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Supreme Court of Ireland Decisions

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Judgment

Title:	T. -v- L.
Neutral Citation:	[2018] IESC 26
Supreme Court Record Number:	97/16
Court of Appeal Record Number:	2014/809
Date of Delivery:	09/05/2018
Court:	Supreme Court
Composition of Court:	Dunne J., Charleton J., O'Malley Iseult J., Mahon J., Gilligan J.
Judgment by:	Dunne J.
Status:	Approved
Result:	Appeal dismissed

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THE SUPREME COURT

[Record No. 2016/97]

Dunne J.

Charleton J.

O'Malley J.

Mahon J.

Gilligan J.

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT, 1989

AND

IN THE MATTER OF THE FAMILY LAW ACT 1995

AND

IN THE MATTER OF THE FAMILY LAW (MAINTENANCE OF SPOUSES AND CHILDREN) ACT 1976, AS AMENDED

AND

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

BETWEEN

T.

APPLICANT/RESPONDENT

AND

L.

RESPONDENT/APPELLANT

Judgment of Ms. Justice Dunne delivered the 9th day of May 2018

Background

This is an appeal by L. (hereinafter referred to as Mr. L.) from a decision of the Court of Appeal of the 3rd December, 2015 dismissing Mr. L's appeal against an order of the High Court (Abbott J.) of the 10th February, 2012 in which T. (hereinafter referred to as Ms. T.) was granted a decree of divorce and ancillary reliefs.

By its determination dated the 10th March, 2014, this Court identified the issue of general public importance as follows:

> "While it is correct to state, as was pointed out in the respondent's notice, that this Court has already definitively determined that the relevant foreign divorce cannot be recognised as a matter of Irish private international law, the issue which was raised on behalf of Mr. L. in the Court of Appeal was as to whether, notwithstanding that situation, relevant provisions of the Union treaties, not least those introduced by the Lisbon Treaty, gives rise to a situation where an Irish court cannot or should not grant a decree of divorce which would be inconsistent with a previous decree granted in another jurisdiction."

Thus leave was granted in respect of the following two issues:

> "(a) whether the Court of Appeal was correct to hold that the Irish courts could properly, as a matter of European Union law, grant a decree of divorce in all the circumstances of this case; and
>
> (b) in the event that Mr. L. succeeds on ground (a), and only in that event, whether the order for costs made by the Court of Appeal should stand."

It is necessary to set out the factual background in order to understand how the issues in respect of which leave was granted have arisen. The parties herein are Irish citizens.

They married in August 1980 in Dublin and have children who are now of full age. The parties moved to an EU Member State in 1987 when Mr. L. took up employment there. The family lived together in that Member State from 1987 until 1992. Unhappy differences arose in the marriage during that period and ultimately Ms. T. returned to Ireland with the children in the summer of 1992. In October 1993 solicitors acting for Ms. T. in that Member State wrote to Mr. L. seeking maintenance and financial support. In December 1993 Ms. T. caused a petition to be served on Mr. L. in the Member State. He was still resident there at that stage. On the 2nd February, 1994 an interim maintenance order was made by the County Court of the Member State. On the 2nd March, 1994 Mr. L. instituted proceedings in the District Court of the Member State seeking a divorce. He returned to Ireland permanently around the 28th May, 1994 to take up a position with an Irish company. On the 12th September, 1994 the District Court of the Member State granted a decree of divorce. In the judgment of the High Court of the 23rd November, 2001, (Morris J.) the Court set out in its judgment the circumstances in which the divorce came to be granted at page 11 of the judgment as follows:

> "The applicant (Ms. T.) has given comprehensive evidence of the way in which she says the respondent (Mr. L.) deprived her and the children of sufficient funds to keep them in any degree of comfort. She said that as a last resort she took advice and was in summary advised that it was open to her to apply to the Court in [the Member State] for what would be described in this jurisdiction as interim maintenance. This jurisdiction was available to her because the respondent was resident in [the Member State]. Based on this advice she contacted a lawyer [in the Member State] and instituted proceedings in [that State] for the recovery of interim maintenance. She succeeded in obtaining such an order. It is, however, a condition of the granting of such an order that the applicant in such proceedings will proceed to prosecute the case to seek a divorce. If this is not done then the order for interim maintenance lapses. The applicant having obtained her order for interim maintenance took no further active steps in the proceedings. I am satisfied that the respondent being aware of the proceedings availed of their existence to settle up outstanding matters and with the co-operation of the wife the necessary steps were taken so that judgment was entered granting the divorce in [the Member State] on the 13th July, 1994. It is common case that the Court in [the Member State] will accept the jurisdiction based on the residence of one of the parties. Outstanding issues between the parties such as maintenance and access to children are dealt with by way of 'a convention' which is agreed between the parties. Such convention was in fact entered into between the parties on the 13th July, 1994.
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> The applicant has told the Court that at the time when she embarked on these proceedings she was confused and the only realistic consideration which she gave to the matter was the urgent need which she saw to have provision made for her and for the children. She says that they were without support to the extent that they were driven to seek social welfare payments in Ireland. The respondent denies that there was ever any shortage of money and points to the fact that leading up to the time when the divorce covenant was entered into he had provided the applicant with sufficient funds to pay a deposit on a house which was not used for this purpose but was devoted towards maintenance of the applicant and the children."

Both parties are agreed that the date of the divorce was the 12th September, 1994, notwithstanding the date referred to in the passage cited above. It is apparent that Ms. T. did not object to the making of the order for divorce. It is also the case that the decree of divorce together with the agreement between the parties as referenced in the convention did not provide for an order for maintenance in respect of the children of the

marriage on the basis that the court of the Member State was of the view that it had no authority to make provision for custody or maintenance of the children as they were no longer resident in the Member State by 1994. Mr. L. has pointed out that the terms of the convention were incorporated into the divorce and that although the court of the Member State did not have jurisdiction to deal with questions of custody or child maintenance it was provided in the agreement between the parties that there was to be a monthly payment of IR£183 to Ms. T. as a contribution by Mr. L. towards the costs of care and upbringing of the children. The agreement also provided for the payment of school fees and also created a joint bank account for the benefit of the children into which he paid the sum of IR£12,747.50 to provide for future disbursements for the children's benefit. (I should point out that the convention referred to by Morris J. in the passage above is described as the divorce agreement in the pleadings).

