly in the divorce context. One particular difficulty has been put forward by Dunn LJ who felt this type of valuation was

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<sup>7</sup> *McA v McA* [2000] ILRM 48, *BD v JD* Unreported High Court, 5<sup>th</sup> December 2003.

<sup>8</sup> [2005] 2 FLR 365.

<sup>9</sup> *Ibid* at para 17. See also Rosettenstein, “Big Money Divorces and Unequal Distributions: Value, Risk, Liquidity and Other Issues on the Road to Unfairness” (2005) 19 IJLP&F 206 where he states that valuing a business is very difficult “particularly if the move is into the realm of closely held corporations...especially ones whose operations fall outside the range of the mundane mom-and-pop corner convenience store, the question of valuation can be premised on speculation once considered the exclusive domain of science fiction writers.” (at p. 210).

<sup>10</sup> Nedas, “Valuation Issues After White and Other Cases” [2004] 34 Fam Law 187 at 188. See also Vigus, “Taking Stock of Share Plans” (2006) 16 CSR 126.

<sup>11</sup> Zipp, above n.2 at 90. See also Nedas, above n.10 for a discussion of the Willing Buyer Approach to valuation.

a necessarily hypothetical exercise because the only way it can be done is to assume that the business will be sold, and that, of course, is the one thing which in fact is not going to happen, and very rarely does happen.<sup>12</sup>

Generally, the “goose that lays the golden egg” will be required to be protected and maintained to fund maintenance and other ancillary orders.

While the above is one main and plainly obvious difficulty with this valuation method, a number of other difficulties may flow from this. For example, American divorce lawyers have been faced with a specific difficulty based on the community property regime that exists there. One American lawyer has noted that under the willing buyer approach, earnings after the divorce are considered in making the valuation.<sup>13</sup> However, he goes on to note that for divorce purposes, these post divorce earnings are considered property outside the scope of the marital property rules.<sup>14</sup> Future earnings or income are not included in the matrimonial assets to be divided under the community property regime. However, England and Ireland do not currently operate a community property regime and the judiciary are expressly directed by divorce legislation to have regard to the “income, earning capacity and other financial resources which each of the spouses has *or is likely to have in the foreseeable future.*”<sup>15</sup> It may be argued that this method of valuation does not therefore give rise to the same difficulties in Ireland and England as it does in community property jurisdictions such as the United States. However the fact remains, in most circumstances at least, that the company has no willing purchaser who is aware of all market and economic conditions at that time. In addition, in normal circumstances the willing purchaser takes the property and all the risk that goes with it. The metaphorical purchaser on the other hand, who is used only for the purposes of valuation, does not actually take the risk but rather leaves it with the divorcing spouse.<sup>16</sup> Thus this method of valuation cannot, in most divorce cases at least, be said to be appropriate.

### ***The Net Assets Approach***

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<sup>12</sup> *Potter v Potter* [1892] 1 WLR 1255 at 1259.

<sup>13</sup> Zipp, above n.2 at 90.

<sup>14</sup> *Ibid.*

<sup>15</sup> Section 20(a) of the Family Law (Divorce) Act 1996. Equally in England such requirements appear under Section 25(a) of the Matrimonial Causes Act 1973.

<sup>16</sup> See Rosettenstein, above n.9, who discusses the concept of risk in some detail. He outlines a number of reasons why it is necessary to assess the risk which is associated with the different assets of divorcing spouses.

This approach has been described as the “model formula valuation method.”<sup>17</sup> It is quite popular as it “can be used to value a business either as a going concern or on a liquidation basis.”<sup>18</sup> It identifies the value of a company’s net assets, thus focusing on the balance sheet rather than on the company’s income or cash flow. Such a valuation should be carried out by “a valuer expert in the particular field and will usually be based on the open market value of such assets.”<sup>19</sup> Brennan and Hennessey stated this type of valuation is particularly useful where “the value of the business is highly related to its assets rather than its performance and earnings”<sup>20</sup> and where the business “has substantial tangible and intangible assets and whose recent earnings may not reflect its intrinsic value.”<sup>21</sup> An advantage of this particular approach is that the assumptions required by the expert are limited and therefore the valuation is not, at least to an unnecessary extent, subject to the subjective opinions of the parties.<sup>22</sup> We will see later that this approach is often used in the context of private company valuations.

### ***The Dividend Yield Approach***

This approach is often favoured where the valuation sought is for a minority shareholding, and this type of valuation is based on the capitalisation of future dividends rather than the capitalisation of future earnings, which will be discussed later. As Mainz, Walker and Wreford note a “minority holding in a private company with a bad dividend record is, at least arguably, worthless.”<sup>23</sup> This argument and the potential application of a discount, explained below, seem to indicate that the valuation of a minority shareholding on divorce, particularly where dividends are scarce, may be a pointless, unnecessary and costly exercise.

### ***The Capitalisation of Earnings Approach***

This is “the most frequently used method of valuing a business”<sup>24</sup> and is based on the simple notion that the value of a business is directly related to the future profits expected from the business.<sup>25</sup> This valuation method is most likely to be used for a mature business as it uses past earnings to calculate and predict future expected earnings. Problems will arise therefore

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<sup>17</sup> Zipp, above n.2 at 90.

<sup>18</sup> Brennan and Hennessey, “Valuing Businesses in the Legal Context” [2001] 8(11) CLP 270 at 274.

<sup>19</sup> Mainz, Walker and Wreford, above n.2 at 225.

<sup>20</sup> Brennan and Hennessey, above n.18 at 274.

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> Mainz, Walker and Wreford, above n.2 at 226. Brennan and Hennessey, above n.18 note that the dividend yield approach to valuation recognises that minority shareholders are not in a position to direct the company or influence the distribution of dividends or the investment of retained profits.

<sup>24</sup> Mainz, Walker and Wreford, above n.2 at 224.

<sup>25</sup> Zipp, above n.2 at 92.

for new companies who attempt to use this approach as they have very little history upon which to calculate future earnings. An essential part of this valuation process is to identify the amount of risk associated with generating this future income and subsequently applying a discount which corresponds with this risk. Mainz, Walker and Wreford submit this “is not a mechanical or an academic exercise but one which requires the use of commercial judgment and an understanding of the business and the industry in which it operates.”<sup>26</sup> This method therefore highlights the need for experienced accountants and valuers in the divorce court. Valuation is not a job which a lawyer should undertake without the advice and help of an experienced professional, as the valuation is too important and very much related to the ultimate outcome of the case.

It should be noted that the one obvious problem with this approach, is “future business earnings are mere projections” and these “projections are subject to numerous contingencies.”<sup>27</sup> Additional difficulties arise in the divorce context as the capitalisation rate is subject to varying expectations depending on whether one is the spouse continuing to own the business in question or the spouse claiming a property right in the value of the business.<sup>28</sup> The objectives and priorities of the spouses usually conflict which often leads to clouded views regarding the company and the value which should be attached. In addition, a question arises as to what exact earnings should be capitalised. Zipp notes that historical earnings are usually a starting point in applying this method, particularly where a private limited company is involved.<sup>29</sup> However, some accountants are of the opinion that historical net profits or taxable income does not properly reflect the profitability of a business. Zipp explains saying “a building owned by the business may actually be appreciating in value while the tax returns will reduce the income for a depreciation deduction.”<sup>30</sup>

In using this approach there is sometimes a reference to the Price Earnings Ratio, particularly when calculating the risk associated with future earnings. This “is a method of valuation based on a market perspective and is heavily reliant on capital markets data, particularly on

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<sup>26</sup> Mainz, Walker and Wreford, above n.2 at 224.

<sup>27</sup> Zipp, above n.10 at 93.

<sup>28</sup> *Ibid.* However, Mainz, Walker and Wreford, above n.2 at p. 226 note, “[u]nsupported partisan forecasts for future maintainable earnings will not be tolerated by the courts and will lead to unfair valuations which cannot be fulfilled. Instead, the assessment of future maintainable earnings must be as realistic as possible.”

<sup>29</sup> Zipp, above n.10 at 93.

<sup>30</sup> *Ibid.*

price earnings ratios of comparable companies.”<sup>31</sup> This combined use of the capitalisation of earnings approach and the P/E Ratio in general has the advantage of reducing speculation and according to Brennan and Hennessy may be the most appropriate approach to be taken by an expert in assisting the court.<sup>32</sup> It is submitted that this method may be particularly attractive to Irish Divorce Lawyers as section 20 of the Divorce Act requires that the courts must have regard to what the earning spouse is likely to earn in the “foreseeable future.”

### ***Goodwill as an asset to be valued***

Some methods of valuation involve looking at both tangible and intangible assets and in order to get a proper view of the intangible assets it is important to correctly value the goodwill of the company. Goodwill has been described as a “mysterious possession”<sup>33</sup> and one that is undoubtedly difficult to quantify. The goodwill of the company was the subject of some discussion in *R v R*<sup>34</sup> where the Coleridge J stated that some small allowance should be made for it but not very much. It is therefore argued that the valuation of goodwill in divorce proceedings may not be of great importance, as it would only truly be of relevance if the spouse intended to sell the business in question. Thus, this author feels that an in depth discussion of this particular asset is unnecessary for the purposes of this research.

### **The Valuation of Shares in a Private Company**

Brennan and Hennessey note “the determination of fair market value of shares in the case of a closely held company<sup>35</sup> is more complex than the determination for a widely held public company... (as closely held shares) are traded infrequently on an erratic market.”<sup>36</sup> In saying that, the courts seem to apply some aspects of the above approaches in making such a valuation. Courtney outlines that this type of valuation is a two step exercise, he states that first you need to determine the company’s worth and second you need to assess the value of the shareholding.<sup>37</sup> A valuation of shares will be required where there is a transfer of shares between parties who cannot agree what they are worth. Such valuations may also become significant on the winding up of a company and the following sections discuss the valuation of shares in the commercial context.

<sup>31</sup> Brennan and Hennessy, above n.18 at 275.

