THE SUPREME COURT

Record No. 160.99

Murray, J.

McGuinness, J.

Geoghegan, J.

BETWEEN

P. F.

APPELLANT/PETITIONER

AND
G. O'M. (ORSE G. F.)

RESPONDENT

JUDGMENT of Mrs Justice McGuinness delivered the 28th day of November 2000 [Nem Diss]

This is an appeal from the judgment and order of O'Higgins J. made on the 26th March 1999 whereby the High Court Judge refused the petition for a decree of nullity presented by the Petitioner. Having heard Counsel on both sides O'Higgins J. made no order as to costs. The Respondent has cross appealed on the issue of costs only.

The Petitioner and the Respondent went through a ceremony of marriage according to the rites of the Roman Catholic Church in December 1987. Following the marriage they lived together in Co. Dublin. They have one child who was born in September 1989 and the Petitioner commenced proceedings for judicial separation in the Circuit Court in Dublin on the 17th May 1995. The parties have lived separate and apart since in or about October 1995. The Petitioner commenced his nullity proceedings by petition dated 31st January 1996. By order of the Master of the High Court dated 16th October 1996 seventeen issues, a number of which related to the capacity of the parties to enter into and sustain a normal marriage

relationship, were ordered to be tried. However, in the course of the hearing in the High Court it was indicated by Counsel for the Applicant that he was relying on one ground only. That ground concerned whether, in the circumstances of the case, the Petitioner gave a full free and informed consent to the marriage. This was also the sole ground upon which the appeal before this Court was argued.

The evidence

The learned High Court judge heard extensive evidence from seventeen witnesses over a period of eight days. As he pointed out in his judgment (at pages 1 to 2) a great deal of the evidence was concerned with different versions of events given by the witnesses as to matters that occurred after the marriage took place. This evidence was largely irrelevant to the actual grounds for nullity. It was directed to issues of credibility. The relevant evidence is summarised in the judgment of O'Higgins J. at pages 2 to 3 of his judgment as follows: -

"The couple met in 1984 when P.F. was 20 and G O'M was 21. They had a happy and relatively uneventful courtship. They commenced having sexual intercourse about six months after they met. They became engaged at Christmas 1986 and were married in December 1987. They purchased a house in the summer of 1987. P. F. lived there and G.O'M joined him at weekends. They were, by any standards, a very good looking couple. He was a member of a successful business family and she had an outgoing vivacious personality. The marriage was initially very happy but Mr F. suspected a relationship between G.O'M and a certain Mr K for whom she had worked prior to the marriage and for whom she continued to work after she became pregnant. A child was born in September 1989. It is unnecessary in these proceedings to analyse the history of the marriage as the issue in this case is as to

-3-

whether G.O'M was having an affair with Mr K. at the time when she was engaged to Mr F. and, if there was such an affair, whether there was full and free consent to the marriage on the part of Mr F. It is fair to say, however, that his suspicions about her relationship with Mr K cast some cloud on the marriage, and G.O'M regarded P. F. as being jealous and over possessive. There are allegations and counter-allegations of sporadic unpleasant scenes in the marriage which G.O'M attributed to his excessive drinking and staying out late. In 1991 they moved house to an area not far away in South County Dublin. G.O'M says that her husband's conduct deteriorated and that he frequently came home in the early hours of the morning. However, there were good times in the marriage even then. In the month of August 1993, Mr K's wife phoned G.O'M and Mr F. to tell them that she suspected her husband Mr K. was having an affair with G.O'M. It is alleged also that she sent nasty communications to G.O'M and to the neighbours concerning her husband's suspected adultery with G.O'M. Around this time both parties sought medical help and G.O'M volunteered to sever any contact with Mr K. However, after a successful few months, things began to deteriorate again and the relationship was stormy and unhappy. Mr F. moved out of the marital bedroom sometime between September 1994 and January 1995 and lived in the attic. He eventually left the house in October 1995. He commenced proceedings for judicial separation in the Circuit Court in May and the grounds were, inter alia, the adultery of his wife with Mr K

The contention of the Petitioner is straightforward. He claims that during the time of his engagement to G.O'M she was involved in an affair with Mr K Had he known

-4-

this he would not have married G.O'M. In the circumstances he claims that his consent to the marriage was not fully informed."

Throughout the trial both the Respondent and Mr K. denied in evidence that they had any sexual relationship either before or after the marriage.

The learned judge then goes on to analyse the evidence in regard to the wife's relationship with Mr K. in considerable detail. At page 12 of his judgment he reaches the following conclusion on the evidence:

"The cumulative effect of the findings of fact in relation to the five matters mentioned above lead me to the firm conclusion that the Respondent had an affair with Mr K before and after the marriage."

There is no doubt that there was sufficient evidence before the High Court judge - evidence which he had heard with great patience and analysed with care - to enable him to reach this conclusion. The Respondent has not appealed against it. In any event, this Court would not in any way interfere with his conclusion on the evidence . **(Hay v. O'Grady [1992] 1 IR 210)**.

Having surveyed the law which had been opened to him, and in particular the judgment of Blayney J. in this Court in the case of ***M.O'M* (orse O'C) v B.O'C** [1996] 1 IR 208, O'Higgins J. concluded:-

"In my view, the failure to disclose factual information concerning the wilful conduct of one of the parties is not the type of circumstance contemplated in the decision of Blayney J. The nondisclosure of inappropriate behaviour prior to or during the courtship is not a ground for nullity. In my view, it is not incumbent on the parties to

give a history of their good or bad behaviour prior to getting married in order to contract a valid marriage. In this case the parties had a courtship which lasted several years. They knew prior to getting married the nature of the contract that they were undertaking. In the circumstances I must refuse the petition on the basis that the Petitioner has failed to satisfy me that his consent was not full, *free and informed."*

Against this decision the Petitioner has appealed. The grounds of his appeal are set out as follows:

"1. *The learned trial judge having determined as a matter of fact that*

(I) *The Respondent had prior to and after the marriage ceremony which took place on the 1st December 1987 conducted an affair with a Mr K.;*
(II) The Appellant/Petitioner had no knowledge of this affair on the 1st December 1987;
(III) The Appellant/Petitioner would not have consented to the marriage had he known of the affair;
(IV) The Appellant/Petitioner would not have gone through the ceremony of marriage had he been aware of a committed relationship between the Respondent and Mr K. short of a full affair;
erred in law in holding that because the said facts related to the wilful conduct of the respondent and not to some consideration of a disposition or proclivity on the part of

the parties to the ceremony, no legal ground existed for the granting to the Appellant/Petitioner of a decree of nullity.

