Neutral Citation No. [2005] IEHC 80

**THE HIGH COURT**

**[2002 No. 2742P]**

**BETWEEN**

**JOAN BRACKEN**

**PLAINTIFF**

**AND**

**CATHERINE BYRNE OTHERWISE CATHERINE RENEE BYRNE**
**(AND BY ORDER OF THE MASTER OF THE HIGH COURT MICHAEL BYRNE)**

**DEFENDANTS**

**Judgment of Mr. Justice Clarke delivered 11th March, 2005.**

1. On the 24th July, 1967 William Bracken, on the basis of a then intended marriage between his daughter Catherine Mary Bracken and Timothy Byrne, executed a deed of settlement ("the deed of settlement") whereby he transferred all of the properties described in Folio 2242 of the register County Wicklow to Catherine Mary Bracken and Timothy Byrne so that after their marriage they would become joint tenants in fee simple of the property subject to certain rights.

2. Insofar as material to this case the rights specified are those at item 2 in the deed of settlement which conferred the right upon "Joan Bracken and Mary Bracken (daughters of the said William Bracken and Mary Bracken) to reside and to be supported and maintained in the said dwelling house at any time they or either of them during their respective lives shall choose to reside there whilst unmarried".

3. The plaintiff is the Joan Bracken mentioned in that clause in whose favour a right of residence and maintenance and support was conferred by the deed of settlement. The defendant is the Catherine Mary Bracken to whom, in conjunction with her soon to be husband Timothy Byrne, the property was vested. Mary Bracken, who is also mentioned in the clause conferring rights, has long since married and no right continues to subsist in her favour.

4. For much of the intervening period Joan Bracken lived and worked in different guises in Dublin but did from time to time visit the family home. That home was itself replaced by a more substantial dwelling which remains in the ownership of the first named defendant. Timothy Byrne, unfortunately, died on 21st February, 2000. In addition the second named defendant, Michael Byrne, who is a son of Timothy Byrne and the first named defendant has benefited by the transfer to him of part of the lands which were previously comprised in Folio 2242 County Wicklow subject to the rights of maintenance and support in favour of the plaintiff.

5. In those circumstances the house, in respect of which the right of residence exists, remains in the ownership of the first named defendant while the lands out of which the right of maintenance and support is to be met are now, in substance, owned by the second named defendant.

6. In order to understand fully the issues between the parties it is necessary to describe in some detail events in the latter part of the 1990s and the early years of this decade. In circumstances which are not particularly germane to these proceedings the plaintiff suffered significant financial reversals in the mid to late 1990s which culminated in her finding herself in a position where, contrary to her previous life experience, she had no significant employment, no interest of ownership in any residential property and only a relatively small sum of cash in capital (being the net proceeds that were left after the disposal of a restaurant business which had not been a success and the premises in which the business was conducted having been the subject of a fire in circumstances where it was underinsured).

7. In all those circumstances it was suggested to the plaintiff by the first named defendant (in conjunction with her husband) that she should come to reside in the family home. It seems clear that neither party had, at that time, got in the forefront of their minds the fact that the plaintiff might have a legal entitlement so to do. However the plaintiff did, in fact, go back to reside in the family home and appears for some reasonable period of time to have lived there as a member of the family and to have enjoyed support and maintenance in practice even if same was not consciously being provided in fulfilment of the obligations under the deed of settlement.

8. It is again common case between the parties that during 1999 a suggestion was made to the plaintiff by the first named defendant and her husband that the plaintiff would be provided with a site on a separate plot of ground which was also in the ownership of Timothy Byrne. In general terms it seems that such an arrangement was perceived to be advantageous to all concerned in that the site was nearer to Dublin where much of the plaintiff's interests were still centered. She had also gained employment which by that time again required her to travel to Dublin.

9. What is, however, in serious controversy between the parties is the basis on which such a site was to be provided. The plaintiff gave clear evidence that the contemplated arrangement was that she would be given the site fully to the extent that it would be placed into her name. She accepted that it would have been for her to secure the building of a house on the site. She had retained the capital sum previously referred to and it was envisaged that that sum, perhaps topped up by a relatively moderate mortgage, would be sufficient to build a house.

10. The first named defendant has equally strongly maintained that the arrangement was to the effect that the plaintiff would be given only a limited interest in the property. I will return to this conflict of evidence later in the course of this judgment.