<sup>32</sup> *Ibid* at 276.

<sup>33</sup> Zipp, above n.2 at 95.

<sup>34</sup> [2005] 2 FLR 365.

<sup>35</sup> A closely held company is a private company which is owned by relatively few individuals.

<sup>36</sup> Brennan and Hennessy, above n.18 at 276.

<sup>37</sup> Courtney, *The Law of Private Companies*, (2<sup>nd</sup> edn, Dublin: Tottel Publishing) p1002.

### ***The Determination of the Company’s Total Worth***

This is the first step in the private company valuation process, but one academic acknowledges this step is perhaps “the most difficult task” especially where there is “conflicting evidence being adduced by both parties.”<sup>38</sup> A private company may be valued as a going concern or as a company in liquidation. However, the status a company holds may not always be black and white. For example, O’Hanlon J in the commercial case *Re Clubman Shirts Ltd*<sup>39</sup> refused to hold that a company was a “going concern” on the basis that the company was running at a loss and was unable to meet its liabilities as they fell due. He said therefore that the company’s assets should be valued on a “break up” basis. Despite the fact that the company was running at a loss, O’Hanlon J refused to find that the shares in the company were worthless and valued them at 60 pence per share. Courtney is of the opinion, however, that O’ Hanlon J may have erred on the side of generosity.<sup>40</sup>

In contrast, in *Colgan v Colgan*<sup>41</sup> Costello J looked at a valuation report concerning a successful group of companies which suggested that they had a combined value of £7,370,000. From this figure Costello J deducted a number of liabilities which the company held amounting to £300,000. He used the “net asset” method of valuation to calculate the share value.<sup>42</sup>

In *Re New-Ad Advertising Company Limited*<sup>43</sup> a more creative version of the net asset approach was favoured.<sup>44</sup> Laffoy J held:

[O]rdinarily the value of a company is obtained by reference to its net asset position at a given date together with a review of its dividend policy over a period of three to five years. In this case there was insufficient evidence to show what the assets of the company were and no dividends were paid. In the alternative, what is to be done is to establish what the income of the company ought to have been and from this to reconstruct what the net asset position would have been if the income to which the company was entitled had been received.

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<sup>38</sup> *Ibid* at p 1003.

<sup>39</sup> [1991] ILRM 43.

<sup>40</sup> Courtney. *The Law of Private Companies, op.cit.*, at p 1003.

<sup>41</sup> Unreported, High Court, 22<sup>nd</sup> July 1993.

<sup>42</sup> He also held that in this case there should not be a discount for the minority shareholding. This application of a discount for minority shareholding will be explained later in this section.

<sup>43</sup> Unreported, High Court, 1<sup>st</sup> July 1997.

<sup>44</sup> *Ibid* at p 14.

### ***The Assessment of the Value of the Shareholding***

Courtney notes:

The fundamental question here will be: should the shares in question be valued on a pro rata basis, or should the shareholding be subject to a discount or a premium to reflect the fact that a minority or majority shareholding is being transferred.<sup>45</sup>

Decisions regarding the application of a premium to a majority shareholding or a discount to a minority shareholding are at the discretion of the court.<sup>46</sup> However, as Courtney notes, it “is generally accepted that in a quasi-partnership private company, a minority shareholding *should not be discounted*, nor a majority shareholding attributed a premium.”<sup>47</sup> As has already been mentioned, where the shareholding in question is a minority shareholding (and it is a non quasi-partnership), based on the aforementioned dividend yield approach, there may be very little benefit from spending time and money on its valuation, particularly where there are little or no dividends being paid out from that company.

Brennan and Hennessy are of the opinion that in valuing shares in closely held companies the following are important factors to be considered:

[T]he company’s earnings and dividend payout capacity, the history of the company from incorporation, the general economic outlook and the outlook for the specific industry, the book values of the shares the financial condition of the business, whether the company has goodwill or other intangible value, previous sale of shares...<sup>48</sup>

This broad approach to valuation appears to have been used in *McNamee v Revenue Commissioners*,<sup>49</sup> where the court considered the sales price in a previous sale when valuing the company’s shares.<sup>50</sup>

## **Divorce Case Law Dealing with the Valuation of Businesses and Companies**

### ***England***

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<sup>45</sup> Courtney. *The Law of Private Companies, op.cit.*, at p1005.

<sup>46</sup> See *Colgan v Colgan*, Unreported, High Court 22<sup>nd</sup> July 1993 which provides an example of this. See also Bailey-Harris, “Case Notes – Ancillary Relief” (2006) Fam Law 435 which discusses a number of cases which demonstrate the difficulty with valuing a minority shareholding in a family company.

<sup>47</sup> Courtney. *The Law of Private Companies, op.cit.*, at p1005.

<sup>48</sup> Brennan and Hennessy, above n .18 at 276.

<sup>49</sup> [1954] IR 214.

<sup>50</sup> This approach is very similar to the approach used in America under the *IRS Revenue Ruling* (Rev. Rul. 59-60 (1959 CB 237) which are used to value a “closely held” or “private” company.

Since *White v White*<sup>51</sup> many family law academics<sup>52</sup> have turned their attention to the valuation of the spouses' respective properties on divorce. *White* has been discussed in detail in previous chapters, and since this case, it appears that fairness is the main objective of the English Courts upon divorce. This case is also authority for the fact that there is no longer room for discrimination between husband and wife and their respective roles. Mainz, Walker and Wreford submit:

Although there is still no presumption of equal division of the assets (since that would require an Act of Parliament), equality is now to be used as a check or a starting-point, and is only to be departed from if there is a good reason to do so.<sup>53</sup>

To use Coleridge J's analogy, to achieve this "equality" it is important to ensure that the "golden egg" has been correctly measured. The valuation that is to be accepted by the courts must be as precise and as accurate as possible. In *White* the court favoured the use of the net asset approach. Lord Nicholls commented as follows:

In the present case a comparison based on net values is fairer than would be a comparison of Mrs White's cash award and the gross value of the farms. Under her award Mrs White will have money. She can invest or use it as she pleases. Mr White's equivalent, as a cash sum, is the net value of the farms. The farms have to be sold before he can have money to invest or use in other ways.<sup>54</sup>

This case clearly illustrates that the liquidity/illiquidity issue is something that must be carefully considered in almost all divorce cases, as it is most often the case that the business assets being valued will not be sold. Therefore, the difference between the liquid cash award given to one spouse and the illiquid company maintained by the other spouse must be acknowledged by the presiding judge.

*Evans v Evans*<sup>55</sup> is an English case that provides us with an in depth discussion of the valuation process in the divorce context. Booth J noted at the beginning of his judgment:

[T]he available assets consist broadly of two properties both subject to mortgages which are the homes of the respective parties and the husband's shareholding in a small company which provides his livelihood and that of the children and which will not be sold in the foreseeable future.<sup>56</sup>

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<sup>51</sup> [2000] 2 FLR 981.

<sup>52</sup> See Nedas, above n.10 and Rosettenstein, above n.9.

<sup>53</sup> Mainz, Walker and Wreford, above n.2 at 221.

<sup>54</sup> [2000] 2 FLR 981 at 996. See Rottenstein, above n.9 who discusses in some detail the importance of assessing the liquidity/illiquidity of all assets which are available for distribution in the divorce proceedings.

<sup>55</sup> [1990] 2 All ER 147.

<sup>56</sup> *Ibid* at 148.

Booth J noted that the valuation of the company was a largely academic exercise since the land is owned and used by the company and will be so for the foreseeable future.<sup>57</sup> He said therefore that the liquidity of the company was especially important in this case as it was necessary to decide on what level of funds the husband could draw from the company in order to fund his maintenance obligations. Booth J made the following recommendations in relation to the valuation process in general:

- (1) Wherever possible, valuations of properties should be obtained from a valuer jointly instructed by both parties. Where each party instructs a valuer then reports should be exchanged and the valuers should meet in an attempt to resolve any differences between them or otherwise to narrow the issues.
- (2) While it may be necessary to obtain a broad assessment of the value of a shareholding in a private company it is inappropriate to undertake an expensive and meaningless exercise to achieve a precise valuation of a private company which will not be sold...
- (3) All professional witnesses should be careful to avoid a partisan approach and should maintain proper professional standards...
- (4) In a substantial case it may be desirable to have a pre-trial review to explore the possibility of settlement and to define the issues and to ensure readiness for hearing if a settlement cannot be reached...
- (5)...While it is necessary for the legal advisers to have sufficient knowledge of the financial situation of both parties before advising their client on a proposed settlement, the necessity to make further inquiries must always be balanced by a consideration of what they are realistically likely to achieve and the increased costs which are likely to be incurred by making them.<sup>58</sup>

It is submitted that Booth J's recommendations are extremely insightful and, as shall be illustrated later in this chapter, they could form the basis for legislative intervention in this area.

In *R v R*<sup>59</sup> the subject of much of the discussion was a 90% shareholding owned jointly by the husband and wife in a company. An accurate valuation was important as the wife's portion would have to be sold to the husband. The husband proposed that the shareholding should be valued at £1.8 million and the wife felt that it should be valued at about £2 million. Both parties put forward the submissions of their respective valuers. Coleridge J referred to these

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<sup>57</sup> *Ibid* at 152.

<sup>58</sup> *Ibid* at 148-149.