2. That the learned trial judge was wrong in law in confining the circumstances of substance, ignorance of which render the Petitioner/Appellant's consent not a full and informed consent, to circumstances concerning a disposition or proclivity of the Respondent.

3. If the learned trial judge was right in law in holding that such circumstances of substance were confined to circumstances concerning a disposition or proclivity of the Respondent, he was wrong in fact and in law in failing to hold that the actions and conduct of the Respondent as found by him constituted circumstances concerning such a disposition or proclivity.

4. That the learned trial judge was wrong in law and in fact in holding that the Petitioner/Appellant gave a full and informed consent to his marriage to the Respondent having regard to his findings of fact in regard to the Respondent's failure to disclose to the Petitioner/Appellant the nature of her relationship with Mr K prior to the said marriage.

5. The learned trial judge erred in law and upon the facts in determining that no ground existed for the granting of a decree of nullity to the Appellant/Petitioner.

6. Such or further or other grounds as may be relied upon."

The Respondent has cross-appealed on the issue of costs only and this matter will be dealt with in the latter part of this judgment.

Submissions of Counsel

Senior Counsel for the Appellant, Mr Durcan, relied principally on the judgment of Blayney J. in this Court in the case of ***M.O'M (otherwise O'C) v B.O'C*** [1996] 1 IR 208. However, he also traced the development of the law on consent to marriage which, he submitted, led to the decision in ***M.O'M* v B.O'C** and should be applied also in the instant case.

He referred firstly to the judgment of Kenny J. in the case of **S v S** (unreported Supreme Court 1st July 1976). In that case the Respondent husband had had a sexual relationship with another woman in the period leading up to the marriage. The marriage was never consummated, the husband apparently declaring that he was unable to have intercourse with his wife and that she revolted him - this despite the fact that he had successfully had intercourse with her prior to the marriage. On the evidence, the majority of this Court (Henchy J., Griffin J.) held that it was a case of impotence *quoad hanc*. Kenny J., while he agreed that the marriage was a nullity, did so on a different ground. He believed that *"the only reasonable inference from the evidence is that the husband did not intend to*

consummate the marriage at the time he got married (page 3 of judgment). " He went on to hold:-

"It seems to me that the intention to have sexual intercourse is such a fundamental feature of the marriage contract that if at the time of the marriage either party has determined that there will not be any during the marriage and none takes place and if the parties have not agreed on this before the marriage or if the ages of the parties make it improbable that they could have intercourse ***(Briggs v Morgan (1820) 3 Phill. ECC 325),*** *a spouse who was not aware of the determination of the other is entitled to a declaration that the marriage was null. The intention not to have or*

-8-

permit intercourse has the result that the consent which is necessary to the existence of a valid marriage does not exist."

Mr Durcan compares this to an inferred intention by the Respondent in the instant case to maintain her sexual relationship with Mr K. both before and after the marriage - an intention of which she did not inform the Appellant. This, he argues, invalidated the Applicant's consent to the marriage.

Mr Durcan also referred briefly to the case of ***Moss v Moss*** **[1897] P.263** , which acknowledged that for a marriage to be valid there must be voluntary consent of both parties, while nevertheless holding that fraud was not a ground for avoiding a marriage.

He went on to outline the modern development of the law regarding consent in cases of duress or undue influence, referring in particular to the judgments of this Court in the case of ***N (otherwise K) v K*** [1985] IR 733. He referred to a number of dicta in that case. Finlay C.J. at page 742 of the report stated:

"The entry into a valid marriage is not only the making of a contract but is also in law the acquisition of a status. The status thus acquired and the related concept of a family receives special protection from the provisions of the Constitution. Furthermore, the provision of the Constitution prohibiting the enactment of legislation permitting the dissolution of a valid marriage makes the contract of marriage absolutely irrevocable. Consent to the taking of such a step must, therefore, if the marriage is to be valid, be a fully free exercise of the independent will of the parties.

-9-

Whilst the Court, faced with a challenge to the validity of a marriage, based on an absence of real consent, should conduct its enquiry in accordance with defined legal concepts such as duress, or, what has been described by O'Hanlon J. as `the related topic of undue influence', these concepts and the legal definition of them must remain subservient to the ultimate objective of ascertaining in accordance with the onus of proof whether the consent of the petitioning party was real or apparent.
Many persons may contract a marriage for motives which could be considered imprudent or improper by others and even by society in general. If a decision so reached is, however, truly their own decision, they cannot successfully impugn the marriage merely because it could be considered to have been an unwise one. If, however, the apparent decision to marry has been caused to such an extent by

external pressure or influence, whether falsely or honestly applied, as to lose the character of a fully free act of that person's will, no valid marriage has occurred. "

Griffin J. at page 751 stated:

"In considering the effect of pressure on the will of a Petitioner, and whether such pressure vitiates the necessary consent, a subjective test must be applied - the test is not whether a reasonable person would have succumbed to the pressure, but whether the pressure alleged was such as to overbear the will of the particular Petitioner. A contract of marriage is almost certainly the most solemn and serious contract into which any party may enter during the course of his or her lifetime. Each of the spouses enters into a commitment which has always been and is intended to last during their joint lifetime. The permanence and indissolubility of the marriage is

underscored by the provisions of Article 41 of the Constitution. It is therefore of the utmost importance that the contract of marriage should be entered into with the full and free consent of the contracting parties, and if, as the Chief Justice has stated in his judgment, the apparent decision to marry on the part of one of the parties has been caused to such an extent by external pressure so as to lose the character of a fully free act of that parties will, no valid marriage has taken place."