The history of the proceedings

It would also be helpful to set out the history of these proceedings. Ms. T. commenced these proceedings by way of special summons in July of 2000. Ms. T. sought a decree of judicial separation pursuant to the provisions of the Judicial Separation and Family Law Reform Act of 1989 or in the alternative a decree of divorce pursuant to the provisions of the Family Law (Divorce) Act of 1996. Following the issue of the proceedings, a preliminary issue was tried on the application of Mr. L., namely, whether Mr. L. "is or is not entitled to a declaration that the validity of a divorce obtained on the 13th day of July 1994 under the civil law of the EU Member State is or is not entitled to recognition in this State pursuant to the Family Law Act 1995 s. 29(1)(d) and/or (e)". That led to the judgment of Morris J. on the 23rd November, 2001 to which I have already referred deciding that the divorce was not entitled to recognition in the State. The decision was appealed to the Supreme Court. Keane C.J. delivered the judgment of the Court on the 26th November, 2003 and in the course of his judgment he noted that the case advanced on behalf of Mr. L. had two limbs:

> "The first was that, at the time the divorce proceedings were instituted in the courts [of the Member State], the husband has acquired a domicile of choice in the [Member State] and that accordingly, the divorce granted by the court [of the Member State]was entitled to recognition in this jurisdiction. The second limb was that, if he had not acquired a domicile of choice, the court should apply the modified rule of private international law adopted by the High Court in *McG. v. W.* in which case, since it was accepted that he had been ordinarily resident in the [Member State] for a period in excess of one year at the time the proceedings were instituted, the decree granted by the court [of the Member State] was entitled to recognition on that basis."

Keane C.J. noted that it was made clear in the written submissions lodged on behalf of Mr. L. that the appeal against that part of the judgment which rejected the alternative case on his behalf that the modified rule in *McG. v. W*. should be applied was not being pursued. Accordingly, the Supreme Court was solely concerned with the issue as to whether the husband was at the relevant time domiciled in the Member State with the result that the divorce granted by the court of the Member State should be recognised by the High Court. Having considered the facts of the case, the Supreme Court concluded that Mr. L. had failed to discharge the burden of proof resting on him of establishing that his domicile of origin had been abandoned and a domicile of choice in the Member State acquired and accordingly his appeal was dismissed and the order of the High Court was affirmed.

Following the decision of the Supreme Court the matter was resumed in the High Court and Mr. L. brought a further challenge to Ms. T's entitlement to seek a decree of judicial separation/divorce and sought the following orders:

> "(1) An order pursuant to the provisions of the Convention on Jurisdiction

> and the Enforcement of Judgments in Civil and Commercial Matters 1968 as incorporated into Irish law pursuant to the Jurisdiction of Courts and Enforcement of Judgments Act 1998 and in particular Articles 17, 19, 12 and 22 of the said Convention that this Court should decline to exercise jurisdiction in respect of the claims for ancillary relief set out at letters A to T [other than the claim set out at F] of the special endorsement of claim on the special summons had herein.
>
> (2) In the alternative an order pursuant to the provisions of Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition of Enforcement of Judgments in Civil and Commercial Matters that this Court should decline to exercise jurisdiction in respect of the claims for ancillary reliefs set out at letters A to T [other than the claim set out at F] of the special endorsement of claim on the special summons had herein.
>
> (3) Further in the alternative an order pursuant to the provisions of Regulations EC No. 1347/2000 (On Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and in Matters of Parental Responsibility for Children of both spouses) and pursuant to the State's obligations as set out under Articles 3, 10, 18 and 39 of the Treaty of the European Union that this Court should decline to exercise jurisdiction in respect of any reliefs and/or the claims for ancillary relief set out at letters A to T [other than the claim at F] of the special endorsement of claim on the special summons had herein."

Once again it was agreed that this matter should be dealt with by way of preliminary issue.

A preliminary objection was raised in the course of the hearing before the High Court (McKechnie J.) to the effect that the issue then being raised by way of preliminary issue should have been raised and determined as part of the preliminary issue previously dealt with by the High Court and subsequently on appeal by the Supreme Court. Reference was made to the rule in *Henderson v. Henderson* [1843] 3 Hare 100. McKechnie J. concluded that the grounds of challenge set out in the notice of motion before him could have been raised at an earlier point in the proceedings and if they had been so raised would almost certainly have been determined as was the issue of domicile. However he exercised a jurisdiction having regard to the importance of the issue raised to determine the issue. He noted in so doing and I quoted:

> "Furthermore and this point is of considerable significance, is the fact that counsel on behalf of [Mr. L.], having taken express instructions, gave an undertaking to this Court that no further issue or new ground of challenge would be raised by him, once the present matters were finally determined. On this basis, and for these reasons, I propose to entertain the present application of the respondent, despite some hardship which undoubtedly this conclusion may cause the applicant."

In the course of his judgment, McKechnie J. helpfully set out the dates upon which the relevant provisions of European law came into force. (See paragraph 17 of his judgment. It may be useful to insert this paragraph in the judgment of this Court.) Having considered the issues raised in the notice of motion before him, the learned High Court judge dismissed the application of Mr. L. The matter was then appealed to the Supreme Court and judgment was delivered by this Court on the 29th July, 2008 (Fennelly J.). In the course of his judgment, Fennelly J. outlined a summary of the conclusions of the High Court judgment as follows (paragraph 28):

> "(1) The maintenance decree of the 12th September, 1994, came within the scope of the Brussels Convention, in particular art. 5(2). The application of that article was not affected by the fact that the [Member

State] maintenance order was ancillary to the contemporaneous [Member State] divorce decree (see Case C-120/79 *de Cavel v. de Cavel* [1980] E.C.R. 1 - 731);

(2) the courts of the member states are bound to apply the *lis pendens* provisions respectively of the Brussels Convention, or, if applicable, of the respective Regulations, provided it is shown that they apply to the circumstances of the case;

(3) it is essential to the application of either or any of the Regulations that it be shown that the judgment of the court [of the Member State] comes within its temporal framework. The wording of temporal or transitional provisions of each of the Regulations showed that they did not apply to that judgment;

(4) if, however, the judgment of the court [of the Member State] came within the scope of the Brussels Convention at the time when it was given, it remained within its provisions (see para. 72 of the judgment): 'if the order qualified for recognition in 1994 it retains that right of recognition today';

(5) however, the maintenance order made as part of the judgment of the court [of the Member State] was 'predicated on the divorced status of the parties'. Following the principle laid down by the Court of Justice in Case C-145/86 *Hoffmann v. Kreig* [1988] E.C.R. 645, the basis on which the maintenance decree of the court [of the Member State] was made was irreconcilable with the decision of the Supreme Court of the 26th November, 2003, already given in this case. At the time of the judgment of the court [of the Member State], it was not the aim of the Brussels Convention, as shown, *inter alia*, by Articles 27(3) and (4) to derogate from the domestic rules of the Member States regarding the status of persons;

(6) consequently the maintenance aspect of the judgment of the court [of the Member State] did not qualify for recognition in this jurisdiction. Thus the High Court had jurisdiction to deal with the claims made by the applicant in the present proceedings."