<sup>59</sup> [2005] 2 FLR 365.

valuations and commented on the qualifications of the valuers of both spouses.<sup>60</sup> Coleridge J went on to say, “the central issue so far as the valuation of that company was concerned, is the way in which the amortisation of the goodwill attaching to the company should be treated in the valuation process...”<sup>61</sup> While in most divorce cases the company will not be sold, in this case the wife’s portion of the joint 90% shareholding would have to be sold to the husband, thus giving rise to the issue of goodwill and whether it should be included in the valuation. Preserving the joint shareholding between the husband and wife would have been contrary to the clean break policy that runs through English law.<sup>62</sup>

Coleridge J then went on to say the “second issue was what annual figures should be adopted to arrive at the maintainable earnings...”<sup>63</sup> The valuers of both spouses submitted competing arguments in this regard. The wife’s valuer said that the entire value of the amortised goodwill should be added back to the net profit or set against any loss to arrive at maintainable earnings. The husband urged that there should be no add-back in relation to the amortised good will and stated that the judge should adopt either the last audited figures or the last audited figures plus the figures for the current year projected and extrapolated forward to the end of this year in Spring 2005. Coleridge J referred to the amortised goodwill and said “some small allowance should be made for it but not very much.”<sup>64</sup> He then made his famous comment about the valuation process saying: “At the end of the day the valuation of companies is more an art than a science. It is necessary to stand back and look at all of the valuation factors.” This oft quoted statement has now become an important consideration in the valuation of companies for the purposes of divorce.

The husband went on to contend that the judge should apply a 20% discount in value based on the fact that he was to carry the ongoing risk associated with the business. Coleridge J said:

I do not propose simply to apply such a discount in this case. But by adopting a different approach overall I shall provide some level of discounting for other reasons which takes in this factor to some small extent.<sup>65</sup>

Coleridge J then highlighted the importance of protecting the business, he said the

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<sup>60</sup> *Ibid* at 368.

<sup>61</sup> *Ibid* at 369.

<sup>62</sup> Section 25A of the Matrimonial Causes Act 1973.

<sup>63</sup> [2005] 2 FLR 365 at 369.

<sup>64</sup> *Ibid*.

<sup>65</sup> *Ibid* at 370.

wife should be paid out in full but in an orderly way so as not to destroy the goose, as it is sometimes described, that lays the golden egg. I do not think that it would be in anybody's interests for the husband to be put under such pressure in relation to the payment to the wife that in fact the company ends up having to be put on the market. Experience shows that that rarely produces the best price, particularly in circumstances where the industry realises that a sale has to proceed.<sup>66</sup>

The judge concluded, taking all the above factors into account that the wife should be provided with £1 million to be paid over five years. It is submitted that this case quite clearly highlights the main difficulties for the judiciary in finding the correct valuation for any company in the divorce context. The family court provides a tension filled atmosphere where one of the parties seeks maintenance and provision from the courts, while the other party's main aim will be to protect the company or business which they have built. Both parties have legitimate aims and interests to be protected which makes achieving a fair result a difficult task for the judiciary.

### *Ireland*

The Irish judiciary, like the English judiciary are aware that the valuation of such companies cannot be seen as an exact science and the factors to be considered, and the weight attached to said factors will vary from case to case. As McCracken J acknowledged, "Mathematical certainty is not demanded for such valuations, nor is it possible."<sup>67</sup>

*D v D*<sup>68</sup> illustrates the prevailing judicial sentiment that family law matters, even where substantial valuations are to take place, "should in the main be dealt with in the Circuit Court."<sup>69</sup> It was argued that this case required a special kind of "expert evidence" and required "detailed attention and the level of hearing that is available in the High Court." The Supreme Court held there "is concurrent jurisdiction in the High Court for cases of considerable complexity, but it does not appear ... that the matters involved in this case are of such complexity that they require a hearing in the High Court." Thus it will only be an especially complex case that will be passed to the High Court for consideration.

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<sup>66</sup> *Ibid* at 371.

<sup>67</sup> *McA v McA*, [2000] ILRM 48 at 55.

<sup>68</sup> Unreported, Supreme Court, 5<sup>th</sup> December 2003.

<sup>69</sup> *Ibid* at 3.

In *McA v McA*<sup>70</sup> the respondent built up a very successful company, in which he held an 85% shareholding and the applicant wife held a 15% shareholding. McCracken J noted, in considering how the company should be valued:

There has been considerable evidence as to the future viability of the core business, due to both recent considerable competition and to the development of other technologies. I accept that there is probably little room for future growth...and indeed the business has probably peaked.<sup>71</sup>

In this case the valuers on both sides were of the opinion that one of the best methods of valuing a trading company was to apply a multiple to the after-tax profits. However as noted by McCracken J, they were “widely at variance as to what that multiple should be.”<sup>72</sup> One suggested a multiple of six, which would value the company at £10,400,000; the other suggested a multiple of four which valued the company at £7,000,000. McCracken J ultimately settled on a valuation of £8,000,000 and added, he did not think “there should be any discount on the value of the applicant’s shares because she is a minority shareholder.”<sup>73</sup> He valued her 15% shareholding at £1.2 million. Thus, this case highlights the difficulty for divorce courts where there are substantial differences in the valuations submitted by both spouses. One obvious issue is that it leaves considerable discretion to the presiding judge.

In *BD v JD*<sup>74</sup> McKechnie J reiterated the sentiments of McCracken J. He stated:

As has been agreed by the Accountants, there is no mathematical formula or precise method, leading to a figure of certainty, which one has to adopt when valuing a company like the present group. It is not a science or an art.<sup>75</sup>

McKechnie J went on to note:

The approach to valuing a private company is I believe quite different to that which would apply when valuing the shares of, say, a publicly quoted company.

In this case, one of the accountants, Mr. Peelo, valued the company based on the capitalisation of earnings approach. Then he conducted a valuation based on the net assets as a means of cross-checking the first valuation. For the group of companies, he arrived at a valuation of over €15 million. Mr Peelo concluded that while there had been an economic downturn and that €15 million was no longer tenable, he felt that a valuation of €2 million

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<sup>70</sup> [2000] ILRM 48.

<sup>71</sup> *Ibid* at 54-55.

<sup>72</sup> *Ibid*.

<sup>73</sup> *Ibid*.

<sup>74</sup> Unreported High Court, 5<sup>th</sup> December 2003.

<sup>75</sup> *Ibid* at para 67.

was appropriate.<sup>76</sup> However, McKechnie J found “serious difficulties with this comparable analysis.” For example, he noted, “it was not known what level of borrowings the partially acquired company had” and “it was not known what part of its net assets comprised of cash.”<sup>77</sup>

Mr Grant, the second and opposing accountant, also used the capitalisation of earnings based approach. Using this approach he came up with two different valuations based on two different years ending. The first was over €6 million and the second was less than €3 million. Because the results were so diverse he felt that the net assets approach was also required. He came up with a valuation of between €7 and €7.4 million. McKechnie J however ruled as follows:

Mr Grant’s estimate value is too conservative there being no way in my opinion that Mr. D would ever contemplate a sale at such a level...I believe that reasonably marketed over an acceptable period of time, a buyer would be found for this company who would be prepared to pay not less than €10 million for it. Indeed Mr Peelo may be correct when he suggests that a greater figure could be obtained.<sup>78</sup>

The valuation of a wife’s 75 per cent shareholding in a company was at the core of the 2009 case, *SN v PO’D*.<sup>79</sup> The wife was involved in a business which provided hotel accommodation for travellers and this business had four companies. The wife was a majority shareholder in all companies with a 65 to 75 per cent share in each of them. The husband had a 10% shareholding in the most successful company and a 1% shareholding in at least one of the other companies. These assets were initially valued by the court in the context of a 2001 settlement.

In 2003 divorce proceedings were commenced and the husband sought ancillary relief in the form of a property adjustment order and/or lump sum payment. The proceedings were transferred to the High Court in 2006 and the wife had in the meantime disposed of her interest in the group of companies. The husband based his arguments in the High Court on the fact that the wife had failed to make an accurate disclosure of her financial circumstances

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<sup>76</sup>*Ibid* at para 64.

<sup>77</sup>*Ibid* at para 61. At paragraph 61 McKechnie J’s discusses what he feels are difficulties with this valuation method. Mr Peelo’s valuations were strongly criticised on a number of grounds. Other criticisms related to the fact that he had not taken the year 2003 or the projected figures for 2004 into account.

<sup>78</sup>*Ibid* at para 70. This part of the judgment was not overturned by Hardiman J on a clarification sought in the Supreme Court.

<sup>79</sup> [2009] IESC 61.

in 2001 and because she had subsequently sold her interests in the companies for a very substantial sum. The High Court judge made two lump sum orders. The first order was for €500,000 and was granted in respect of the increased value which the judge attributed to the company. He felt that the initial valuation of the company was not accurate as it was reached on the basis of inaccurate information regarding the value of the company which was supplied by the wife. He referred to this as an “information deficit loss.” In addition, the husband was granted a sum of €1,648,800 as the judge felt that the husband should be compensated for his comparative lack of success in business compared to his wife.

The wife appealed to the Supreme Court against the findings of the High Court that the husband was entitled to an award of €1,648,800. She did not contest the award of €500,000. The Supreme Court analysed the submissions at the time of the 2001 settlement and the findings of the High Court. Fennelly J noted that in 2002, prior to the sale of the wife’s company, Mr Peelo, who produced audited accounts and valuations on behalf of the wife, attributed no value to the companies in the open market sense. In addition, the report submitted by Mr Peelo reported a hopeless future for the wife’s company and showed net losses at the end of April 2001. However, it subsequently emerged that there had been significant increases in the expected turnover for the coming year and the wife was aware of these dramatic increases but the husband was not. It was also discovered that increased salaries had been given to a number of directors including the wife. Mr Brown, the husband’s financial adviser, supplied reports to that court stating that he believed the companies to be valued in the range between €31,224 and €2,324,820 and concluded that they were likely to have a value which was in excess of €1 million at least.

Fennelly J, in the Supreme Court, discussed the High Court’s award of €500,000 to the husband. He believed the sum “represented one half of the increased value (1 million) which he (the High Court judge) had attributed to the company over and above Mr Brown’s 2001 valuation.”<sup>80</sup> However Mr Justice Fennelly noted that he found the judge’s statements to be “puzzling” since they did not “explain the figures from which the ‘median value’ was taken.”<sup>81</sup> He then went on to say that it “cannot have been right, in any event, to take account at all of Mr Peelo’s suggested value of zero, which must have been entirely discredited both by the disclosure of the greatly increased profits and turnover of the companies during

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<sup>80</sup> *Ibid* at para 28.