At page 754 of the report McCarthy 3. stated:

"Marriage is a civil contract which creates reciprocating rights and duties between the parties but, further, establishes a status which affects both the parties to the contract and the community as a whole. The contract is unique in that it enjoys, as an institution, a pledge by the State to guard it with special care and to protect it against attack, with a prohibition against the enactment of any law providing for the grant of a dissolution of marriage (Article 41, Section 3, of the Constitution). This constitutional prohibition emphasizes the durability that is peculiar to the contract of marriage and the consequent need for a full appreciation of what that contract entails and that one is wholly free to enter into it or not. As was said by Costello J. in ***Murray v Ireland*** **[1985] 1 IR 532** *at pages 535-536:*
'... the Constitution makes it clear that the concept and nature of marriage which it enshrines are derived from the Christian notion of a partnership based on an irrevocable personal consent given by both spouses which establishes the unique and very special lifelong relationship. '
These qualities have a twofold effect to enhance the sanctity and durability of the marriage contract and to highlight the need of a true voluntary consent, based upon

adequate knowledge and freed from vitiating factors, commonly described as undue influence or duress, particularly those emanating from third parties. "

Mr Durcan also referred to the judgment of Hederman J. in this Court in ***D.B. (otherwise O'R) v O'R [1991] 1 IR 289,*** where the learned judge stated (at page 303):-

"On the facts as proved in evidence and accepted by the learned trial judge, did the Petitioner establish that she was not in a position, prior to the marriage, freely to

exercise her independent will to enter into the covenant of marriage? The learned trial judge did not in her judgment deal with this issue. Clearly for the reasons I have already referred to, the evidence accepted by the learned trial judge can lead to only one conclusion, viz. that the Petitioner at the time of the marriage was not in a position to give a consent to the marriage and her consent was not a real consent but an apparent consent. "

Both ***N v K*** and ***D.B. v O'R*** were, however, in essence duress cases. Counsel for the Petitioner submitted that the necessity for an informed consent as the basis for a valid marriage had been re-emphasised and further developed in the judgment of Blayney J. (with whom Hamilton J. and O'Flaherty J. agreed) in the case of ***M.O'M (otherwise O'C) v B.O'C*** ***[1996] 1 IR 208***. In that case the Respondent, who was a laicised priest, had attended a psychiatrist for some six years during the process of his laicisation. He was not, apparently, suffering from any mental illness or gross personality disorder. The Petitioner was unaware at the time of the marriage that he had been attending the psychiatrist. In her evidence she stated that had she been so aware she would not have married him. The High Court refused the petition, finding that the Petitioner and Respondent were able to enter into and sustain a

normal functional lifelong marital relationship with each other and that the Petitioner had given a full free and informed consent to the marriage. The Petitioner appealed to this Court.

In his judgment Blayney referred to the dicta in **N v K** quoted above and went on to say (at page 217):-

"What has to be determined, accordingly, is whether the consent of the wife was an informed consent, a consent based upon adequate knowledge, and the test is a subjective one, that is to say, the test is whether this spouse, marrying this particular man, could be said to have had adequate knowledge of every circumstance relevant to the decision she was making, so that her consent could truly be said to be an informed one. "

The learned judge went on to refer to the wife's evidence and concluded:

"The test is subjective. Because of this, great weight must be attached to the wife's evidence that had she known that the husband had attended Dr. O'S for approximately six years she would not have married him. It is possible that another person would not have reacted in the same way, but this was the wife's evidence of how she would have reacted if she had known and this was accepted by the learned trial judge. For her, accordingly, the fact that the husband had attended Dr. O'S was a circumstance which would have influenced her in making up her mind. And it could not be said that it was not a circumstance of substance. Apart altogether from any question of psychiatric illness - and there was no evidence that the husband had ever suffered from such an illness - a person's mental health or mental stability is obviously

a matter of great importance and anything which might throw doubt upon it calls for serious consideration.

Because of this the husband ought to have told the wife that he had attended Dr. O'S. His failure to do so deprived her of knowledge of a circumstance which was clearly relevant to the decision she was making.
For these reasons I would allow the wife's appeal and declare that her marriage was null and void by reason of the fact that her consent to it was not an informed consent."

Mr Durcan submitted that in the instant case the wife had been involved in a sexual relationship with Mr K in the period before the marriage and even during the engagement. The husband had been completely unaware of this and had given evidence that, had he known of it, he would not have married her. He had also given evidence that he held a traditional view of marriage. The husband, Mr Durcan argued, had been deprived of information in regard to a matter of importance which was highly relevant to his decision to marry. His consent was therefore not an informed consent and the marriage was therefore, on the authority of the ***M.O'M*** case, void.

Mr Durcan also referred to an ex-tempore judgment of McKenzie J. in the case of M.J. v C.J. (21st February 1991 unreported). In that case three days after the wedding, the husband stated that he had been involved with a married woman with two children up to the weeks before the marriage, having categorically denied it up to that time. A decree of nullity was granted.

Counsel submitted that O'Higgins J. in the High Court had erred in distinguishing between issues of disposition, condition or proclivity and issues of conduct in the context of

an informed consent. The test as expressed by Blayney J. was open to a wide interpretation including issues of conduct and should be so interpreted.