11. It is again common case that on foot of whatever arrangements may have been in place the plaintiff sought and ultimately secured planning permission from Wicklow County Council in respect of the building of a dwelling house. It is also common case that contact was made, on the recommendation of the first named defendant, with a builder who provided a quote for the construction of the dwelling house concerned.

12. Unfortunately just as the planning process was coming towards a close Timothy (who was more normally called Theo) Byrne died some few months after notification of intention to grant planning permission had been given and very soon after the final notification of the grant of planning permission had occurred.

13. Soon after that disputes arose between the plaintiff and the first named defendant as to whether she was to receive a limited interest in the site or was to obtain it entirely in her own name. There can be little doubt that those disputes led to a significant worsening of relations between the parties. As a result the plaintiff investigated her legal entitlements and ultimately received advice on the provisions of the deed of settlement.

14. In those circumstances these proceedings were brought which seek either the payment of a sum of money to represent the value of the rights of residence maintenance and support which necessarily involves a claim as against the first named defendant in relation to the right of residence and as against the second named defendant in respect of the right of maintenance and support. All such claims relate to a loss both to date and into the future.

15. In the alternative to the claim in respect of a right of residence (but not in respect of the claim in relation to a right of maintenance and support) the plaintiff contends that she is entitled to enforce the agreement which she alleges was in place in relation to the site.

**Rights of residence and maintenance – the law**

16. Section 81 of the Registration of Title Act, 1964 provides:-

> "A right of residence in or on registered land, whether a general right of residence on the land or an exclusive right of residence in or on part of the land, shall be deemed to be personal to the person beneficially entitled thereto and to be right in the nature of a lien for monies worth in or over the land and shall not operate to create any equitable interest in the land".

17. The only occasion when that section has the been the subject of judicial consideration arose in *Johnson and Anor v. Horace* [1993] I.L.R.M. 594 where Lavan J. had to consider the effect of the section in the circumstances of that case.

18. It should be noted that at p. 598 of the judgment Lavan J. indicated that neither the case law nor the statute clarifies whether or not the beneficiary of the right or the owner of the property can insist on the right being converted into monies worth. In dealing with that issue the court went on to state the following:-

> "I have no doubt but that there are circumstances in which a court could enter by agreement with the parties into a valuation of their respective interests. There are also circumstances where a court might compel such a valuation in the general interest of the administration of justice or under its equitable jurisdiction".

19. On the facts of the case before him Lavan J. was satisfied that there was duress on the part of the defendant owner and no abandonment of the right of residence on the part of the plaintiff. Much of the remainder of the case was concerned with how the rights could be valued and whether, on the facts of that case, it was appropriate to direct that the rights no longer be enforced and be, in substance, converted into money.

20. It is important to note that Lavan J. went on to hold that "the defendant has not the means nor the intention to make proper provision for the plaintiff's right of residence". In those circumstances the plaintiff was awarded injunctive relief which in substance allowed her to become able to enjoy the right of residence and also was awarded damages in respect of interference with the right up to the date of trial.

21. It is clear therefore, that the reason why Lavan J. was not persuaded to convert the plaintiff's entitlement to money was that it was impractical on the facts of that case so to do. The case is therefore not authority for the proposition that a court could not covert the right of residence to money in an appropriate case.

22. However that begs the question as to what would be such an appropriate case. Neither counsel in the case before me argued that there was an entitlement, as of right, on the part of either the owner of the property or the beneficiary of the right to have the right converted into money.

23. In a case where the owner of such rights is effectively excluded from the enjoyment of those rights by the owner of the property there may be circumstances where the appropriate form of redress which the court should grant would be to value the rights and direct that the beneficiary be paid for those rights rather than to grant injunctive relief. Clearly the ability of the defendant to pay the sums thus awarded would be an important factor in the exercise of the court's discretion as to whether the remedy should be by way of injunctive relief to restore the enjoyment of rights on the one hand or the payment of the sum of money in lieu on the other hand. However in many such cases it may well be that the breakdown in relations between the parties is not for as clear-cut a set of reasons as enabled Lavan J. in *Johnson* to take the view which he did on the facts of that case. The circumstances which may lead to such a breakdown can lie at any point upon a spectrum from one where the entire blame may rest upon the beneficiary of the right on the one hand to a case where the entire blame may rest upon the owner of the property on the other hand. Indeed it is, perhaps, important to note, that in the absence of very voluminous evidence indeed it might, in many cases, be difficult for the court to determine, with any precision, the precise apportionment of blame in relation to what will, often, be a breakdown in relations between parties stemming from a whole variety of reasons.