<sup>81</sup> *Ibid* at para 29.

2003...”<sup>82</sup> Fennelly J acknowledged that attempting to identify a “median value” “was a reasonable way in which to exercise his (the trial judge’s) discretion.”<sup>83</sup> However he found that both Mr Peelo’s and Mr Brown’s valuations were rendered false by inadequate information. Thus he felt that the only way to appropriately deal with this matter was to remit it back to the High Court for further consideration. He noted the purpose of this order would be “to enable that court to reassess the compensation for information deficit loss in light of the judgment.”<sup>84</sup>

Fennelly J also disagreed with the High Court judge’s additional award of €1,648,800. He said that the duty of the court was to ensure that there was proper provision for the husband and to consider the Section 20 factors when coming to a decision on proper provision. He stated however:

I do not find any basis in section 20 or in the notion of “proper provision” for an award designed to compensate one party for loss of self esteem. I would not, therefore, uphold the award of the sum of €1,648,800 on the basis upon which it was in fact awarded.<sup>85</sup>

This case therefore highlights the problems and increased costs which arise where the parties fail to make proper disclosure; thus the importance of adequate disclosure should not be underestimated.

In *C. O’R v M. O’R*<sup>86</sup> O’Donovan J discussed the valuation of a company in which the husband had a 99% shareholding and the wife had a 1% shareholding. Mr O’S, the company’s auditor valued the industrial units of the company at €30,000. O’Donovan J noted however “there was some controversy about the net value to Mr O’R of the Company should it be disposed of.”<sup>87</sup> Mr S.B, a chartered accountant, said on one hand, based on Mr O’S’ above valuation, that if it was disposed of it would have a net value of approximately €32,000. However, on the other hand Mr O’S was of the opinion that Mr O’R would have to pay capital gains tax and so the property should therefore be valued at around €60,000. O’Donovan J looked to the statements of Mr O’R himself in deciding on which of the valuations would be more accurate. He felt “Mr O’R did not envisage that, if he disposed of

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<sup>82</sup> *Ibid*

<sup>83</sup> *Ibid* at para 40.

<sup>84</sup> *Ibid* at para 41.

<sup>85</sup> *Ibid* at para 39.

<sup>86</sup> Unreported, High Court, 19<sup>th</sup> December, 2000.

<sup>87</sup> *Ibid* at 13.

the company, he would end up with much less than €100,000.” As already mentioned in an earlier chapter the judge in this case was willing to order the sale of this company in order to make proper provision, as the husband himself admitted that it was in poor condition and had probably passed its peak.

Also central to this judgment was the valuation of the assets of a partnership of which Mr. O’R was a member. The partnership had acquired industrial units and O’Donovan J noted “it was common case that that piece of property was worth multiples of the €460,000 which the partnership is alleged to have paid for it.”<sup>88</sup> Thus some of the main debates before the court surrounded the current market value and the current letting value of this industrial unit.

Mr B O’S an estate agent, gave evidence on behalf of Mrs O’R stating that he believed that the market value of the property in an open market was about €3,250,000 and the annual letting value of the property was about €230,000, or at least €200,000. However Mr L.J McC, a chartered surveyor who gave evidence on behalf of Mr O’R stated that he felt that the current market value of the property was about €2,550,000 and its annual letting value was about €150,000. He felt that the current building was very old and that in reality if it was to be purchased the buyer would have to demolish the building and start again. He stated that Mr O’S was incorrect to base his valuation on the value of buildings nearby as these nearby buildings were some of the most upmarket buildings in the West of Dublin City. Mr O’S on the other hand argued that the units in the building had been completely renovated and thus it could no longer be described as a 1970’s building. O’Donovan J leaned towards the opinion of Mr O’S saying “it is my view that the probabilities are that the current market value of the industrial unit...is probably of the order of €3,250,000 and that the current letting value of the unit is probably not less than €200,000.”<sup>89</sup> This case again highlights how difficult it is to uncover the truth and the correct valuations of various properties where both spouses have their own personal valuers to bend the rules of valuation in whatever direction they may require.

The above case law highlights the role played by judicial discretion in deciding whether or not a discount or premium should be applied in the circumstances of the case. It also

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<sup>88</sup> *Ibid* at 14.

<sup>89</sup> *Ibid* at 15.

highlights the discretion given to the judiciary where the figures of the opposing valuers greatly differ.

### **Specific Issues Surrounding Valuation in the Divorce Context**

The valuation of a company or business in order to achieve a fair division of assets on divorce gives rise to a number of complicated issues. It is far more problematic than the valuation of a company for company law purposes; not least because in a divorce court the parties are less willing to make all information readily available. In addition, it is sometimes the case that one or both spouses will put forward information that is not entirely true, perhaps that the company or business is facing its end, when this in reality is not the case. Furthermore, it is usually the case that the company or the shares in question are not in reality about to be sold. This is one of the central issues which arise in the divorce context.

As has already been mentioned above the metaphorical buyer is very different to an actual buyer. When the company or business is not actually being sold one can only presume what one might pay for the business and this presumption will never be wholly accurate. In addition, there are a number of concerns which flow from this, namely the issues of risk and liquidity. To explain this simply; if a spouse is not going to sell the company in question he or she is not going to liquidate the assets or dispose of the risk attached to the company in question. The “risk factor” is something that is very difficult to account for as “[e]ach individual business contains unique facts and circumstances which make it different from all other businesses. It is very important that the risk factor is appropriately considered as “an unbalanced order may result in an individual receiving an asset which displays different risk characteristics from those displayed by assets assigned to the other spouse.”<sup>90</sup> Consideration must also be made for the spouse’s ability to handle the risk in question.

In relation to liquidity, if the business is not going to be sold the next question is how much money can be raised from the business itself. The courts must consider whether the company itself can be used as security to obtain a loan for the purpose of proper provision or whether a certain amount of funds can be drawn from the company for this purpose. Where such funds cannot be raised, it is submitted that an illiquid asset such as a company is not much use in making “proper provision.” It has been acknowledged that a husband could end up in a situation whereby, if he can neither sell his shares nor raise money for a lump sum via other

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<sup>90</sup> Rosettenstein, above n.9 at 210.

means, the result of his divorce is to make his ex-wife the forced long-term co-owner of his business.<sup>91</sup> This of course is very rarely a satisfactory result for either spouse. However, if the company is to be valued under the open market approach it would be unfair if one spouse received half its value in risk free liquid assets, while the other spouse has the illiquid risk laden assets, therefore allowances must be made for the aforementioned factors even if the discounts to be applied may be difficult to quantify.

As can be seen quite clearly throughout the above judicial and academic commentary, private limited companies appear to cause the most difficulties as their shares are notoriously difficult to value. This is particularly the case in the confrontational and tension filled matrimonial atmosphere. Extra confusion is added by the broad discretion which is left to the judiciary in deciding whether to apply minority discounts or majority premiums. In addition, it has been said that a minority shareholding in a private limited company which pays out poor dividends is virtually worthless. It may be argued that time spent in valuation of these shareholdings is perhaps time wasted. This, conceivably, is something to be considered by the divorce courts and it is submitted that perhaps in certain cases time should not be wasted on the valuation of such worthless shareholdings. To abide by such a rule would save both time and money for the parties to a divorce. This will be discussed in a later section. This is quite problematic for divorce lawyers, since, it goes without saying that the spouse with such a minority shareholding is undoubtedly in a better position than the one without. However based on the above commentary it appears that the extent to which this spouse is better off is impossible to determine.

Another difficulty arises where there are third-party shareholders. As Rowe notes this “may put a barrier up against raising funds directly from the company and raises issues in respect of valuing the spouse’s interest.”<sup>92</sup> All of these issues will undeniably lead to increased tension between the spouses; more time spent debating the situation and higher costs for both parties in the divorce court.

It is clear that the idea of “fairness” is now pivotal in both English and Irish case law and thus the accurate valuation of companies has never been more crucial in the divorce court as the

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<sup>91</sup> Mainz, Walker and Wreford, above n.2 at 222.

<sup>92</sup> Rowe. “A Family Affair...” [2006] 156 NLJ 866 AT 867. Section 20(1) of the Family Law (Divorce) Act 1996 requires the court to consider the interests of third parties in dividing the assets between the divorcing spouses. Third party interest may include the employees, directors and shareholders in the company.

only way to achieve this fairness is through the precise and accurate valuation of all assets. It has been submitted that “great care needs to be taken to ensure that the award to one party is appropriately balanced against the award to the other, lest the goal of achieving fairness be undermined.”<sup>93</sup> It is therefore clear, that accurate disclosure will be required by both spouses and it is submitted that due to the importance of fairness and justice within in the valuation process, penalties should be introduced for spouses who deliberately mislead the other spouse and the court regarding the extent and value of their assets. The so-called millionaires’ defence, whereby a husband is not required to give full financial disclosure, provided he can satisfy the court that he will be able to pay his wife any reasonable amount the court may order, is no longer a crutch for husbands.<sup>94</sup> As noted by one academic:

Wives may now want detailed valuations of their husband’s businesses in an attempt to convince the court that they ought to be awarded a higher amount. Full and clear disclosure will now become of greater importance and it is possible that we will see more husbands’ deliberately concealing their wealth.<sup>95</sup>

As a result of the above complexities associated with a divorce valuation it is clear that a forensic accountant is required as he “will have a thorough knowledge of valuation methods but will also be familiar with the requirements of the litigation process.”<sup>96</sup> One who is experienced in the specific field of matrimonial finance may be particularly attractive. Makin has outlined the considerations and calculations which must be made when valuing a company. He says one must:

Try to understand the external factors leading to success or failure. Is the business’ product becoming obsolete? Is a local retail business facing competition from multiple retailers? Are competitors taking market share by selling on the internet?