Counsel for the Respondent, Ms Whelan, argued that the Petitioner was seeking a decree of nullity on a ground of misrepresentation by silence. Historically misrepresentation, mistake and fraud had never been grounds for nullity save in the narrowest of circumstances which did not extend to the area of misconduct. She submitted that the learned High Court judge was correct in differentiating between a lack of information in regard to conduct prior to the marriage and a lack of information going to the question of mental stability.

She referred to the dicta regarding consent in ***N. v K.*** and ***D.B. v O'R*** , and submitted that the learned judges in those cases used the term *"informed"* or *"adequate knowledge "* in the context of duress and with the meaning of "informed about possible alternatives to marriage". She referred to the discussion of the nature of consent to the placement of a child for adoption set out in ***G. v An Bord Uchtala [1980] IR 32*** and the line of authorities which followed

that decision. In those cases, she submitted, it was quite clear that *"informed"* meant "informed as to the alternatives to adoption". It certainly did not mean that the natural mother had to be fully informed about the prior conduct of the possible adopters.

Ms Whelan went on to refer to Article 41.3 of the Constitution. While the Article had now been amended to permit the dissolution of marriage, the commitment to the protection of marriage remained. Grounds for nullity should not be so far expanded that there would be an area of doubt as to the validity of virtually every marriage. There were many possible examples of circumstances in the premarital conduct of a spouse, perhaps far in the past, which might be unknown to the other spouse. If such a matter were to be discovered, perhaps many years after the marriage, the subjective test suggested by Mr Durcan would mean that the uninformed spouse would only have to give evidence that he or she would not have

married if that particular information had been available, to create grounds for a decree of nullity. This was undesirable on grounds of public policy and contrary to Article 41 of the Constitution.

Ms Whelan submitted that parties were entitled to know if they were validly married; they must enjoy a legitimate expectation that the institution of marriage would be protected. The law should not produce uncertainty in marriage, and nullity should not be granted on the ground so wide as to be incapable of proper definition. The remedy for voluntary misconduct was divorce, not nullity.

In reply Mr Durcan submitted that the circumstances at the instant case came well within the test set out in **M. v O'M**. With regard to the difficulty of definition and interpretation, he submitted that it was for the Court to decide in each case whether the ground had been established. The ground would have to be a relevant matter of substance which would have affected the decision to marry.

The Law and Conclusions

The originating point of the development of the modern law of nullity is a much quoted passage from the judgment of Kenny J. in the case of **S v S** (unrep. S. Ct. 1st July 1976):

"The power of the High Court to declare a marriage null is derived from the Matrimonial Causes and Marriage Law (Ireland) (Amendment) Act 1870 by which the jurisdiction exercised by the Ecclesiastical Courts of the Church of Ireland was transferred on the disestablishment of that Church to a Court for Matrimonial Causes and Matters whose powers were subsequently transferred to the High Court. Section 13 of that Act provided that in all suits and proceedings the Court of

Matrimonial Causes and Matters was to proceed, act and give relief on principles and rules which, in the opinion of the Court, were as nearly as may be conformable to the

principles and rules on which the Ecclesiastical Courts of Ireland had up to then acted and given relief.
The law administered in the Ecclesiastical Courts in Ireland was not the general canon law of Europe as it existed before the reformation but an ecclesiastical law of which the general canon law was the basis but which had been modified and altered by legislation and judicial decisions and which was known by the distinguishing title of the King's Ecclesiastical Law (the ***Queen v Millis 10 Cl. and F. 534: Usher v Usher (1912) 2 IR 445)****. In that law two principles were fundamental in suits for nullity. The first was that the Petitioner had to establish his or her case with a high degree of probability or, as Lord Birkenhead expressed it in* ***C (otherwise R) v C 1921 p.399****, `must remove all reasonable doubt'. The second was that the ground of nullity had to exist at the date of the marriage: events or acts subsequent to the marriage were never a ground for a declaration of nullity* ***(Napier v Napier (1915) .184) .***
Section 13 of the Act of 1870 did not have the effect of fossilising the law in its state in that year. That law is, to some extent at least, judge-made and Courts must recognise that the great advances made in psychological medicine since 1870 make it necessary to frame new rules which reflect these. Despite this, I think that the two fundamental principles I have mentioned are still basic to the law of nullity. "

While in this passage Kenny J. suggests that the former ecclesiastical law may be developed in the light of the *"great advances made in psychological medicine "*, he does not, however, suggest that the principles of the older law as in enjoined in Section 13 of the Matrimonial Causes and Marriage Law (Ireland) (Amendment) Act 1870 may simply be abandoned.

The *"great advances made in psychological medicine"* have been used in particular to develop the ground for nullity now known as *"inability to form and sustain a normal marriage relationship"* (see, for example the judgment of Costello J. (as he then was) in ***D v C [1984] ILRM 173***, and the judgments of this Court in **U.F.** ***(orse U. C.) v J. C. [1991] 2 IR 330)***. The same principles have been used to a lesser degree in the development of the law of duress or undue influence as it affects the contract of marriage.

It also must be borne in mind, as pointed out by Henchy J. in his dissenting judgment in ***N (orse K) v K [1985] IR 733 at 745:***

"In relation to the contract of marriage, it is to be said that the Courts, at least in this jurisdiction, have given a more liberal scope to the doctrine of duress as a nullifying element than would be applied in the construction of certain other kinds of contract. This is probably because the dissolution of marriage being prohibited by the Constitution, certain marriages which at no stage were viable have been declared null on the liberal and humane interpretation of the doctrine of duress in relation to the contract of marriage. "

That the development of the law of nullity in this jurisdiction in the past twenty years has been affected by the absence until recently of any law providing for the dissolution of marriage was freely admitted by Mr Durcan during the course of argument in the instant case.

Since the amendment of Article 41 of the Constitution and the enactment of the Family Law (Divorce) Act 1996 this external pressure on the law of nullity no longer prevails.