24. In the light of such general observations it is necessary to address the question as to the proper approach of the court in circumstances such as this.

25. *Prima facie* the starting point must be that the entitlement of the beneficiary of a right is to have that right enforced. Therefore the starting point should be that the owner should be entitled to appropriate injunctive relief to ensure that they can enjoy the right.

26. However there may be circumstances where that is not practical or reasonable. Obviously the parties are free to agree the terms upon which rights can be extinguished. Furthermore, as Lavan J. pointed out in Johnson the court can enter by the agreement of the parties into a valuation of their respective interests. More difficult questions arise where one party asserts that the rights should be exercised but the other suggests that the rights be converted into money. In principle the party seeking the cash conversion could be either the beneficiary of the rights or the owner of the property. In this case it is the beneficiary who seeks to have her entitlements paid off in money. The first named defendants says that there has been no prevention of the exercise of the rights concerned and that no entitlement to money therefore arises. It seems to me that one of the questions which the court needs to address is as to whether it has been demonstrated that it is not reasonable, in all the circumstances of the case, to require the beneficiary to be satisfied with the enjoyment of the rights to which she is entitled, enforced, if necessary, by appropriate injunction.

27. In most cases the practical enjoyment of a right of residence and a right of maintenance and support will require the owner of those rights to be involved in, at least to some extent, a quasi family situation. To require such a situation to continue in circumstances where there has been a sufficient degree of breakdown in the relationship between the parties so as to render it unreasonable to require the parties concerned to live in those circumstances must lead the court to a situation where it has to consider alternative remedies.

28. A further question which the court needs to consider is as to the extent to which it may be possible to apportion responsibility for the situation which has led to it being unreasonable to require the continuance of the arrangements in practice. Clearly a case where that responsibility rested wholly or substantially on the beneficiary of the right would give rise to a situation in which the owner of the property could not reasonably be expected to allow for the continuance of the exercise of the right. However in those circumstances it may well be that the beneficiary would have placed him or herself in a position where they might be said to have forfeited any entitlement either to the actual exercise of the rights to have a payment in money to the value of the rights. On the other hand where the reasons whereby it had become unreasonable to expect the continuance of the exercise of the rights stemmed wholly or substantially from the actions of the owner of the property there can be little doubt that it would be an appropriate to consider the exercise of the court's jurisdiction to award to the beneficiary of the rights a sum measured as the value of the rights in lieu of their continued exercise together with an appropriate sum in damages to compensate for any loss to the date of hearing.

29. The difficulty arises in cases where it may not be possible to establish that either party is wholly or substantially at fault. That raises the question as to how far it is necessary for the beneficiary of the rights to go in establishing responsibility for the state of affairs on the part of the owner of the property in order to be able to invoke the jurisdiction of the court for the award of such money. Intermediate cases where both parties must bear some of the responsibility will, therefore, give rise to the greatest difficulty.

30. Having regard to the fact that the primary entitlement of the beneficiary of the right is to exercise of the right conferred upon them, it seems to me that the appropriate test must be that in addition to satisfying the court that it has become unreasonable in all the circumstances of the case to require the beneficiary to be content with the exercise of the right, it is also necessary for the beneficiary to satisfy the court that the balance of the responsibility for that situation lies upon the owner of the right. It is not, however, necessary for the beneficiary to establish that they are entirely free from responsibility.

**Application to the facts of this case**

31. Both sides gave conflicting evidence as to the circumstances which pertained in the house both before and most particularly after the death of Theo Byrne. While the plaintiff made certain minor complaints as to the situation prior to that unfortunate event it does not seem to me that any of the matters complained of could go any distance towards a meeting the test which I have identified above as being one where it is necessary to show that by virtue of circumstances which were predominately the responsibility of the owner it had become unreasonable to expect a continuance of the practical exercise of the right by the beneficiary.