A number of issues were raised by way of appeal to this Court contending that the learned trial judge was wrong in a number of respects, namely:

"in failing to hold that the judgment of the court [of the Member State] came within the provisions of Brussels 1 or alternatively Brussels II;

in holding that the judgment should be considered pursuant to the Brussels Convention;

in not having regard to the European Communities (Civil and Commercial Judgments) Regulations 2002 (S.I. No. 52 of 2002);

in holding that the Supreme Court judgment of the 26th November, 2003, was irreconcilable with the judgment of the court [of the Member State];

in holding that the maintenance order of the court [of the Member State] was dependant on the enforceability of the divorce decree or was not entitled to recognition by virtue of Article 27(3) or (4) of the Brussels

Convention;

in failing to hold that Articles 61 and 65 of the E.C. Treaty create a separate and independent source of enforceable rights and in holding that the State had complied with its obligations pursuant to those articles;

in failing to hold that the exercise of the court of jurisdiction in these proceedings would constitute an unlawful interference with the free movement rights of the respondent as a worker within the European Community pursuant to Article 39 of the E.C. Treaty or his rights as a citizen pursuant to Article 18 of that Treaty."

Having considered the grounds of appeal raised by Mr. L., the Supreme Court dismissed his appeal from the decision of the High Court on the second set of preliminary issues raised by Mr. L. and further refused to refer any of the issues of community law raised by Mr. L. to the European Court of Justice.

Given that the preliminary issues raised by Mr. L. were now concluded, the door was opened for the substantive proceedings to be heard and determined by the High Court. In a judgment dated the 10th February, 2012, the High Court granted a decree of divorce in respect of the marriage between Ms. T. and Mr. L. and made a number of orders in relation to periodical payments, the payment of a cash sum, the beneficial occupation of the dwellings which the parties presently occupied and in relation to succession rights of the parties. The judgment of the High Court was then appealed by Mr. L. to the Supreme Court and there was a cross-appeal by Ms. T. in relation to an issue in respect of a lump sum order. The Thirty Third Amendment of the Constitution having come into effect, the appeal was subject to an Article 64 transfer and ultimately came before the Court of Appeal. Ryan P., Peart J. and Irvine J. delivered the judgment of the Court on the 3rd December, 2015. In the course of that judgment, the Court dealt with a number of arguments put forward on behalf of Mr. L. in relation to EU matters. The Court concluded (at para. 48):

"In the judgment of this court, all the arguments that the husband has put forward either through his counsel or his own separate document must yield to the definitive judgment of the Supreme Court on the status of the divorce [from the EU Member State]; to the rejection by that court of the various Union law challenges and submissions; and as to a reference to the separate consideration of that question by the Supreme Court in 2008. In our view, the learned High Court judge was not only entitled to come to the conclusion he did but was obliged to do so, as is this Court."

The Court of Appeal then went on to consider the substantive issues determined in the proceedings as to the amount of proper provision to be made in relation to the retirement fund of Mr. L. and in relation to the cross-appeal by Ms. T. in respect of the refusal to award her a lump sum to enable her to buy a house and in relation to the issue of costs.

Leave to appeal was granted by this Court in the terms set out in the determination referred to at the beginning of this judgment.

The only other fact of relevance is a matter referred to in the written submissions provided to this Court on behalf of Ms. T. to the effect that Mr. L. is now re-married on the basis of the recognition of the Irish divorce. Nevertheless, he continues to contend that this divorce is void. In the submissions, it is noted on behalf of Ms. T. that Mr. L. is prepared to accept the validity of the Irish divorce when it suits him to do so. This matter is dealt with to a small extent in footnote 41 of Mr. L.'s submissions where he

states:

> "The woman claimed in paragraph 4.14 of her written submissions before the Court of Appeal that the man was estopped from asserting the invalidity of the Irish divorce, since he had relied upon it to re-marry in Ireland. The woman had objected unsuccessfully to the intended marriage. Whereas the superintendent registrar relied upon the Irish divorce, the man maintained that he was divorced since 1994."

(See page 21 of his written submissions and paragraph 19 of her written submissions).

I will return to this issue later in the course of this judgment.

The recognition of foreign divorces

This Court has already decided the decree of divorce granted by the District Court of the Member State in 1994 is not entitled to recognition in this State. It is not suggested, nor could it be suggested on the facts of this case, that the decision of the Supreme Court on the appeal in 2003 from the judgment and order of Morris P., was wrong or that the subsequent decision of this Court in 2008 from the judgment and order of McKechnie J. was wrong. Rather, it is sought to argue that those decisions are distinguishable. As a general observation it is very difficult to see how the earlier decisions in these self-same proceedings could be distinguishable on any basis. It is clear from the identification of the issue to be determined as described by this Court that the question now arising is whether subsequent provisions of European Union Treaties, including the Lisbon Treaty, give rise to a situation where an Irish court cannot or should not grant a decree of divorce which would be inconsistent with a previous decree granted in another jurisdiction, notwithstanding the previous judgments of this Court refusing to recognise the decree of divorce granted in the District Court of the Member State and refusing to decline jurisdiction to deal with ancillary matters, which decisions paved the way for the hearing of the divorce application before Abbott J.

Before considering whether subsequent European Union Treaties could have the effect contended for by Mr. L. it would be useful to examine briefly the evolution of the law in relation to the recognition of foreign divorces in this jurisdiction. A useful overview of this topic is to be found in Shannon, *Divorce Law and Practice*, Thomson Round Hall, 2007. The starting point for the discussion is the Constitution of Ireland which, when introduced in 1937, contained a prohibition on the granting of a decree of divorce in this jurisdiction. Article 41.3.3° of the Constitution, before the Constitution was amended in 1996 to provide for divorce, provided as follows:

> "No person whose marriage has been dissolved under the civil law of any other State but is a subsisting valid marriage under the law for the time being in force within the jurisdiction of the Government and Parliament established by this Constitution shall be capable of contracting a valid marriage within that jurisdiction during the lifetime of the other party to the marriage so dissolved."