Historically both in Irish and English law a clear distinction has been drawn between duress, which vitiated consent and was a ground for nullity, and fraud, misrepresentation or mistake, none of which was a ground for nullity. The position is summarised by Mr Shatter in his work *"Family Law"* at pages 189 to 190 as follows:-

"Historically, in cases determined before the Supreme Court decision in ***N (orse K) v K*** *both mistake and misrepresentation were given a very restrictive role in the annulment of marriages. In 1835 in* ***Swift v Kelly (1835) 3 Knapp 257*** *it was said that:*
'....no marriage shall be held void merely upon proof that it had been contracted upon false representations and that but for such contrivances, consent would never have been obtained. Unless the party imposed upon has been deceived as to the person and thus has given no consent at all, there is no degree of deception which can avail to set aside a contract of marriage knowingly made.'
On this principle if X marries Y believing him to be Z there is no valid marriage. On the other hand if X marries Y believing him to be rich and he turns out to be poor, the validity of the marriage is not affected. Fraud as a ground for avoiding a marriage was said `not to include such fraud as induces consent, but is limited to such fraud as procures the appearance without the reality of consent' ***(Moss v Moss (orse Archer) [1897] P.263).*** *The mere presence of fraud of itself was held not to be ground for a nullity decree. Thus, the fact that a woman concealed from her*

husband at the time of their marriage that she was then pregnant by another man was held not to invalidate their marriage. Similarly, concealment by a man from the woman that he was marrying of the fact that on the night immediately preceding their wedding he had slept with another woman was held not to render their marriage void. "

Both ***Swift v Kelly*** and **Moss v Moss** were approved by Haugh J. in ***Griffith v Griffith*** **[1944] IR 35**.

The whole question of misrepresentation or fraud arising from the misconduct of one party prior to the marriage was most fully considered in the case of ***Moss v Moss [1897]*** **P.263**. In that case the facts are briefly summarised by Sir F.H. Jeune, President, at the beginning of his judgment:

"In this case the Petitioner seeks to have his marriage with the Respondent declared null and void, on the ground that, without his knowledge in fact, and without any neglect on his part to make himself acquainted with the truth, his wife was pregnant by another man at the time of his marriage with her. I find that these allegations of fact were proved. .... On these facts, the argument before me was that there was

fraud by the wife in regard to the essentials of marriage, and that, therefore, the marriage was null and void. "

The learned President opened his judgment by stating his belief that this proposition had no authority in English law and:

"it would be impossible for this Court, at the present day, to give assent to a principle of such importance, and so far reaching, without the sanction of precedent. The

-20-

absence of English authority was, indeed, almost, if not quite, admitted on behalf of the Petitioner, and the argument in his favour was mainly based on the reasoning in decisions of some of the American Courts. "

He went on to quote from the earlier decision in **Swift v Kelly** quoted above. The learned President then discussed at some length the position of marriage both as a contract and as conferring a status, and be differentiated between marriage and all other forms of contract. He concluded (at page 268):

"The result is that the English law of the validity of marriage is clearly defined. There must be the voluntary consent of both parties. There must be compliance with the legal requirements of publication and solemnisation, so far as the law deems it essential. There must not be incapacity in the parties to marry either as respects age or physical capability or as respects relationship by blood or marriage. Failure in these respects, but I believe in no others. ... renders the marriage void or voidable. It has been repeatedly stated that a marriage may be declared null on the ground of fraud or duress. But, on examination, it will be found that this is only a way of amplifying the proposition long ago laid down that the voluntary consent of the parties is required. In the case of duress with regard to the marriage contract, as with regard to any other, it is obvious that there is an absence of a consenting will. But when in English law fraud is spoken of as a ground for avoiding a marriage, this does not include such fraud as induces a consent, but is limited to such fraud as procures the appearance without the reality of consent. The simplest instance of such fraud is personation ... "

-21-

The learned judge then gave examples to show that by this he meant fundamental mistake either as to the person whom the Petitioner had married or as to the nature of the actual ceremony. No other form of misrepresentation or mistake will invalidate consent or ground a decree of nullity. He quoted Lord Stowell in the case of ***Wakefield v McKay 1*** **Phillim.134** as stating:

"Error about the family or fortune of the individual though procured by disingenuous representations does not at all affect the validity of the marriage "; and the same judge in ***Ewing v Wheatley 2 Hagg. Cons. 175*** *"it is perfectly established that no disparity of fortune or mistake as to the qualities of the person will impeach the vinculum of marriage "; and in* ***Sullivan v Sullivan 2 Hagg Cons. 238*** *`the strongest cases you could establish of the most deliberate plot, leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this Court to release him from chains which, though forged by*

others, he had riveted on himself. If he is capable of consent and has consented, the law does not ask how the consent has been induced "

Sir F.H. Jeune P. acknowledged that the position was different in America and in many of the Civil Code countries. There had been decisions in America where a decree of nullity had been granted in a situation where a woman had induced a man to marry her while she was pregnant by another man. In other jurisdictions unchastity before marriage on the part of the woman had been held to be a sufficient ground.