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<sup>93</sup> Rosettenstein, above n.9 at 214. See also Nedas, above n.10 who emphasises the importance of precision in valuing the assets as it is vital in achieving equality between the spouses. The main aim of the Irish courts is not to achieve equality, but rather to achieve proper provision. Nonetheless precise valuations will also be of central importance in achieving that aim in the Irish jurisdiction.

<sup>94</sup> Mainz, Walker and Wreford, above n.2 at 226.

<sup>95</sup> *Ibid.*

<sup>96</sup> Sim, “Witnessing a Change 3 - Gazette in Practice – Expert Witness” [1999] 48 LS Gaz, 17 Dec, 36(4).

Nedas above n.10 at 187 explains the difficult process which such an accountant will have to undertake and says “[s]imply casting an eye over published financial statements supplemented by the detailed historical trading and profit and loss accounts will not be sufficient. Management accounts, budgets and cash-flow forecasts will need to be supplied together with copies of any business plans, lending proposals and capital raising documents. Additionally, having analytically reviewed the data, the accountant may well wish to discuss his initial findings with the company’s finance director and/or company auditors.”

Look at internal factors. Is the business overtrading: expanding so quickly that profits are not collected quickly enough to finance ongoing trade? Is the business solvent?<sup>97</sup>

In addition, Makin notes that he would not advocate the company's auditor to perform a valuation for matrimonial purposes saying he

is unlikely to be an experienced valuer, or to have the skills to give expert evidence. He is unlikely to be able to sign the declaration that he has no financial interest in the outcome of the case – indeed, he is bound to be prejudiced as he is looking after his continuing client.<sup>98</sup>

Independent and accurate forensic accountancy skills will be required at great cost and it is submitted, therefore, that the 1996 Act should be amended to require that the divorce court have a single valuer for both parties in a divorce case. The parties should first be given the opportunity to provide and agree on one valuer who will value all of the matrimonial, business and company assets, a recommendation which was made by Booth J in *Evans v Evans*. It is suggested that if the parties fail to agree on a joint valuer, an independent court appointed officer should carry out all valuations necessary in the case. The joint valuer will be able to objectively decide on the most appropriate method of valuation based on the circumstances of the case. As suggested by Booth J, this process should take place pre-trial. It is suggested that one valuer should meet with both solicitors to narrow down the issues to be considered before the court. This will reduce the discretion afforded to the judiciary and help build a more coherent body of case law. The cost of this valuer should be split between both spouses.

In addition to the aforementioned judicial support for such changes, there is also significant academic support for same. One academic, has suggested it “is important (and more cost-effective) to agree at the outset on what needs to be valued so that the forensic accountant has clear parameters within which to work.”<sup>99</sup> Another academic notes, “the early collaboration of solicitor and accountant should ultimately reduce the time spent in conference with

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<sup>97</sup> Makin, above n.2 at 1165-1166. See also Nedas, above n.10 at 187 who highlights that it is of great importance that the spouse's business is valued with precision. He says “the court will want to be satisfied that the goose that lays the golden egg has been correctly weighed. As a result, in cases where a private business is material to the parties' wealth or income or both, significantly closer attention will need to be paid to the company.”

<sup>98</sup> Makin, above n.2 at 1166.

<sup>99</sup> Sim, above n.96 at 5. See also Mainz, Walker and Wreford, above n.2 who discuss the importance of reducing costs resulting from valuations in divorce proceedings. He said to facilitate the reduction of such costs both parties and their advisors must behave sensibly.

counsel by anticipating some of his requirements in the financial area.”<sup>100</sup> Support for these changes is also reinforced by the fact that, in many cases, opposing valuers only seem to create more confusion for the presiding judge and as a result, more time spent by him and the valuers in deliberation. It is also important to note that the judge is unlikely to be a qualified valuer or accountant and an officer of the court, introduced to instruct the judge as to the correct valuation is likely to be a welcome change for most judges in a divorce court. Therefore, the effect of the introduction of such a valuer or court officer will bring about two welcome changes in that it will reduce both the cost of valuations in general, and the time spent by the judiciary in wading through various falsifications and exaggerations.

Such responsibilities are placed on an independent court appointed officer in other areas of family law. For example, the court has the power to order welfare assessment reports to be drawn up by one of the persons listed in Section 47 of the Family Law Act 1995.<sup>101</sup> Section 47 applies to all family proceedings except adoption proceedings and family proceedings in the District Court. A copy of any report so prepared must be made available to the Counsel or solicitor, if any, representing each party in the proceedings.<sup>102</sup> The appointment of independent officers of the court can also be seen in the company law sphere. In the case of a compulsory winding up, the court will appoint an official liquidator to wind up the company. An examiner is also a court appointed officer and is appointed to examine a company’s affairs and report to the court on its prospects of survival. Therefore this author’s suggestion to introduce a court appointed valuer would not be at odds with certain existing procedural facilities available in both the company law or family law courts.

A new approach to case management in family law cases was introduced on 1<sup>st</sup> October 2008, whereby the parties to a contested divorce have to go before the County Registrar to narrow the issues in the case before it goes to the judge. The reasons for this new process include minimising the cost of proceedings and the time spent in the divorce court. It was noted by one commentator, Finola Freehill,<sup>103</sup> that the volume of pre-trial motions in family law cases

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<sup>100</sup> Bearman, “Family Law – The Divorce Accountant” [1990] 25 LS Gaz, 4 Jul, 87(24).

<sup>101</sup> The listed parties are as follows: (a) a Probation and Welfare Officer nominated by the Minister for Justice; or (b) such person nominated by a health board specified in the order as that board may nominate, being a person who in the opinion of that board is suitably qualified for the purpose; or (c) any other person specified in the order.

<sup>102</sup> For further discussion of this see Shatter, *Shatters Family Law* (4<sup>th</sup> edn, Dublin: Butterworths, 1997) pp 116-118. Shatter argues that it is illogical that section 47 does not apply to District Court Family Proceedings or to adoption proceedings and feels that its application should be extended to such proceedings.

<sup>103</sup> Finola Freehill, *New Family Law Rules* [www.aclsolicitors.ie/news/new\\_family\\_law\\_rules/](http://www.aclsolicitors.ie/news/new_family_law_rules/)

in the Circuit Court are considerable and such motions seriously delay the trial. It is hoped that this new rule will help relieve the Circuit Court judges of a large pre-trial application caseload and free up the judges to allow them to carry out the trial work. The introduction of a single court appointed valuer to the divorce court would hopefully provide some of the same benefits and reduce the time spent by the judge in deciding which of the competing valuations to accept. Perhaps the valuer could be appointed by the County Registrar as part of the case management process. It is important to note that the above suggestions regarding the introduction of a single valuer for both spouses is not only cost-effective but is also consistent with the new case management initiative taken by the Irish family courts in October 2008.

### **Conclusions**

In conclusion, it is clear that the valuation of companies and businesses, especially in the matrimonial atmosphere, is a process which is fraught with difficulty. This is particularly the case where one or both spouses fail to disclose important information or supply the other with inaccurate or untrue information. However as noted by Zipp, “[w]hile valuation appears to be a daunting task, its concepts can be mastered.”<sup>104</sup> In relation to the various methods of valuation it appears that the capitalisation of earnings approach, combined with the Price Earnings Ratio, may be the most attractive. As seen in *JD v BD* the net assets approach was used to cross check the capitalisation of earnings approach and this could perhaps be regarded as good practice as the valuation of companies is not an exact science and has no strict formula. However, divorce lawyers must be aware that all cases differ and a technique used in one case may not be as effective in another. The case law also highlights the issues that arise when both husband and wife obtain different valuers who come to different conclusions. The appointment of a joint valuer or a court appointed valuer would go a long way to reduce these problems. As has been discussed, the 1996 Act should be amended to impose such a requirement. Early planning and cooperation between all parties to the divorce is essential in reducing costs and achieving an accurate valuation of the company or property in question. It is submitted that this proposed legislative amendment coupled with the new case management system would be a step in the right direction.

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<sup>104</sup> Zipp, above n.2 at p.380. With regard to mastering the methods of valuation he notes that the retention of a careful and knowledgeable expert is essential.

## Recommendations and Conclusions

The principal aim of this thesis was to assess the adequacy of Irish law relating to the treatment of the business and company assets of divorcing spouses. The analysis of the law in this area reveals an absence of clarity, coherency and consistency. The ambiguities associated with Irish divorce law is evident throughout this thesis. For example, it remains unclear whether the judiciary's apparent qualified endorsement of a clean break approach in *T v T*<sup>1</sup> will bring an end to the strict anti-clean break approach that was previously adopted in this jurisdiction. It is also uncertain what exactly amounts to "proper provision" in any given case, despite the importance which is attached to this requirement in the Irish Constitution and Irish divorce legislation. In addition, it is not entirely clear, although it seems unlikely, whether the courts will attempt to divide assets between spouses on any percentage basis into the future.<sup>2</sup> Nonetheless, and leaving these issues aside momentarily, it is argued that the most worrying feature of Irish matrimonial property law is the striking lack of clarity and what can only be described as outright confusion amongst the judiciary when it comes to the consideration and redistribution of a spouse's business and company assets upon divorce. Even at the most basic level, it is not entirely certain whether it is possible to use the business or company assets of a spouse to properly provide for the dependent spouse. Although the legislative provisions facilitating the granting of property adjustment orders and orders for sale impose no explicit limitation on the types of property which may be the subject matter of such an order,<sup>3</sup> the reluctance of the judiciary to interfere with such assets suggests a perceived difficulty with such an approach. It is quite worrying that a definitive answer to this fundamental question has yet to be provided and the absence of clarity is likely to become more problematic in the future.

Chapter one of this thesis outlined the striking and undeniable importance of the "proper provision" requirement. This requirement is at the centre of all divorce case law, divorce legislation and has even been placed on a constitutional pedestal. Despite its importance, legislative guidance to the judiciary in relation to how they should achieve proper provision is extremely limited. The only guidance which currently exists in this jurisdiction is the section 20 factors.<sup>4</sup> These factors are discussed in chapter one<sup>5</sup> and require the judiciary, to consider,

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<sup>1</sup> [2002] 3 IR 334

<sup>2</sup> See chapter one pp12-18 for a discussion of these issues.