This provision of the Constitution was first considered in the well known case of *Mayo-Perrott v. Mayo-Perrott* [1958] I.R. 336 in which it was concluded that Article 41.3.3° did not preclude the Irish courts from recognising a foreign divorce in accordance with common law principles. The issue was considered again in the case of *Bank of Ireland v. Caffin* [1971] I.R. 123. Following that decision it became clear that once the common law rules for the recognition of a foreign divorce were established, the Irish courts were not precluded from recognising such divorce. The position at common law at that time was that a divorce would be recognised provided that the spouses concerned were domiciled in the jurisdiction that granted the divorce at the time of the divorce. The position in this regard was reiterated in the case of *Gaffney v. Gaffney* [1975] I.R. 103/ (133?). Walsh J. in that case stated:

> ". . . the Courts here do not recognise decrees of dissolution of marriage pronounced by foreign courts unless the parties were domiciled within the jurisdiction of the foreign court in question."

Thus, it can be seen that domicile was at the heart of the question of recognition of a foreign divorce.

Domicile is a complicated concept but is of importance when determining a person's status. The common law rules as to domicile include the concept of dependent domicile. A minor has a domicile of dependence, that is, in general, the domicile of its parents. (This can, in turn, depend on whether the parents are married or unmarried.) A person can acquire a domicile of choice and of course, the question of whether such a domicile of choice had been acquired by Mr. L. was at the heart of the first Supreme Court decision in these proceedings. That is an issue of law and fact. A significant change in the common law position in relation to domicile occurred with the introduction of the Domicile and Recognition of Foreign Divorces Act 1986. Until its enactment, a woman, on marriage, no longer had an independent domicile of her own but acquired a domicile of dependence so that her domicile became that of her husband. This was so regardless of residence. Thus, if a married woman's husband acquired a domicile of choice in another jurisdiction, his wife acquired a domicile of dependence in that jurisdiction regardless of whether she lived there or not. As was pointed out by Shannon in *Divorce Law and Practice* at paragraph 16 - 17:

> "In some ways this facilitated the recognition of foreign divorces before 1986 because, before then, both spouses had to be domiciled in the jurisdiction that granted the divorce. If the husband was domiciled there, then since his wife took his domicile, so too was she, and the divorce could be recognised, even if the wife remained in Ireland. But this could never happen the other way around, i.e. a wife could never move abroad without her husband and get a divorce that would be recognised here (though it might be perfectly valid in the place where it was granted). If he stayed here, so too, in Irish law, did her domicile. This inequality prompted the introduction of the Domicile and Recognition of Foreign Divorces Act 1986, which abolished the dependent domicile of a wife from the 2nd October 1986, and from that date onwards a wife was capable of gaining an independent domicile."

Section 5(1) of the Act of 1986 provided as follows:

> "For the rule of law that a divorce is recognised if granted in a country where both spouses are domiciled, there is hereby substituted a rule that a divorce shall be recognised if granted in the country where either spouse is domiciled."

As can be seen therefore, a significant change was brought about in respect of the common law rules in relation to domicile and the recognition of foreign divorces. Accordingly from the 2nd October, 1986 a foreign divorce could be recognised in this jurisdiction if granted in a country where either spouse was domiciled. As can be seen however, domicile remained at the heart of the question of recognition of a foreign divorce.

Two further decisions require to be considered. The first of those is the decision in the case of *G. McG. v D.W.*; A.R. notice party [2000] 1 IR 96 to which reference was made by Keane C.J. in the 2003 judgment of this Court. In the course of her judgment in the High Court in that case, McGuinness J. took the view that there was a change in policy in relation to recognition of foreign divorces given that Ireland had, by that time, passed a constitutional referendum which permitted divorce and legislation had been introduced to provide for divorce based upon either domicile within the State or upon ordinary residence within the State for one year prior to the institution of proceedings. Given those circumstances, she concluded that there was a clear policy that the recognition of

a foreign divorce was not limited to a party's domicile.

It is interesting to note that a contrary view was taken by Kinlen J. in the case of *M.E.C. v. J.A.C.,* Unreported, High Court, Kinlen J., 16th April, 2002. In that case, the issue that arose for consideration was whether or not an 1980 English divorce was entitled to recognition in this jurisdiction. The divorce in that case was a pre-1986 foreign divorce and the question that arose was the question of whether residence alone could be a sufficient basis for the recognition of a foreign divorce. Kinlen J. refused to recognise the validity of a divorce granted in England in 1980 on the basis that a retrospective extension of the grounds of recognition would create uncertainty. It was his view that if there was to be a further extension of the grounds for recognition of a foreign divorce that that should be done by way of legislation. Interestingly, Morris J. in the course of his judgment in these proceedings referred to the decision in *McG v. D.W*. and stated:

> "I have no doubt however, that since it was open to the court in *McG v. W. (No. 1)* [2000] 1 ILRM 107 to bring the common law in line with current policy it was correct to do so. I believe that if there was a jurisdiction still vested in me I should do so in this case. However, in my view the passing of the Act removes this jurisdiction from me."

Therefore, he was of the view that following the passing of the Act of 1986 the position in relation to a post-1986 divorce had to be determined by reference to the Act of 1986 which as will be recalled expressly legislated for the recognition of a divorce granted in another country where either spouse was domiciled and accordingly was not based on residence. It was noted in the judgment of the Supreme Court in 2003 that the alternative case on behalf of the husband to the effect that the modified rule as to recognition adopted in *McG v. W.* should be applied was not being pursued in the course of the appeal and, accordingly, the Supreme Court did not proceed to consider the judgment of McGuinness J. in that case any further.

The only other decision to be referred to at this stage is the decision of the Supreme Court in the case of *H. v. H*. [2015] IESC 7 which concerned the recognition of a decree of divorce obtained by one of the parties while resident in England. Subsequently, that party sought a decree of divorce in the Circuit Court in this jurisdiction and in circumstances where the Circuit Court made a declaration that the decree of divorce obtained in the United Kingdom was a valid divorce in this jurisdiction, her application for a divorce in this jurisdiction was dismissed. She appealed that decision to the High Court and following a hearing before the High Court certain findings of fact were made, namely, that the English decree of divorce would not be entitled to recognition in this jurisdiction unless the State recognised the validity of a foreign divorce lawfully granted in a country where neither party to the marriage in question was domiciled at the date of the institution of the proceedings but where one party was resident at that date. Having regard to the findings of fact, the learned High Court judge stated a case to the Supreme Court to determine whether or not the foreign divorce in that case could be recognised even though it was accepted and found as a fact that neither of the parties were domiciled in the U.K. at the time of the making of the decree of divorce in that jurisdiction. Having considered the decision of McGuinness J. in *McG v. W*. and the decision of Kinlen J. in *M.E.C. v. J.A.C.* referred to above it was concluded as follows in the majority judgment of the Court, (Dunne J.):