With a sense of the realities of human nature - and indeed an appreciation of gender equality - which surely still resounds with common sense to day Sir F.H. Jeune P. comments (at page 276):

-22-

"I could understand a broad principle that unchastity before marriage should vitiate the contract, as some legislatures have, I believe, enacted that it shall, on the ground that a man believes he is making a pure woman his wife. But that is assuredly not the law of England, and, unless there is to be one law for a man and another for a woman, it is impossible to suppose it ever could be. "

The learned judge bases his rejection of the case put forward by the Petitioner in ***Moss v Moss*** on the uncertainty which such a ground would bring into the whole area of marriage. As an example he raises the query:-

"What would be said if the husband did not become aware of his wife's pregnancy at marriage for a long time after it, and perhaps after the birth of legitimate children, as might well happen if a sailor left his wife for a voyage soon after marriage, and before his return there was a miscarriage or the child died? Could he many years after annul the marriage? It is difficult to see why not, if he had no means previously of discovering the truth. Could be bastardise his children? It is also difficult to see why not, unless some further refinement be introduced into the law. My belief is that to assent to the proposition for which the Petitioner contends would be to introduce into a law which now is, and beyond question should be ... certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion. "

He quotes the American commentator Bishop on what had happened in American law as follows:-

-23-

"Such judicial utterances upon it as we have are largely conflicting, and otherwise muddled, so that, should an author discussing it present all the views, and those only, which have occurred to the judges and found embodiment in their utterances, he would lead his readers into a labyrinth of contradictory and chaotic things, out of which the Practitioner could not readily discover a path. "

It would I think be fair to say that in the instant case, during argument in this Court, the Court itself expressed concerns very similar to those set out by Jeune P.

in **Moss v Moss**. I have referred at some length to the judgment of Jeune P. in ***Moss v Moss*** firstly because I feel that it sets out clearly the traditional view of this aspect of the law of nullity, but also because it clarifies the rationale behind it. Also the facts in ***Moss and Moss,*** though more extreme, are not a thousand miles distant from the facts in the instant case. It has been found on the evidence by the learned O'Higgins J. in the High Court that the Respondent carried on a sexual relationship with Mr K. during the period immediately before. the marriage and that she concealed this fact from the Petitioner. He also found that subsequent to the marriage she committed adultery with Mr K. Adultery, being misconduct during the course of the marriage, is of course a ground for judicial separation and has traditionally being a ground for divorce in other jurisdictions; it has never been a ground for nullity.

I now turn to the authorities opened to this Court by Mr Durcan and Ms Whelan. Mr Durcan relies considerably on the development of the concept of consent as expressed in ***N (orse K) v K*** and in***D.B. (orse O'R) v O'R [1991] 1 IR 289***. In considering the passages quoted by Mr Durcan from the various judgments in the Supreme Court in these cases it must be borne in mind that these dicta deal with consent, or lack of consent, in the context of

duress. There can be a danger in relying on individual dicta without referring to the context of the facts of the case.

In **N (orse K) v K** the findings on the evidence of Carroll J. in the High Court, which were accepted by all the judges in this Court were as follows:

"(1) The Petitioner is a quiet, unassertive girl. She was brought up strictly but was always obedient to her parents.
(2) The Petitioner said there was no question of having the baby at home without being married and I accepted this. I am satisfied that at that stage there was only one outcome contemplated by the Petitioner's parents, and that was marriage.
(3) The parties would not have got married but for the pregnancy.
(4) The Respondent was completely immature and unsuitable for marriage. He had no job and no means of supporting a wife and child.
(5) The Petitioner was little more than a school girl. She did not see any alternative to getting married. She would not consider an abortion. If she did not get married she believed she would get no support from her parents and would have to leave home.
(6) She acquiesced in her parents wishes from the start. They said marriage was the best thing and she thought they knew what was best.
(7) She got no counsel or advice on what alternatives she did have, such as adoption or bringing up the child as a single parent.
(8) The shock of discovering she was pregnant probably put her into a state where she could not think clearly."

In ***D.B. (orse O'R) v O'R*** the facts are set out in the headnote:

"The Petitioner was brought up in an orphanage and did not know or meet her parents until she was thirteen. In 1965, aged 15 1/2, she took a short summer holiday with them during which she met the Respondent who was some ten years her senior. Following the holiday and her return to the orphanage, they kept secretly in touch and subsequently had sexual intercourse around the following Whit Sunday. On completing her schooling with the Intermediate Certificate she went to live with her parents where a letter from the Respondent was intercepted and she was sent back to the orphanage by her parents. Her pregnancy was confirmed and the nun in charge of the orphanage made the arrangements for her marriage with the Respondent. No attempt was made to explain to her the alternatives to marriage. The parties were married on the 12th August 1966. "

It is in the context of these facts that this Court should, in my view, consider the use of the word *"informed"* in relation to consent in the passages open to the Court. Finlay C.J. does not use the word*"informed"* in regard to consent at all but refers to a situation where *"the apparent decision to marry has been caused to such an extent by external pressure or influence, whether falsely or honestly applied, as to lose the character of a fully free act of that person's will.* " Given the context, I would the accept the submission of Ms Whelan that where *"informed"* is used in the other judgments it is used in the sense of being informed about the alternatives to marriage which might be available to the young girl in question. There is no suggestion whatever in the judgments as I read them that the Petitioner should have been fully informed about either the conduct or the character of the Respondent prior to the marriage and that if she was not so informed the marriage was void.

Ms Whelan has also suggested a comparison with the concept of consent to the placement of a child for adoption by an unmarried mother as set forth by this Court in ***G v An Bord Uchtala [1980] IR 32***. In the judgment of Walsh J. in that case the learned judge speaks of the meaning of the phrase *"the placing of the child for adoption "*. He interprets the phrase thus:

"... I think one may reasonably assume that it means either the handing over of the child for the purpose of its being adopted or even, if the mother retains the child, the giving of a clear and unambiguous indication that it is her desire to surrender her natural rights in respect of the child and that it is to be adopted. I am satisfied that, having regard to the natural rights of the mother, the proper construction of the provision in Section 3 of the Act of 1974 is that the consent, if given, must be such as to amount to a fully informed, free and willing surrender or an abandonment of these rights. However, I am also of the opinion that such a surrender or abandonment may be established by her conduct when it is such as to warrant the clear and unambiguous inference that such was her fully informed, free and willing intention. "

Again, in the context of the facts of the case, the term "*fully informed"* must be taken to mean that the natural mother is informed of her own rights and of the alternatives to adoption before she makes her decision. It cannot mean that she has full information about the perspective adopters. In the context of adoption

practice in 1977 when the events in ***G v An Bord Uchtala*** took place, it is unlikely that the natural mother would ever have had

anything but the most minimal information in regard to the prospective parents of her child. While, of course, the situation in adoption is very different from that of marriage, the similarity of the phraseology used by the learned judges in ***G. v An Bord Uchtala*** and in ***N (otherwise K) v. K.*** and ***D.B. (otherwise O'R) v. O'R,*** lends at least a degree of validity to the comparison between them.