<sup>3</sup> See chapter three at pp 45-46.

<sup>4</sup> Section 20 of the Family Law (Divorce) Act 1996.

<sup>5</sup> Chapter one at pp 8-12.

for example; the contributions of the spouses, their incomes, present and future, third party interests and the standard of living of the divorcing couple. These factors are of limited assistance as the list of factors is not exhaustive and it does not give an indication of which factors should take priority in a particular case. As was demonstrated, the importance of the proper provision criterion in this jurisdiction initially led to the adoption of a judicial approach which seemed opposed to the concept of clean break. The clean break divorce debate was briefly discussed in chapters one and three and it is clear that, recently, judicial and academic support for accommodating certain aspects of a clean break approach has emerged in this jurisdiction. Although the arguments in favour and against the adoption of a clean break approach are beyond the scope of this thesis, it is clear that any further legislative or judicial endorsement of such an approach will have serious implications in all areas of ancillary relief. However, of more relevance for the purposes of the current discussion, it would, as was highlighted in chapter three, increase the urgency for the introduction of guidelines in relation to how business and company assets should be treated on divorce.

A further complicating issue is whether the separate legal personality doctrine applies in the divorce context. This doctrine has been discussed in considerable detail in chapter two and any order which interferes with the assets of a company on divorce appears to infringe one of the most well established principles of company law. As outlined in this chapter, the *Salomon* principle provides that even where the company can be described as a one man company, it is nonetheless a separate legal entity. It is clear that this principle has the potential to cause serious problems and gross injustice for the dependent spouse in the divorce court. The separate legal entity in some cases may be a one man company which has been used to fund many of the usual and day-to-day family expenses during the marriage and the owning spouse may have complete control of all of the company's affairs. Nonetheless, there is no explicit provision in the divorce legislation which allows the court to adjust the ownership or order the sale of company assets in an appropriate case. The absence of legislative guidance has led to a marked judicial reluctance to interfere with such assets and such reluctance is apparent in both Ireland<sup>6</sup> and England<sup>7</sup> as was illustrated in chapters three and four of this thesis.

As was demonstrated in chapter two of this thesis, however, it is not unheard of to give certain aims, interests and legal objectives priority over this company law doctrine of separate

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<sup>6</sup> See *L v L* [2007] IEHC 438 and *S.J.N. v P.C.O'D*, Unreported, High Court, November 29<sup>th</sup> 2006.

<sup>7</sup> See *Nicholas v Nicholas* [1984] FLR 285 and *Mubarak v Mubarak* [2001] 1 FLR 673.

legal personality. Kahn Freund has noted the court's willingness to look behind the corporate veil where tax evasion or any attempt to defraud the Revenue has been discovered.<sup>8</sup> If the exception to the doctrine in favour of the Revenue can be justified on the basis of the "public good" it is submitted that the same justification would be appropriate in the divorce court. It is also asserted that to allow the doctrine of separate legal personality to take priority over the constitutional "proper provision" requirement would be an overly extensive application of the doctrine.

The problem with regard to separate legal personality and matrimonial property law was brought into sharp focus by certain recent caselaw discussed in chapters three and four. In England, the *Mubarak* case<sup>9</sup> seems to suggest that the corporate veil may be lifted in an appropriate case where no third party interests would be affected. This approach is reflected by the opinion expressed by McKechnie J in the Irish case, *BD v JD*,<sup>10</sup> who felt that where no third parties would be affected, it was important to give the proper provision requirement the standing it deserves. He clarified that the court has jurisdiction over all assets, even those held by a private limited company. However, Munby J in *Hashem v Shayif and Another*<sup>11</sup> held that the absence of third party interests alone is not sufficient to justify piercing the corporate veil as such would conflict with the *Salomon* principle.<sup>12</sup> The *Salomon* principle specifically allows for a one man company to avail of the doctrine of separate legal personality. It is clear that legislative intervention is required to clarify whether and in what circumstances company assets may form the basis of an ancillary order.

As outlined in chapter two, the "avoidance of legal and contractual obligations" exception to the doctrine of separate legal personality could form the basis for legislative intervention in the divorce context. However, given the confusion that exists with regard to the application of this exception in the context of the avoidance of future obligations and the unique nature of the divorce environment, it is submitted that it would be preferable to justify the exception to the doctrine on the basis of the *sui generis* nature of matrimonial property proceedings<sup>13</sup> or the constitutional status of the proper provision requirement. In general, common law principles and legislative aims cannot undermine the special position which is given to

<sup>8</sup> Kahn-Freund, "Some Reflections on Company Law Reform" (1944) 7 MLR 54 at 55.

<sup>9</sup> [2001] 1 FLR 673.

<sup>10</sup> [2005] IEHC 407 at para 28.

<sup>11</sup> [2009] 1 FLR 115.

<sup>12</sup> Similar concerns were expressed by Ryan in this jurisdiction. See Ryan, 'Interaction of Family Law and Company Law' (2009) 12 (1) IJFL 3 for further discussion of this issue.

<sup>13</sup> See McKechnie J, [2005] IEHC 407 at para 28

constitutional provisions in this jurisdiction. However, it is clearly necessary to introduce explicit legislative reinforcement of the acceptability of resorting to company assets where necessary to make proper provision.

It is also crucial that the legislature formulates a number of mandatory considerations for the judiciary (additional to the section 20 factors) when they are faced with the prospect of considering a property adjustment order, order for sale or a maintenance order where the assets of a business or company will be used to fulfil or secure the order made by the court. Some of these considerations or factors have already been highlighted as important by Irish and English caselaw and others can be borrowed from the experience of British Columbia on this issue, which was examined in chapter five. Chapter two, which provided a brief analysis of the operation of the doctrine of separate legal personality in British Columbia, illustrated that the courts in that jurisdiction are at least as strict, if not stricter, in their application of the doctrine of separate legal personality as the Irish courts.<sup>14</sup> Nevertheless, specific legislative provision has been made to allow for the re-distribution of company and business assets on divorce in the appropriate case. It has been submitted in this thesis that the British Columbian jurisdiction has developed an effective process to deal with a spouse's business assets in the divorce court and while Ireland does not currently operate under a Community Property Regime, the process which has developed there may still be of relevance in formulating the aforementioned mandatory factors for consideration by the Irish judiciary.

It is submitted that the overarching and initial consideration must be for the judiciary to decide whether proper provision can be achieved without interfering with the business or company assets of the owning spouse. If proper provision can be effectively achieved without such interference then there is no need for the court to proceed any further in its deliberations. However, the court could direct that in the event of a default by the spouse subject to the ancillary order, the original orders of the court will be reconsidered and company or business assets may be sold or transferred.<sup>15</sup> In the event that proper provision cannot be achieved without such interference, it is advised that the following factors should be set out for mandatory consideration by the court:

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<sup>14</sup> For example *B.G Preeco I (Pacific Coast) Ltd v Bon Street Holdings Limited* (1989), 60 DLR (4<sup>th</sup>) 30, 37 BCLR (2d) 258. Seaton JA distinguished the facts of this case from those in *Jones v Lipman* [1962] 1 All ER 442 but it nonetheless seems to be a strict application of the *Salomon* principle.

<sup>15</sup> As seen in *Wildman v Wildman* (2006), 273 DLR (4<sup>th</sup>) 37 (Ont. CA) in Canada and *N v N* in Ireland.

1. The viability of the company or business as a going concern should be investigated. A viable business should not be interfered with to its detriment and it would be important to decide whether the business or company can sustain maintenance payments into the future or whether it would be more beneficial to the couple to sell the said company.
2. Alternatively, it may be appropriate to rely on company or business assets to secure maintenance payments. British Columbia adopted the Canadian Federal Child Support Guidelines which allow the court to use a company's earnings or assets to provide or secure maintenance payments for children. It is submitted that Irish legislation should be amended to specifically allow the courts to exercise a similar jurisdiction.
3. Any third party interests in the company or business in question must be considered. This would include employees, directors and creditors and those with a share in the business or company.
4. The origin of the business or company should be considered.
5. Whether the company or business asset in question was used as a family asset for a part of the marriage is also of importance. An example of this would be if it was used as the family home.<sup>16</sup>
6. Whether the spouses themselves have disregarded the corporate veil of the company should also be considered. For example, if the earnings of the company or business had, during the marriage, been used to meet regular and day-to-day household expenses or whether funds could be withdrawn from the company whenever the earning spouse so wished.<sup>17</sup>
7. The contributions of both spouses to the home and/or to the business or company in question should be considered in depth. Sections 56 to 65 of the Family Relation Act 1996 in British Columbia seems to have developed a step-by-step process which is designed to aid the judiciary in deciding at what point a business asset becomes a family asset. While we do not currently operate under a Community Property Regime, Canadian legislators seem to have struck an ideal balance between the competing interests in requiring that the dependant spouse must have made contributions to the

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<sup>16</sup> This was the case in the English case of *Nicholas v Nicholas* [1984] FLR 285.

<sup>17</sup> See in *BD v JD* at [2005] IEHC 407 at para 27.

business in question. The contributions may be direct or indirect but the size and substance of the contributions will influence the judiciary in deciding whether there should be an equal or unequal division of the assets under section 65 of the same Act. The caselaw in this area is helpful, coherent and above all consistent, making it easier for parties to a divorce to predict the outcome of the case. It is submitted that the contributions of the dependant spouse should also represent a crucial factor in any legislative scheme introduced in Ireland. It would be vital to reinforce through legislation that contributions in the home constitute an indirect contribution to the business to prevent the outcomes discussed in chapter three. While the importance of contributions to the home and caring for children are currently stated in section 20(f) of the Family Law (Divorce) Act 1996, it is advised that it be specifically stated that such non-financial contributions be given equal footing with financial contributions to the family, given their significance in providing security in family life.<sup>18</sup>

8. In dividing the assets the liquidity and risk attached to the business or company in question must be considered.
9. If a lump sum payment is to be made, the court must consider what in reality will be the exact cost to the owing spouse in withdrawing the funds from the company or business in question.<sup>19</sup>

It is submitted that by introducing these mandatory legislative considerations, the overall effectiveness, coherency and clarity in this area of law will be improved and judicial discretion will be reduced.