> "*McG. v. W*. sought to modify the common law rule in relation to recognition of foreign divorces in respect of the period prior to the Act of 1986. The basis upon which a common law rule can be modified was identified in the decision of this Court in *W. v. W*, in which it was recognised that common law rules are judge-made law and may be modified, if necessary, having regard to public policy. In that case, the common law rule in relation to the dependent domicile of wives was

> modified to bring it into line with the statutory rule provided for in the Act of 1986. It is undoubtedly the case that the Family Law (Divorce) Act 1996 enables divorces to be granted by reason of residence in the State but if the legislature had wished to modify the position in relation to the recognition of foreign divorces, it was open to the legislature to do so at that time or indeed at any subsequent time. No such change has been brought about and in circumstances where the 1986 Act governs the recognition of foreign divorces on the basis of domicile, I fail to see how it could be said that the present policy of the court is such that the common law rule applicable to foreign divorces granted prior to the 2nd October 1986 may be modified. For that reason I regret to say that in my view, *McG. v. W*. was not correctly decided."

It was also observed in the course of the judgment in that case as follows:

> "It is unfortunately the case that the law in respect of the recognition of foreign divorces has developed in a way which provides for different criteria for the recognition of foreign divorces depending on the happenstance of where and when the divorce was granted. For example, the recognition of a divorce granted in New York will be based on the domicile of one of the parties; a divorce granted in an EU State after the 1st March 2005 will be recognised on the basis of habitual residence in accordance with the provisions of Brussels II *bis* which came into force on that date. Had the divorce at issue in this case been granted after the 1st March 2005, the provisions of Brussels II *bis* would have applied and on the facts of this case it is difficult to see any basis which could have precluded its recognition. Is there any justification for a system of recognition based on habitual residence for one group of people while for another group recognition is based on domicile? Given the disparity between the different criteria for recognition of foreign divorces in this country and the importance of permitting people to have clarity and uniformity in relation to their status, it seems to me that it is desirable to reconsider the legislative position in relation to this difficult issue so that there could be, so far as is possible, a uniform approach to the recognition of foreign divorces. After all, people are surely entitled to have certainty as to their marital status."

Thus, as can be seen from the decision in that case, the position in relation to the recognition of a foreign divorce granted in this jurisdiction is based on the proposition that such divorce will be recognised on the basis of domicile where the common law rules are applicable.

EU law developments

The common law rules in relation to the recognition of foreign divorces remain the same for persons who are not EU citizens. However for those who are citizens of an EU Member State, the position in relation to recognition of a foreign divorce is now different as a result of a series of changes in European law which have had a bearing on this issue. The sequence of such change is well summarised by Shannon at paragraph 16.32 where he stated:

> "As stated above, divorces obtained in any of the EU Member States (other than Denmark) since March 1st 2005, are governed by European Parliament and Council Regulation (EC 2201/2003) concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility (hereinafter referred to as "Brussels II *bis*"). This Regulation replaced European Parliament and Council Regulation 1347/2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (known as the Brussels II Regulation), which had been enacted in March, 2001 to replace the Brussels II Convention, which was signed on May 28th, 1998. While

> Brussels II *bis* has prospective effect, Article 64 of the Regulation contains transitional provisions which render the recognition and enforcement provisions of Brussels II *bis* applicable to divorces obtained prior to March 1st, 2005 in certain circumstances. Those circumstances largely relate to divorces obtained after the entry into force of the Brussels II Regulation, thereby opening a transitional 'window' between March 2001 and March 2005."

It should be noted that Council Regulation 1347/2000 came into force in this jurisdiction on March 1st, 2001. It was repealed when Brussels II *bis* became directly applicable on March 1st, 2005 as was expressly provided for in Article 72 of Brussels II *bis*, subject to the transitional provisions referred to in the passage quoted above from Shannon. The effect of the Brussels Convention and the Brussels Regulations were considered at length in the judgment of this Court in these proceedings in 2008. As was noted by Fennelly J. at paragraph 51 of his judgment:

> "The inescapable fact which faces the appellant is the date of the judgment of the court [of the Member State], which is in September, 1994. If it had been delivered at any time since the entry into force of either Brussels I (1st March, 2002) or Brussels II (1st March, 2001), the position might well have been radically different. It will be necessary to consider the actual effects of those Regulations only if either or both of them applies."

It should be noted that Brussels I (Council Regulation No. EC No. 44/2001 of 22nd December, 2000) related to jurisdiction and the recognition and enforcement of judgments in civil and commercial matters and in the context of family law proceedings, specifically concerned matters relating to maintenance. Having considered the provisions of Brussels I, Brussels II and Brussels II *bis*, Fennelly J. in the judgment of the Court concluded that neither Brussels I, Brussels II or Brussels II *bis* applied to the judgment of the court of the Member State.

Discussion

In circumstances where this Court has already determined that the divorce granted by the District Court of the Member State in September 1994 cannot be recognised in this jurisdiction because neither of the parties was domiciled in the Member State at that time, and further that the provisions of Brussels I, Brussels II and Brussels II *bis* have no application to the judgment of the court of the Member State, how then can Mr. L. contend that the grant of a divorce in this jurisdiction is irreconcilable with the decision of the court of the Member State?

In essence, Mr. L. contends that the grant of a divorce in this jurisdiction in respect of his marriage would be unrecognisable in the Member State and possible unenforceable in other Member States given that at the time of the grant of the second divorce in this jurisdiction, Article 67(1) of the Treaty on the Functioning of the European Union (TFEU) provides that the European Union comprises "an area of freedom, security and justice with respect for fundamental rights and the different legal systems of the Member States". It will be recalled that the TFEU was created by the Treaty of Lisbon and sets out the competences of the European Union. Article 4 of the TFEU provides that the Union and Member States have shared competence in the area of freedom, security and justice.

Reliance is also placed on the provisions of Article 67(4) of the TFEU which provides that "the Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters". Accordingly, the argument put forward on behalf of Mr. L. is that there is a general obligation on the courts of Member States not to create irreconcilable judgments that are incompatible with the provisions of the Treaty of Lisbon and the TFEU insofar as it provides that the Union shall constitute "an area of freedom, security and justice".

The arguments in support of Mr. L's contentions rely to some extent on Brussels I, II and Brussels II *bis*. It is submitted that the grant of a second judgment within the EU is irreconcilable with the judgment of a court of competent jurisdiction elsewhere within the EU. He contends that once proper regard is had to the objectives of Brussels I, Brussels II and the Treaties provisions in the context of area of freedom, security and justice, then, the earlier judgments of this Court did not grant a jurisdiction to grant a divorce together with ancillary relief as a second such judgment would be irreconcilable with the earlier judgment of the Member State.