The decisions in ***N (otherwise K) v K.***, ***D.B. (otherwise O'R) v. O'R)*** and related judgments widen and deepen the concept of consent. They do so in the context of duress, or at least external influence. In themselves they do not, in my view, deal with an invalidity of consent based on lack of information regarding premarital conduct which is here contended for by Mr. Durcan.

The two authorities on which Mr. Durcan mainly relies - and in my view must almost solely rely - are the judgments of MacKenzie J. in the High Court in ***M.T. v C.J.*** (21st February 1991 unreported) and the judgment of Blayney J. in this Court in ***M.O'M (orse O'C) v B.O'C [1996] 1 I.R.*** **208**, passages from which have been quoted earlier in this judgment.

O'Higgins J. in the court below referred to the decision in **M.J. v C.J.** He had been handed a transcript of evidence in that case; no such transcript was provided for this Court and it has proved impossible to trace it through the normal sources. O'Higgins J. points out that in that case three days after the wedding the husband stated that he had been involved with a married woman with two children up to three weeks before the marriage, having categorically denied it up to that time. The marriage was annulled. However, O'Higgins J. comments (at p. 14 of his judgment):

"The decision in the case of ***M.J. v. C J.*** *is of limited assistance. In that case the petition was unopposed and one of the parties was not*

legally represented. Furthermore, it was an ex tempore judgment delivered in circumstances where it was not necessary for the learned judge to rise to consider his decision. Moreover, the decision is based both on the absence of true consent and because the parties lacked due discretion. "

I would respectfully agree with the comments of the learned High Court judge. The case of **M.O'M. v. B.O'C** is a very different matter, carrying as it does the authority of this Court. Again, however, I would stress the necessity of looking at the decision in the context of the facts of the case. These are summarised in the headnote;

"The Petitioner and the respondent were married in 1985 as wife and husband respectively. Two children were born to the marriage. There were tensions in the marriage from its outset, which grew progressively worse resulting in scenes of

violence on the part of the Respondent. The couple separated at Christmas 1989, though at the date of the hearing of the petition in February 1994 they were both still living in the family home.
The Petitioner brought a petition in the High Court seeking a declaration that the marriage was null and void and of no legal effect, on the grounds that her husband lacked the capacity at the date of the marriage to enter into and sustain a normal marriage relationship and that she had not given a free and informed consent to the marriage.

Prior to meeting the Petitioner the Respondent had been a priest. He found the life lonely and difficult and commenced a laicisation

-29-

process in 1976 which was not completed until 1981. During the period of laicisation and up to 1982 the Respondent attended a psychiatrist, Dr. O'S. Between 1976 and 1982 the Respondent attended Dr. O'S, between three and six times each year, apart from 1978, when he saw him ten times. In evidence the Petitioner said that she had not known that her husband had attended a psychiatrist for a protracted period during his laicisation and that had she known she would not have married him. The High Court refused the petition finding that the Petitioner and responded were able to enter into and sustain a normal functional lifelong marital relationship with each other. On the issue of consent the learned trial judge found that the Petitioner had given a full free and informed consent to the marriage.
The Petitioner appealed to the Supreme Court, setting out five grounds on which it was contended that the decision of the High Court should be reversed. The first four grounds were all concerned with the issue of whether the Petitioner and Respondent were capable of entering and sustaining a normal marriage relationship with each other; it was contended that the learned trial judge failed to give due weight to psychiatric and medical evidence presented at the trial. The fifth ground of appeal was that the learned trial judge erred in law in holding that the wife gave a full free and informed consent to the marriage in that there was uncontroversial evidence that the wife was unaware at the time of the

-30-

marriage that the husband had attended a psychiatrist for several years prior to the marriage. "

It is clear that in the High Court a considerable part of both the evidence and the argument was directed towards the first four grounds - the inability of the husband to form and sustain a normal marriage relationship. At least one of the psychiatric witnesses, Dr. F., had given evidence that the couple were inherently incapable of forming and sustaining a normal marriage relationship. The other expert witness, Dr. O'S. appears to have accepted the existence of some form of *"personality complex"* but stated that to grant a decree of nullity on this ground would, result in chaos. In the High Court Kinlen J. held on the evidence that the parties were able to form and sustain a normal marriage relationship and this finding was, as is normal, upheld by this Court following **Hay v O'Grady** [1992] 1 I.R. 210. Blayney J. quotes at some length the findings of Kinlen J. on the history of the marriage. These findings deal primarily with the inherent nature, character and behaviour of the respondent during the marriage. There is no reference to lack of information

leading to lack of an informed consent. In this Court, as was pointed out by Blayney J. (at p. 217 of the report) the wife relied on a single matter as establishing that she did not have adequate knowledge of all the relevant circumstances. He quotes her evidence on which she relied as supporting her case. It was contained in two answers which she gave in her direct evidence on the first day of the hearing:

"81 Q. What was your reaction to this when you heard that he had been attending a psychiatrist for seven years?
A. I was completely stunned. It certainly, looking back, explained a lot that was unexplained previously. But it came as a complete surprise to me, I was given no inkling of that.