While the above legislative amendments are central to improving the law in this area, it is important to note that if they are implemented the valuation of companies and businesses in the divorce court will be increasingly significant. This issue has been discussed in chapter six of this thesis, where this author identified some of the most appropriate valuation techniques for a divorce court. It was apparent that the willing buyer approach may not always be appropriate in the divorce context, given the fact that the company or business before the divorce court is not usually going to be sold. The net assets approach seems to be a popular

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<sup>18</sup> One academic has noted, “[t]he proliferation of contribution arguments has compelled legal practitioners to feel obliged to consistently assert the homemaker’s business contribution, therefore implicitly undermining the homemaking contribution.” Ouazzani, “Ancillary Relief and the Public/Private Divide” (2009) Fam Law 842 at 848.

<sup>19</sup> Such was advised by Hardiman J in the Supreme Court in *BD v JD* [2004] IESC 101 at p 12-15.

approach in both the company law and family law courts. It values the assets of the business or company and then values the company as a whole with reference to these findings. The capitalisation of earnings approach is also quite popular amongst valuers and is directly related to future profits. Some issues which arise in relation to this approach are that it is not suitable for a new company and that the future earnings are mere projections and cannot be regarded as certain. However, when this approach is combined with the price earnings ratio, a more accurate result can be achieved. This author finds that the capitalisation of earnings combined with the price earnings ratio is particularly attractive in the divorce context as section 20 of the Divorce Act requires the court to consider the earnings which the spouse is likely to have in the “foreseeable future.” In adopting this approach, however, the courts must have regard to external factors such as the state of the economy and the company’s ability to obtain credit.

The valuation of a shareholding may also prove problematic. Decisions regarding the application of a premium to a majority shareholding or a discount to a minority shareholding are at the discretion of the court. It has been argued however that a minority shareholding is virtually worthless and that the valuation of such a shareholding is a waste of the court’s time and the parties’ money. Nonetheless, the person who has the minority shareholding is in a better position. Perhaps the dividend yield approach is appropriate in this regard as the payment of dividends is the only benefit the spouse gains from such a company.

It is suggested, however, that divorce legislation should not limit the types of valuation approaches that can be adopted in this context as chapter six demonstrates that each approach may have a role to play in specific circumstances. For example, the net asset approach brought about a fair result in the case of *White v White*.<sup>20</sup> However, in the Irish case of *BD v JD*<sup>21</sup> the combined use of the capitalisation of earnings approach and the nets assets approach was used by one of the accountants. It is submitted, however, that a forensic accountant who is familiar with the operations of the divorce court must be employed to carry out any such valuations, as only a person with such experience will understand which approach is most appropriate.

It is clear from the judgements outlined in chapter six that the court has had serious difficulty wading through the conflicting submissions of opposing valuers, who are paid to safeguard

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<sup>20</sup> [2000] 2 FLR 981.

<sup>21</sup> Unreported High Court, 5<sup>th</sup> December 2003.

the interests of the spouses who employ them. It is submitted that this gives excessive discretion to the judiciary in deciding on the appropriate value for the property in question, as it is unlikely that the presiding judge is experienced in this particular area. In addition, the conflicting reports of both spouses' independent valuers lead to more time spent in the divorce court and more money spent by the parties. Thus, in relation to the valuation process the following legislative reforms should be introduced:

1. Full and Frank disclosure must be demanded by the legislature and penalties must be introduced for failing to fully and frankly disclose all assets.
2. The dividend yield approach should be adopted, where possible, to reduce time spent in valuing minority shareholdings.
3. The parties should be given the opportunity to choose a joint valuer. If the parties fail to agree on the identity of the valuer, the court must appoint one to value all the assets of the divorcing spouses and the cost of the valuer shall be divided between the parties.
4. The court-appointed valuer must be an independent forensic accountant who is experienced in the area of divorce proceedings, in order that a precise valuation can be achieved.
5. Valuations should be carried out pre-trial.
6. The auditor of the business or company in question should be precluded from carrying out such valuations.

It is submitted that such reforms would be consistent with the new approach to case management in family law cases which was introduced on 1<sup>st</sup> October 2008, whereby the parties to a contested divorce have to go before the County Registrar to narrow the issues in the case before it goes to the judge. This has been discussed in some detail in chapter six<sup>22</sup> and the aim of such changes is to minimise costs and time spent in the divorce court.

In conclusion it is clear that, currently, there is a legislative vacuum in relation to the appropriate treatment of the business and company assets of a divorcing spouse. This vacuum has prevented the development of a coherent and consistent body of case law and has led to a

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<sup>22</sup> Chapter six at p. 133.

significant amount of confusion in this area. Predictability, coherency, consistency, finality and certainty are qualities which are important in all areas of law and yet, to date they cannot be associated with Irish matrimonial property law. While the legislative amendments recommended in this thesis have primarily been directed at the Irish legislature, many of the suggested amendments would be equally beneficial in the English context. Although the topic seems to have been the subject of greater discussion and analysis in England, it has not lead to less confusion and it is submitted that guidance is even more vital as a result of the clean break style divorce which operates there and recent proposals to allow partnerships to avail of the doctrine of separate legal personality.<sup>23</sup>

Divorce is a difficult experience for all parties and it is important that the law, where possible, reduces the amount of stress and anguish which the parties experience during the divorce process. It is submitted that the adoption of reforms which inject some degree of predictability into the law in this area would help to reduce such stress. More importantly, it may in fact prevent spouses from entering into the hostile atmosphere of the divorce court and instead encourage them to settle their affairs outside of the court in a more amicable fashion. The uncertainty and outright confusion which currently exists in this jurisdiction with regard to company and business assets is completely unsatisfactory – the case for reform is clear.

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<sup>23</sup> See Chapter Two at p. 42.

## *Bibliography*

### *Articles*

- Abbott, "Child support and clean break once a parent" (1994) 144 NLJ 244.
- Ann Png, "Lifting the Veil: Creasy v Breachwood Motors: a right decision with wrong reasons" (1999) 20(4) Comp. Law 122-125.
- Bailey-Harris, "Case Notes – Ancillary Relief" (2006) Fam Law 435.
- Bailey-Harris, "Case Reports - Ancillary Relief" (2007) Fam Law 13.
- Bailey-Harris, "Case Reports - Ancillary Relief" (2008) Fam Law 1179.
- Bailey- Harris "The Paradoxes of Principle and Pragmatism: Anchilliary Relief in England" (2005) 19 Int. JLPF 229.
- Bamber, "Impropriety and the Corporate Veil" (2009) Fam Law 130.
- Bearman, "Family Law – The Divorce Accountant" (1990) 25 LS Gaz, 4 Jul, 87(24).
- Bolster, "Disregarding Separate Legal Personality of a Subsidiary Company where the "Justice of the Case Requires" (1999) 17 ILT 9.
- Bowe, "Valuing the Business" (2008) 15 Tax. J 953.
- Bowmer, "To Pierce or not to Pierce the Corporate Veil – why substantive consolidation is not an issue under English Law" (2000) 15(8) JIBL 193.
- Brennan and Hennessy, "Valuing Businesses in the Legal Context" (2001) 8(11) CLP 270.
- Buckley, "'Proper Provision" and "Property Division": Partnership in Irish Matrimonial Property Law in the Wake of T v T" (2004) 7(3) IJFL 8.
- Burrows, "Judgment Summons: Standard of Proof" (2001) LS Gaz, 20 Apr, 31.
- Chandler, "The Boundaries of Ancillary Relief: A v A and Whig v Whig" [2008] Fam Law 128.
- Cohen and Hennessey, "Valuation of Property in Marital Dissolutions" 23 Fam L.Q. 339 (1989-1990).
- Conneely, "The Family Law (Divorce) Act 1996: Some Observations" (1997) 15 ILT 78.
- Coveney, "Proper Provision in Matrimonial Breakdown: The Debate Continues In the Aftermath of T v T" (2003) 6 (1) IJFL 3.
- Crowley, 'Divorce Law in Ireland — Facilitating or Frustrating the Resolution Process?' (2004) CFLQ 49.

Crowley, “Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part One” (2007) 10 (1) IJFL 19.

Crowley, “Equal versus Equitable Division of Marital Assets – What can be learned from the experiences of other jurisdictions? Part Two” (2007) 10(2) IJFL 12.

Clissman and Hogan, ‘Trends in Divorce on the Ten Year Anniversary of its Introduction – A Review of Recent Case Law’ (2007) Bar Review.

Daehnert, “Lifting the Corporate Veil: English and German Perspectives on Group Liability” (2007) 18(11) ICCLR 393-403.

Dewar, “Concepts, Coherence and Content of Family Law” in Birks P.B.H., *Examining the Law Syllabus: Beyond the Core* (Oxford University Press, 1993), pp. 81-82.

Dewey, “The Historic Background of Corporate Legal Personality” (1926) Yale LJ 655.

Douglas, “Case Reports: Ancillary Relief” (2008) Fam Law 505.

Eekelaar, “Asset Distribution on Divorce – Time and Property” (2003) Fam Law 828.

Ellman, ‘Financial Settlement on Divorce: Two Steps Forward, Two to Go’ (2007) 123 LQR 2-9.

Fairclough, “Company Law: lifting the veil of incorporation” (1992) 3(10) JIBL 192-193.

Farquhar, “Family Assets in British Columbia” (1995) 12 Can. J. Fam. Law 229.

Farrar, “Fraud, Fairness and Piercing the Corporate Veil” (1989-1990) 16 Can. Bus. LJ 474.