Thus, the core of Mr. L's case is the contention that the grant of a divorce in this jurisdiction creates a second divorce judgment which is irreconcilable with the original judgment from the Member State and as such is a breach of the obligations to be found in Article 67 of the TFEU. Article 67, it should be borne in mind, whilst it provides for an area of freedom, security and justice, does so expressly with respect for fundamental rights and different legal systems and traditions of Member States. It is also relevant to have regard to Article 81 dealing with judicial co-operation in civil matters which provides at 81(1) as follows:

> "The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States."

It goes on to provide at 81(3) as follows:

> "Notwithstanding paragraph 2, measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a special legislative procedure. The Council shall act unanimously after consulting the European Parliament.
>
> The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The Council shall act unanimously after consulting the European Parliament.
>
> The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision."

It was pointed out on behalf of Ms. T. that the provisions referred to in the Treaty of Lisbon and the TFEU are Articles which set out objectives to be pursued by the EU and which extend or confirm previous competences to the EU. Accordingly, it is submitted that they are merely permissive and instructional as to the scope of secondary legislation which it is open to the Union institutions to enact and apply. That this is so can clearly be seen from the provisions of Article 81 to which I have just referred. Reference is made in the submissions of Ms. T. to the judgment of Fennelly J. when he spoke of the predecessors to Article 67, namely Articles 61 and 65 of the Treaty establishing the European Community (the TEC) where Fennelly J. stated at paragraph 88:

> "These are purely permissive provisions. They empower the Community institutions to adopt measures. It is the measures actually adopted that affect the rights of individuals. Neither Article 61 nor Article 65 provides any basis whatever for the appellant's contention that the Irish courts should decline jurisdiction to hear his wife's proceedings in respect of

> judicial separation, divorce or ancillary matters."

When one considers those provisions and compares them with the provisions of Article 67, it is impossible to describe the provisions of Article 67 as anything other than "purely permissive provisions". If further support for this is to be found anywhere it is to be found in Article 81 itself which makes clear the degree of control in relation to family law measures retained by Member States. The objectives and the competences of the European Union to achieve greater judicial co-operation in civil matters as part of its area of freedom, security and justice, depend on secondary legislation to be achieved. It is the measures adopted on foot of the Treaties which determine the rights of individuals. Reference was made in the submissions on behalf of Ms. T. to the commentary by Professor Paul Craig in his book, *The Lisbon Treaty*, 2010, Oxford University Press at pages 357 to 359, where he states:

> "The Lisbon Treaty has now modified and expanded EU competence in relation to civil law and procedure . . .
>
> Article 8 TFEU modifies Article 65 EC in a number of ways. First, the reference to the reference to the internal market has been altered, such that it now reads that measures can be adopted 'particularly when necessary' for the proper functioning of the internal market, as opposed to the previous language, which was framed in terms of 'insofar as necessary'. This shifts an extension of EU competence, since the formulation in Article 81 TFEU is facultative, rather than limiting in the manner hitherto.
>
> Second, Article 81 TFEU accords pride of place to mutual recognition as the regulatory technique in this area. This is, as will be seen below, a theme that is repeated in relation to judicial co-operation in criminal matters. It remains to be seen how far this alters the previous legislative strategy in relation to civil law and procedure.
>
> Third, the list of matters that the EU can address has been extended by the Lisbon Treaty . .
>
> Fourth, Article 81 TFEU makes special provision for cross-border measures that deal with family law, requiring Council unanimity and consultation with the European Parliament. This decisional rule can be modified, however, in accordance with Article 81(3)."

Thus, it is submitted on behalf of Ms. T., that the TFEU does not override existing legislation. In the absence of any further secondary legislation, it is difficult to see what effect the provisions of the Treaty could have such that it is not now permissible for an Irish court to grant a divorce in circumstances where the earlier divorce granted by the courts of the Member State is one which is not recognisable in this jurisdiction.

At the end of the day the argument made by Mr. L. requires this Court to come to the view that the provisions of the TFEU relied on by him have the effect of retrospectively affording recognition to the divorce from the Member State. Fennelly J. in the course of his judgment in these proceedings addressed the issue of retrospectivity at paragraph 70 of his judgment where he referred to the decision of the Court of Justice in Case C-98/78 *Racke v. Hauptzollamt Mainz* [1979] E.C.R. 69 in the following terms:

> "It is a general principle of law, widely recognised in different systems of law, that provisions intended to have a retrospective effect must be clearly expressed so as to lead to that result. As the Court of Justice held, at para. 20 of its judgment in *Firma A. Racke v. Hauptzollamt Mainz*, cited by the applicant, 'although in general the principle of legal certainty precludes a Community measure from taking effect from a point in time

> before its publication, it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected'."

See also the discussion on retrospectivity in the decision of this Court in *Sweetman v Shell E&P Ireland Limited*, *Lennon Quarries and TJ Lennon* 2016 IESC 58.

Throughout the submissions made on behalf of Mr. L. is the argument that the Irish courts do not have jurisdiction to grant a judgment in divorce proceedings because to do so would be to grant a judgment which is irreconcilable with the earlier decision of the District Court of the Member State. In making this point, it is submitted on behalf of Mr. L. that the Irish courts should have proper regard to the objectives of Brussels I, Brussels II and the provisions of the Treaty of Lisbon in providing for a European Union area of freedom, security and justice. A fundamental difficulty for Mr. L. in making this submission is that it is impossible to see any basis upon which it would be appropriate to have regard to those provisions and in particular the provisions of the Brussels Convention, Brussels I, Brussels II and Brussels II *bis* in circumstances where having regard to the provisions of those Regulations and the TFEU, they have no application to the divorce from the Member State obtained by Mr. L. It is undoubtedly the case that the objectives of those Regulations is to bring about uniformity in the approach of Member States to the recognition of foreign judgments and in the context of these proceedings a foreign divorce. However the fact that the Regulations may have certain objectives does not mean that those objectives can be considered or indeed ought to be considered when the Regulations referred to do not apply to the facts of the case. In the circumstances, it is impossible to see what bar there could be to the granting of a divorce in this jurisdiction in circumstances where the divorce previously granted in the Member State simply cannot be recognised in this jurisdiction The objectives contained in Brussels I, Brussels II and Brussels II *bis* do not have any bearing on the facts of this case as was found by this Court in 2008. They are clearly prospective in their effect and could not have had retrospective effect unless that was clearly expressed to be the case. . It can be seen that the provisions of the TFEU are permissive and set out the competences of the EU to provide for judicial co-operation by means of secondary legislation and were not expressed to alter the status of individuals retrospectively in this field of competence.