82Q. You have said you weren't aware of this before the marriage, if this had been discussed with you before the marriage what would your attitude to marrying B. O'C. have been?
A. I certainly would not have married him because those kind of psychiatric illnesses, you get remissions but you never get a cure. "

It is in my view clear from the wife's own replies that she regarded the husband's having attended a psychiatrist as indicative of mental instability and probably some form of psychiatric illness. Blayney J. attached *"great weight"* to this evidence. This is reflected in his judgment at p. 218 of the report where he comments:

"Apart altogether from any question of psychiatric illness - and there was no evidence that the husband had ever suffered from such illness - a person's mental health or mental stability is obviously a matter of great importance and anything which might throw doubt upon it calls for serious consideration. "

While, interpreted literally, the wife lacked merely the factual information that her husband had attended a psychiatrist for a period prior to the marriage, it is clear that she, at least, saw this as a matter going to his inherent mental stability or, as O'Higgins J. put it in the court below, to some condition, disposition or proclivity of his rather than merely to a matter of conduct.

The formulation of the need for an informed consent by Blayney J. in ***M.O'M. v. B.O'C.*** as contended for by the Petitioner would appear to be so wide as to cover almost any situation where a petitioner has at the time of the marriage lacked relevant information on a

matter of substance concerning the conduct, character or circumstances of the Respondent, and that this will ground a decree of nullity. This, it appears, would apply regardless of whether or not the information had been deliberately concealed by the respondent. The test is subjective. Presumably all that would be required would be for the Petitioner to give evidence that he or she would not have married the Respondent had this information been available before the

marriage. One has only to formulate the test in this way to realise that it could readily give rise to an undue widening of the grounds for nullity which would lead to precisely the type of difficulty so well set out by Sir. F.H. Jeune P. in ***Moss v Moss:***

"... *To assent to the proposition for which the Petitioner contends would be to introduce into a law which now is, and beyond question should be, and believed to be certain, a new principle not resting on any sound basis, and, develop as it must in several directions, sure to give rise to many doubts and much confusion. "*

This cannot have been the intention of Blayney J. in ***M.O'M. v. B. O'C***. I must conclude that the case of ***M.O'M v B. O'C***. should be distinguished from the present case on the facts and on the particular nature of the information involved which gave rise to considerations of inherent disposition and mental stability. I respectfully agree with O'Higgins J. that it cannot be extended to cover concealed misconduct and other forms of misrepresentation.

The courts have always stressed the necessity for certainty in marriage, as did the learned judge in ***Moss v. Moss***. This is reinforced, as was submitted by Miss Whelan, by Article 41.3.1 of Bunreacht na hEireann:

"The State pledges itself to guard with special care the institution of marriage, on which the family is founded, and to protect it against attack "

The introduction of a ground for nullity which, taken to its logical conclusion, could bring uncertainty into a wide variety of marriages is not only undesirable as a matter of public policy but is contrary to the clear intention of Article *41.1.3*.

I would dismiss the appeal and uphold the order of the learned High Court judge.

I should add that one cannot, of course, fail to sympathise with the position of the Petitioner and to understand his grief and anger on discovering the conduct of the Respondent both before and after the marriage. He is not, however, without a remedy. He already has proceedings for judicial separation in being in the Circuit Court.

Finally I would echo what was said by the learned Henchy J. at the close of his dissenting judgment in **N *(otherwise K) v K at page 749:***

"Regardless of today's result, this case may he said to emphasise the need for a modern Statute providing for the grant of decrees of nullity of marriage on fair, reasonable and clearly stated grounds and making due provision for the consequences of such decrees on those directly affected by them. "

In circumstances where no remedy of dissolution of marriage was constitutionally available there may well have been some advantage in permitting the law of nullity to be developed only through the operation of precedent and the common

law. But in the circumstances of today, where remedies of both judicial separation and divorce are available and are clearly defined by Statute, it would surely be desirable for the Oireachtas to turn its

mind to providing a clear statutory code setting out both the grounds for nullity and its ancillary consequences both for the parties and for any possible children.

THE CROSS APPEAL

The Respondent has appealed against the refusal of O'Higgins J. to make any order for costs in the court below. There is no written ruling on the matter of costs in the book of appeal but it appears to be accepted by counsel on both sides that the learned High Court judge felt that the Respondent's persistent denial that she had had any sexual relationship with Mr K. either before or after the marriage had greatly lengthened the course of the trial and that, despite the fact that the Petitioner had failed in his petition, he would have used his discretion not to make any order for costs. There is also the fact that the Respondent was in receipt of legal aid.

Miss Whelan submits that despite the fact that the Respondent was represented through the Legal Aid Board she had to pay a considerable contribution towards her costs. Under the Rules of the Superior Courts and traditionally in matrimonial cases the husband had to meet all the costs of both parties regardless of the outcome of the case. She acknowledged that in the case of **F. v L.*(otherwise F.) [1991] 1 I.R. 40*** Barron J. had held that the rule previously applied in matrimonial proceedings, which allowed a wife her costs against her husband in all circumstances, was no longer justified, and that it was the duty of the Court to make such orders as to costs as was just in the circumstances of each individual case. However, she submitted that as the petitioner had lost the case, costs should follow the . event in the normal way.

Mr. Durcan submitted that section 27 of the Matrimonial Causes and Marriage Law (Ireland) Amendment Act, 1870 provided that the courts:

"On the hearing of any suit, proceeding or petition under this Act ... may make such order as to costs as to such courts may seem just".

Costs, he submitted, were in the end a matter for the discretion of the trial judge and in this case the trial judge had substantial reasons for exercising his discretion in the way in which he did.

It seems to me that Mr. Durcan is correct in this submission, which is in accordance with the judgment of Barron J. in ***F. v. L. (otherwise F.)***. I would not interfere with the learned trial judge's exercise of his discretion in refusing to make any order as to costs. He was, no doubt, aware of the fact that the Respondent was in receipt of

legal aid, even if it did not cover the whole of her costs. I would dismiss the cross-appeal and uphold the order of the learned High Court judge.