32. That matters became considerably more fraught after the death of Theo Byrne is undoubtedly clear on either account. On the basis of all of the evidence I am satisfied that what led to a breakdown in relations between the plaintiff and the first named defendant was the dispute which emerged over the nature of the interest which the plaintiff was to be given in the site. Until that dispute arose any issues between the parties were of little significance. Thereafter relations became strained and, as is the wont in such situations, matters which might not have given rise to any great acrimony between the parties started to become major issues. The plaintiffs principal complaint is really that she was not treated, in a number of important respects, in a manner which was consistent with her having an entitlement to reside in the house rather than being there with the permission of the first named defendant. Some of the matters complained of may not have being of great importance and would not have been likely to have given rise to any serious acrimony were it not for the unhappy differences that emerged from the dispute over the site. It seems to me, therefore, that an analysis of that dispute is essential to understanding much of the acrimony that ensued.

33. On that issue the plaintiff's case is simple. She was to get the site put into her name.

34. I have to confess that I found it considerably more difficult to understand the first named defendants case. In answer to counsel for the plaintiff in the course of cross examination she said the following at Q. 203 (day 2):-

> "Of course the house would be in her name, naturally, but the site would never be in her name. Joan was getting planning permission so obviously the house was going to be in Joan's name but the site would never be in her name."

35. It should be noted that the context of the question which elicited that answer was an invitation to the first named defendant to explain why the plaintiff would be required to spend her own money on building the house if it was not to be put into her name.

36. I find it impossible to accept that the arrangement was as described by the first named defendant. I have taken into account that she (the first named defendant) is not someone familiar with property or business and that such matters were almost certainly exclusively dealt with by her husband. However she was involved in the making of the arrangements in relation to the site and it seems to me that her recollection as to what those arrangements could not be correct. In the circumstances, and having had the opportunity to observe both parties and consider the totality of their evidence in that regard, I have come to the view, on the balance of probabilities that the account of the plaintiff as to what those arrangements were is more likely to be correct and I therefore find as a fact that the arrangements entered into between the first named defendant and her husband on the one hand and the plaintiff on the other hand was to the effect that a site would be placed into the name of the plaintiff. While it was not specifically referred to I am satisfied that it was implicit in that agreement that, as a result, the plaintiff would no longer have to exercise her right of residence.

37. In the light of that finding it seems to me that much of the acrimony that followed stemmed from the legitimate concerns of the plaintiff that her sister was going back on the arrangement that had been freely entered into. While it would be wrong to absolve the plaintiff from any blame in relation to the worsening of relations and while many of the instances described in the evidence are relatively minor in themselves I have nonetheless come to the view that they need to be viewed against the background of the fact that relations had seriously deteriorated by reason of the first named defendant backing out on the agreement previously reached.

38. I have therefore come to the view that the situation had, within a relatively short time after the death of the late Theo Byrne and certainly by the late summer of 2000 reached a stage where it was no longer reasonable to expect the plaintiff to exercise the right of residence. For the reasons set out above I have also come to the view that while responsibility for that situation rested upon both the plaintiff and the first named defendant the preponderance of that responsibility rests on the first named defendant. I am therefore satisfied with the tests which I have identified above for establishing an entitlement to the have the rights converted into money have been met by the plaintiff.

39. Before leaving the liability issues under this heading I should add that I have given some consideration to the fact that s. 81 of the Registration of Title Act, 1964 relates only to rights of residence and not to rights of maintenance and support. However on the facts of this case it does not seem to me to be practical to require the exercise of a right of maintenance and support without also requiring the exercise of the right of residence. That might not always be the case. However on the facts of this case it seems to me that the same result must follow in respect of the rights of maintenance and support as apply to the right of residence.

40. For reasons which will be clear in the course of analysing the financial value of those rights there does not seem to me to be any basis on the facts of this case for taking the view adopted by Lavan J. in Johnson to the effect that that the conversion of the rights to money would be impractical. It seems to me, therefore, that it is necessary to assess the value of those rights and direct that the plaintiff be paid that value together with a suitable sum to compensate her for her exclusion from the enjoyment of those rights to date.

**The agreement in respect of the site**

41. The final liability issue concerns the plaintiff's alternative claim to the effect that she is entitled to have that agreement enforced as against the first named defendant in her capacity as the personal representative of Theo Byrne the registered owner of the site in respect of which the agreement existed. While I am satisfied, for the reasons indicated above, that the arrangements between the parties did involve an agreement to transfer such a site I am not satisfied that that agreement is legally enforceable.