It is clear, therefore, that following on from the decision of this Court in 2003 and the decision in 2008, that absent a provision which had the effect of altering the position in relation to the recognition of foreign divorces, there could have been no bar on the granting of a divorce in this jurisdiction by the High Court. The argument made on behalf of Mr. L. to the effect that granting such a divorce would be to create a second irreconcilable judgment is misplaced. It has been made abundantly clear by this Court on two previous occasions that the divorce granted in the District Court of the Member State cannot be recognised in this jurisdiction. Therefore from the point of view of the Irish courts, there is no other irreconcilable divorce judgment. That being so, there is no bar to a divorce being granted here. For the reasons already explained there is nothing in the TFEU which would support a contrary view. Indeed, it would be somewhat surprising if the TFEU was to have had the effect contended for by Mr. L., such that parties who understood their status to be married or divorced as the case may be, could find that as a result of the coming into force of the TFEU that their previous understanding and court rulings obtained by them were set at naught as a result of an agreement between the Member States.

It is undoubtedly the case that some individuals will find themselves having to deal with issues surrounding the validity of second marriages and the recognition of divorces which cannot be resolved by relying on either the common law rules, where appropriate, or Brussels II *bis* in the case of EU citizens. Brussels II *bis* was designed to eliminate the incidence of so called "limping marriages". As Shannon, speaking of the Brussels II

Convention, puts it in Para 16-36:

> "The aim of the Convention, thus, was to minimise the incidence of such "limping marriages" by providing a single framework for the determination of marital validity. Once the courts of one EU country (with proper jurisdiction) had determined a matter which the Convention was concerned, the Courts and other authorities in every other contracting state were obliged to enforce and recognise such judgment, subject to certain exceptions similar to those which are now contained in Brussels II *bis* and which are outlined below." (My emphasis)

The emphasis in the that passage is on the requirement to recognise and enforce judgments determined in one Court by the Courts of other contracting states once the first state had "proper jurisdiction". The jurisdiction of the District Court of the Member State to grant a divorce was never entitled to recognition in this jurisdiction by reason of any common law rule or any international agreement or provision. That has been made abundantly clear by the previous judgments of this Court. The applications previously made by Mr. L. were designed to stop the Irish Courts from granting a divorce in this jurisdiction. Those earlier judgments paved the way for the grant of a divorce and it is impossible to see any legal basis for contending that the divorce granted subsequent to those decisions could be viewed as being irreconcilable with the earlier divorce granted in the Member State. It could only be irreconcilable if the earlier divorce was entitled to recognition in this jurisdiction. No subsequent measure has retrospectively altered the position or status of the parties.

Other issues

Mr. L. has also raised the issue to the effect that granting a divorce in this jurisdiction undermines legal certainty as to his status and that as such given that the law applicable to him in this jurisdiction is different to that applicable to him in the Member State, this operates as an impediment to his exercise as an EU citizen of his freedom of movement within the European Union. This was an argument raised by him in the previous proceedings before the courts and the matter was dealt with in the judgment of Fennelly J. referred to previously. The point now made is that since the decision in 2008, the Treaty of Lisbon, the TFEU and the Charter of Fundamental Rights have a bearing on this issue and it is emphasised that there is an impediment to the free movement of Mr. L. in circumstances where there will be in effect two divorce judgments, namely the divorce in the Member State in 1994 and the subsequent Irish divorce. It is worth reiterating what was said by Fennelly J. when he considered this issue:

> "94. Even on that assumption, the one most favourable to the appellant, one returns to the legal situation which pertained at the time of the judgment of the court [of the Member State]. The Brussels Convention was the only legal basis for recognition of judgments of courts of other contracting states, but, as I have already shown, the Convention did not extend to 'the status or legal capacity of natural persons'. That remained the situation until the entry into force of Brussels II. Thus, the appellant is necessarily confined to the Brussels Convention. If it were not for the provisions, authorising non-recognition, of art. 27 of that Convention the maintenance order would have to be recognised here. For the reasons already given, he cannot succeed on that ground. Thus it is the provisions of the Brussels Convention itself that represent the obstacle of which the appellant complains.
>
> 95. Finally and decisively, the argument made under this heading is related essentially to the question of recognition of the judgment of the court [of the Member State], upon which this court ruled in its judgment

> of November, 2003. When asked why this argument was not then advanced, counsel said that it was a matter which the court should itself have raised. I do not think so. It is true that the *lis pendens* rules both of the Brussels Convention (art. 21) and of Brussels I (art. 27) require a court secondly seised to decline jurisdiction 'of its own motion' where the same subject matter is the subject between the same parties in another member state. But the court must be made aware of the fact, if it is so to act. It is highly far fetched to suggest that this court should, in 2003, have thought of a novel argument which has occurred to the appellant only on this appeal."

It is difficult at this remove now to see any basis upon which changes brought in by the Treaty of Lisbon or any other measures relied on by Mr. L. could have any different impact on the arguments in relation to freedom of movement. The argument now made has again focused on not so much the recognition of a foreign divorce as it is crystal clear that such an argument cannot be made, but focuses rather on what is said to be the irreconcilability of the Irish divorce judgment with the earlier judgment of the District Court of the Member State. It is a matter of fact as pointed out on behalf of Ms. T. that at the time of the divorce from the Member State in 1994 there were no provisions under EU law for the recognition of foreign divorces. The introduction of various EU measures which have brought about a change in relation to the provisions in respect of the recognition of foreign divorces may well have been intended to reduce and where possible to eliminate the possibility of irreconcilable judgments being given in different Member States. It has to be borne in mind however that those regulations and provisions are prospective and not retrospective in effect. At the time of the granting of the divorce from the Member State the divorce could not be recognised in this jurisdiction. Nothing has happened since to change that fundamental position. It is difficult to see any basis upon which it could be argued that the existence of a second divorce has the effect of restricting the freedom of movement of Mr. L. Reference was made in the submissions to the decision of the Court of Justice in the case of *Block* (C-67/08) to the effect that there was no breach of the principle of the free movement of capital in circumstances where it was held by the German courts that Spanish tax liability could not be offset against German tax liability on inheritance deriving from Spanish financial institutions to an heir residing in Germany of a deceased person who had also resided in Germany. It was stated by the Court as follows:

> "Community law, in the current stage of its development and in a situation such as that in the main proceedings, does not lay down any general criteria for the attribution of areas of competence between the Member States in relation to the elimination of double taxation within the European Community. . .
>
> 31. It follows from this that, in the current stage of the development of Community law, the Member States enjoy a certain autonomy in this area provided they comply with Community law, and are not obliged therefore to adapt their own tax systems to the different systems of tax of the other Member States in order, *inter alia*, to eliminate the double taxation arising from the exercise in parallel by those Member States of their fiscal sovereignty and, in consequence thereof, to allow the inheritance tax paid in a Member State other than that in which the heir is resident to be deducted in a case such as that of the main proceedings (see, to that effect, *Columbus Container Services*, paragraph 51).
>
> . . .
>
> 35. Furthermore, according to the settled case-law of the Court, the Treaty offers no guarantee to a citizen of the Union that transferring his

> residence to a Member State other than that in which he previously resided will be neutral as regards taxation. Given the disparities in the tax legislation of the Member States, such a transfer may be to the citizen's advantage or not, according to circumstances . . ."