Gallagher, “A Company’s Separate Legal Personality – Lifting the Corporate Veil” (2005) 23 ILT 167 at 168.

Gower, “Some Contrasts Between British and American Corporate Law” (1956) 69 Harv. L. Rev. 1369 at 1379.

Hargovan and Harris, “Piercing the Corporate Veil in Canada: a comparative analysis” *Comp. Law.*, Vol. 28, No.2, p.58, 2007.

Hawke and Marston, “Company Law – Facades and Corporate Veils” (1989) LS Gaz, 3 May, 86 (32) at 35.

Horgan and Daly Jermyn, “Ancillary Relief Applications in Separation and Divorce” [2001] 2 IJFL 2.

Horgan, “A Decade of Divorce in Ireland” (2007) 10(1) IJFL 1.

Horgan, “Practical Problems Arising in Ancillary Relief Proceedings” (2001) 3 IJFL 3.

Howell, Russell, Newbury, Pannone and Mitchell “Ancillary Relief Update: Winter 2008” (2008) Fam Law 1198.

Howell, “Salomon Under Attack” (2000) 21(10) Comp. Law, 312-314.

Innes, “Financial Provision on Divorce: the Scottish Perspective” (2008) IFL 241.

Kahn-Freund, “Some Reflections on Company Law Reform” (1944) 7 MLR 54.

Khazova, “Property, Maintenance and Post-Soviet European Family Law” (2009) IFL 160.

Lee and Ho, “Disputes over Family Homes Owned Through companies: constructive trust or promissory estoppels?” (2009) LQR v. 125, pp.25-31.

Linklater, “Piecing the Corporate Veil” – the never ending story? (2006) 27(3) Comp. Law 65-66.

Mainz, Walker and Wreford, “The Valuation of Assets Post-White” (2001) Fam Law 221 at 225.

Makin, “Family Values: Expert Witness Supplement” (2003) 153 NLJ 1164.

Marshall, “Divorce and the Family Business” (2003) Fam Law 407.

Martin, “From Prohibition to Approval: The Limitations of the “No Clean Break” Divorce Regime in the Republic of Ireland” (2002)16 IJLPF 223.

Martin, “Judicial Discretion in Family Law” (1998) 16 ILT 168.

Maughan and Copp, “Piercing the Corporate Veil” (1998) 148 NLJ 938.

Miles, “Equality on Divorce?” (2001) 60(1) CLJ 46.

Miller, ‘Financial Provision and Business Assets’ (1992) 1 PCB 49.

Monaghan, “The Slicing of the Material Cake – The Relevance of Separation Agreement to the Making of Property Adjustments Orders” (1999) 2(2) IJFL 8.

Moore, “A Temple Built on Faulty Foundations: Piercing the Corporate Veil and the Legacy of Salomon v Salomon” (2006) JBL 180.

Moore, ‘The significance of the “home maker” contributions upon divorce’ (2007) 10(1) IJFL 15.

Morris, “Proposed Changes to Limited Partnerships” (2008) 32 CSR 95.

Murray and Goddard, “Cutting the Veil – Pensions Protection Fund” (2004) 12 Pensions World 53.

MacCann, “Company Law Reform: One Man Companies” (1990) 8 ILT 166.

McCormack, “Judicial Application of Salomon’s Case in Ireland” May 1984 Gazette 97.

Nakajima, “Lifting the Veil” (1996) 17(6) Comp. Law 187.

Nedas, “Valuation Issues After White and Other Cases” (2004) 34 Fam Law 187 at 188.

Nicholls, “Beyond the Veil: Wildman v Wildman” (2007) 44 Can. Bus LJ.

O’Toole, “An Introduction to the Judicial Separation and Family Law Reform Act 1989” (1990) 6 Fam. LJ.

Ouazzani, “Ancillary Relief and the Public/Private Divide” (2009) Fam Law 842.

Parkinson, “The Yarkstick of Equity: Assessing Contributions in Australia and England” (2005) IJPFL 19(163).

Pedley, “Hints for Hungry Litigators” (2005) 155 NLJ 702.

Power, “Maintenance: No clean break with the past” (1998) 1(1) I.J.F.L. 15.

Power and Shannon, “Practice and Procedure: Clean Break Settlements” (2005) 8(2) IJFL 28.

Reynolds, “Rents in the Corporate Veil” (2006) 156 NLJ 971.

Roca Trias, “Dealing with the Economic Consequences of Divorce for Wives: Alimony under the Spanish Civil Code” (2000) IJLPF 14(45).

Rosettenstein, “Big Money Divorces and Unequal Distributions: Value, Risk, Liquidity and Other Issues on the Road to Unfairness” (2005) 19 IJLP&F 206.

Rowe, “A Family Affair...” (2006) 156 NLJ 866.

Ryan, ‘Interaction of Family Law and Company Law’ (2009) 12 (1) IJFL 3.

Scanlon, “The Salomon Principle” (2004) 25(7) Comp. Law 196.

Shannon, “Editorial: Separating the Issues” (2000) 3(2) IJFL 1.

Shannon, ‘Divorce ten years on: The case for reform’ (2008) 11(1) IJFL 1: Editorial.

Sim, “Witnessing a Change 3 - Gazette in Practice – Expert Witness” (1999) 48 LS Gaz, 17 Dec, 36(4).

Sterling, ‘*White v White* – An Analysis and Update of Recent Cases’ (2002) 166 JPN 184.

Turner, “Division of Third Party Property in Divorce Cases” (2003) 18 J. Am. Acad. Matrimonial Law, 375.

Vigus, “Taking Stock of Share Plans” (2006) 16 CSR 126.

Von Wachter, “The Corporate Veil...” (2007) 157 NLJ 990.

Zietman, “Litigation – 99% judgment proof” (1992) LS Gaz, 29 Jan, 89(22).

Zipp, “Divorce Valuation of Business Interests: A Capitalization of Earnings Approach” 23 Fam. L.Q. 89 (1989-1990) at 90.

Zuckerman, “Finality of Litigation – Setting Aside a Final Judgment” (2008) 27(2) CJQ 151-157.

### **Books**

Birks P.B.H., *Examining the Law Syllabus: Beyond the Core* (Oxford University Press, 1993).

Black, Bond, Bridge and Gribbin, *A Practical Approach to Family Law* (8<sup>th</sup> edn., Oxford: University Press, 2007).

Courtney, *The Law of Private Companies*, (2<sup>nd</sup> edn, Dublin: Tottel Publishing, 2008).

Delaney, *Equity and the Law of Trusts* (4<sup>th</sup> edn, Dublin, Thomson Roundhall, 2002).

Dignam and Lowry, *Company Law* (5<sup>th</sup> edn, London, Oxford University Press, 2008).

Gower, *Principles of Modern Company Law*, (3<sup>rd</sup> edn., London: Sweet and Maxwell, 1969).

Gower, *Principle of Modern Company Law*, (5<sup>th</sup> edn, London: Sweet and Maxwell, 1992).

Hicks and Goo, *Cases and Materials on Company Law*, (6<sup>th</sup> edn, New York: Oxford University Press, 2008).

Keane, *Company Law*, (4<sup>th</sup> edn, Dublin:Tottel Publishing, 2008).

Kelly, *The Irish Constitution* (3<sup>rd</sup> edn by Gerard Hogan and Gerry Whyte) (Dublin: Butterworths 1994).

Lowe and Douglas, *Bromley’s Family Law*, (9<sup>th</sup> edn, London: Butterworths, 1998).

Nestor, *An Introduction to Irish Family Law* (Dublin: Gill and Macmillan, 2007).

O’Halloran, *Family Law in Northern Ireland* (Dublin: Gill and MacMillan, 1997).

Shannon, *The Divorce Act In Practice* (Dunlin: Round Hall Sweet and Maxwell, 1999).

Shannon, *Divorce: The Changing Landscape of Divorce in Ireland* (Dublin: Round Hall Sweet and Maxwell, 2001).

Shannon, *Divorce Law and Practice* (Dublin: Thomson Round Hall, 2007).

Shannon, *Law Society of Ireland – Family Law* (Dublin: Oxford University Press, 2003).

Shatter, *Family Law in the Republic of Ireland*, (Dublin: Wolfhound Press 1980).

Shatter, *Shatters Family Law* (4<sup>th</sup> edn, Dublin: Butterworths, 1997).

### ***Committee and Commission Papers***

67 Dail Debates 11 May and 4 June 1937.

Law Commission, *The Ground for Divorce*, Law Com. No. 192 (1990) London, HMSO, paras. 2.8 to 2.21.

### ***Speeches***

Byrne, (1999) 'Forward' in Shannon (ed), *The Divorce Act in Practice*, (Dublin: Round Hall) ii-ix.

Clissmann SC 'Recent Developments Regarding "Ample Resource" cases in Irish Matrimonial Law' (Trinity College Dublin: The MacNeill Theatre Hamilton Building, 8<sup>th</sup> October 2005).

Durcan SC, 'Divorce, Judicial Separation and Ancillary Relief' (Dublin: Thomson Round Hall Annual Family Law Conference, 24<sup>th</sup> November 2007).

Ó hUallacháin, 'Recent Developments in Irish Family Law – Ancillary orders in Judicial Separation and Divorce' (Dublin: Trinity College Dublin, Saturday, 8th October 2005).

### ***Websites***

[www.acsolicitors.ie/news/new\\_family\\_law\\_rules/](http://www.acsolicitors.ie/news/new_family_law_rules/)

[www.bailii.org](http://www.bailii.org)

[www.irishstatutebook.ie](http://www.irishstatutebook.ie)

[www.lawcom.gov.uk](http://www.lawcom.gov.uk)

[www.lawreform.ie](http://www.lawreform.ie)

[www.lexusnexus.com](http://www.lexusnexus.com)

[www.westlaw.ie](http://www.westlaw.ie)

[www.westlaw.co.uk](http://www.westlaw.co.uk)