42. There is no consideration so as to give rise to a contract.

43. There is, in any event, no note or memorandum so as to satisfy the statute of frauds. Counsel for the plaintiff places reliance on *McCarron v. McCarron* (unreported Supreme Court judgment of Murphy J. 13th February, 1997). Part of the case advanced by the plaintiff in that case was based on the doctrine of proprietary estoppel. In considering that aspect of the case Murphy J. cited with approval *Plimmer v. Wellington Corporation* 1884 9 App Cas 699 where it was stated:-

> "Where an owner of land has invited or expressly encouraged another to expend money on part of his land on the faith of an assurance or promise that that part of the land will be made over to the person so expending his money the Court of Equity will prima facie require the owner by appropriate conveyance to fulfil his obligation and when, for example, for reasons of title, no such conveyance can effectively be made, or a Court of Equity may declare that the person who has expended the money is entitled to an equitable charge or lien for the amount so expended".

44. Murphy J. went on to note that he saw no reason why the doctrine should be confined to the expenditure of money or the erection of premises on the lands of another. He noted that it might well be argued that where a plaintiff suffers a severe a loss or detriment by providing his own labours or services in relation to the lands of another he might equally qualify for recognition in equity.

45. However the only detriment suffered here was the making of a planning application and some brief discussions with a builder. I am not satisfied that any sufficient detriment was incurred such as would require a Court of Equity in reliance on the doctrine of proprietary estoppel to require a conveyance of the lands.

46. The plaintiff's relief is, therefore, confined to payment in respect of the right of residence and the right of maintenance and support.

**Quantum**

47. While expert evidence was called by both sides in respect of the valuation of the right of residence and, indeed, the evidence of the plaintiff based such valuation on two alternative approaches, by the close of the evidence the plaintiff accepted that the valuation placed upon such right of residence by the defendants' valuer was correct. It seems to me, therefore, that there is no dispute but that the value, as of today, of the right of residence is €145,000. It should be noted in that context that the house itself is worth upwards of €340,000 while the farm (including its milk quota) appears to be worth not too far short of €1 million. There was uncontested evidence that the appropriate multiplier for a person of the plaintiff's age and gender by reference to which the right of maintenance and support should be valued was 861 times the relevant weekly payment. The plaintiff gave evidence that she was currently sharing a house in Dublin and that her grocery and utility bills came to something between €100 and €120 per week. However it does not seem to me that in practice the weekly value of the right of maintenance comes to quite that sum. Firstly even when the plaintiff enjoyed the right of support without any hindrance or difficulty she did not exercise it at all times. Secondly some regard has to be had to the fact that a right of support and maintenance derives from the profitability of the lands out of which the right of support and maintenance is to be met. I had the uncontested evidence of the second named defendant to the effect that his earnings from the relevant farm (that is to say the farm over which the right of maintenance and support lies) permitted drawings of approximately €300 per week. In all the circumstances it seems to be appropriate to place a current value on the right of maintenance and support at €70 per week thus giving a capital value into the future of €60,270.

48. While the precise time at which it became unreasonable to require the plaintiff to directly exercise her rights cannot be established with absolute precision I believe it is appropriate to regard that time as having arisen in the latter part of 2000 and thus to calculate her losses to date on the basis of 225 weeks.

49. There was little real evidence as to the weekly value of the right of residence. While the plaintiff gave evidence that she currently had the use of two rooms with the use of a kitchen and bathroom in Dublin (being a share of a house) in respect of which she had to contribute €500 per month together with expenses, it is difficult to see that there would be any comparability between that sum and the value of a right of residence in a rural area. Doing the best I can it seems to me that I should award a sum of €15,000 for the loss of the right of residence to date. On the basis of the above period of 225 weeks and a cost of maintenance and support of €70 the loss of that right to date comes out at €15,750.

50. The total sum to be awarded is therefore:-

> Future value of the right of residence €145,000
>
> Future value of the right of maintenance and support €60,270
>
> Value of right of residence to date €15,000
>
> Value of maintenance and support to date *€15,750*
>
> Total €236,020

51. I would therefore propose awarding the plaintiff that sum and making no order in respect of any of the other reliefs sought. The sums awarded in respect of loss of the right of residence (i.e. €160,000) are as against the first named defendant. The sums awarded in respect of loss of the right of maintenance and support (i.e. €76,020) are as against the second named defendant.