Although that case concerned the question of taxation in the context of freedom of movement, the same point could be made in relation to divorce proceedings and the recognition of such judgments. As was pointed out in the case of Block there is no guarantee to a citizen of the Union that transferring his residence to a Member State other than that in which he previously resided will be neutral, to paraphrase, as regards the recognition of divorce. Community law has developed and has changed but the changes effected in Community law do not mean that the granting of a divorce in this jurisdiction in any way precludes or restricts the free movement of an EU citizen.

Finally, I should make brief reference to CaseC-370/90, *Singh*, which was relied by Mr. L. for the proposition that Articles 45 and 49 of the TFEU preclude restrictions on Union citizens who exercise the right of freedom to leave their Member State and to return to it. That was a case which concerned family members from outside the EU and the issue of family reunification. It was stated by the CJEU at para 19 as follows:

> "A national of a Member state might be deterred from leaving his country of origin in order to pursue an activity as an employed or self employed person as envisaged by the Treaty in the territory of another Member State if, on returning to the Member State of which he is a national in order to pursue an activity there as an employed or self employed person, the conditions of his entry and residence were not at least equivalent to those he would enjoy under the Treaty or secondary law in the territory of another Member State."

Curiously, this case was not relied on before this Court in 2008. In any event, it is impossible to see how the grant of divorce in this jurisdiction has that effect. Apart from a mere assertion that by creating legal uncertainty, the grant of the divorce in this jurisdiction operates as a real impediment to his exercise of his freedom of movement within the EU, there is no evidential basis to support the assertion. Indeed, it is stated that subsequent to the grant of the divorce, he moved to a third Member State (from which he has since returned.) How then has he been impeded in the exercise of free movement? There is no evidential basis for this assertion.

A possible reference to the Court of Justice

The question of whether or not there should be a reference to the Court of Justice only arises in circumstances where a reference is necessary to enable this Court to give judgment. It is notable that when this matter was before the Supreme Court in 2008, it was also submitted on behalf of Mr. L. that there should be a reference to the European Court of Justice. It is suggested that a question should be referred as to whether or not the grant of a second and irreconcilable EU divorce and related ancillary orders in 2012 and 2013 is incompatible with EU law, having regard to the Union area of freedom, security and justice and Brussels I and II. For the reasons already set out it is abundantly clear that Brussels I and II are not applicable to the facts of this case and that the provisions of the Treaty of Lisbon in relation to the Union area of freedom, security and justice do not have any bearing on the issues in this case and consequently, I would not propose to refer any questions to the Court of Justice.

Finally, I think it is appropriate to make an observation on one issue that arose late in the day in relation to the fact that subsequent to the grant of the divorce in this jurisdiction, Mr. L. married Ms. C. in this jurisdiction. It is clear that correspondence took place prior to the marriage of Mr. L. to Ms. C. with the Superintendent Registrar in

relation to the entitlement of Mr. L. to marry in this jurisdiction. At paragraph 5 of the affidavit sworn by Mr. L. on the 2nd February, 2018, he made the following averment:

> "With regard to paragraph 11 of the affidavit under reply, I reiterate that I did not rely on the Irish divorce. The Registrar General did. I relied on the divorce [from the Member State]. Either way, I was free to marry. We agreed to differ. My position has been nothing if not consistent on this point. I reject the characterisation of this litigation as an abuse of process."

It is abundantly clear, that, when Mr. L. sought to marry in this jurisdiction his entitlement to do so was the subject of consideration by the Registrar General. It is also abundantly clear that without the benefit of the Irish divorce, Mr. L. would not have been eligible to marry in this jurisdiction. To say that he "relied on the divorce [of the EU Member State]" is, practically speaking, meaningless. The truth of the matter is that Mr. L. was only able to marry in this jurisdiction because of the Irish divorce. It is entirely inappropriate that Mr. L. should on the one hand, whatever he may say about relying on the divorce from the Member State, go through a ceremony of marriage which would not have been possible without the benefit of the Irish divorce and at the same time in these proceedings maintain that the Irish courts did not have the competence to grant such divorce. It has to be said that that comes close to abuse of process.

Conclusions

Mr. L. has maintained that the Irish courts do not have jurisdiction to grant a judgment in divorce proceedings because to do so would be to grant a judgment which is irreconcilable with the earlier decision of the District Court of the Member State. In 1994 when that divorce was granted, it was not possible to obtain a divorce in Ireland as the Constitutional prohibition on divorce had not yet been removed. At that time, his divorce from the Member State could not have been recognised in Ireland under the common law rules of private international law, a point which would have been readily ascertainable. Indeed, at that time, it was not uncommon for Irish people to obtain foreign divorces given the absence of divorce provisions in this jurisdiction, notwithstanding the potential lack of recognition of such divorces. Apart from the common law rules applicable, there was no international Convention, treaty or agreement in place at that time that could have availed Mr. L. in the recognition of his divorce. The subsequent introduction of EU measures for the recognition of divorce in the each Member State does not assist Mr. L. as those measures clearly do not have effect retrospectively. Mr. L. makes the point that if an issue as to recognition were to arise in a third Member State as to the recognition of either the divorce from the Member State or the Irish divorce, there will be two irreconcilable divorce judgments. The one thing that can be clearly said is that no other EU Member State will give recognition to the divorce from the Member State on foot of any EU measure or provision enacted subsequent to that divorce. One of the objectives of the various EU measures referred to at length in this judgment is obviously intended to reduce the incidence of "limping marriages" but it is an objective that has a temporal effect and cannot have any effect on a divorce granted in 1994 which is not entitled to recognition by virtue of any EU measure.

In all the circumstances of this case, I would dismiss the appeal insofar as it concerns the issues of European law.