Neutral Citation: [2013] IEHC 576

THE HIGH COURT

[2012 No. 123 CAF]

IN THE MATTER OF SECTION 5 OF THE FAMILY HOME PROTECTION ACT 1976

BETWEEN:/

A.T.

Applicant/Appellant

-and-

B.T.

Respondent

JUDGMENT of Mr. Justice Keane delivered on the 29th day of November 2013

Background

1. This is an appeal against an interlocutory order made by Her Honour Judge McDonnell in the Circuit Court on the 13th December 2012. The appellant had sought an Order, pursuant to the terms of s. 5 of the Family Home Protection Act 1976, that the family home be temporarily transferred into her sole name pending the determination of the within proceedings.

2. The appellant now seeks the same interlocutory relief before this Court in circumstances where, in the single operative section of the order under appeal, the Circuit Court did instead: "Restrain any judgment mortgages against the property without the leave of the court."

3. It should be explained that, in the notice of motion grounding the original interlocutory application in the Circuit Court, the appellant had identified, as the reliefs that she was seeking, first, "an Order pursuant to section 5 of the Family Home Protection Act 1976 restraining the registration of judgment mortgages against the said property and/or transferring the said property into the sole name of the Applicant pending the determination of the within proceedings", and second, "such further Orders pursuant to section 36 of the Family Law Act 1995 and/or section 5 of the Family Home Protection Act 1976 as are necessary to protect the family home."

4. The Family Law Civil Bill that initiated the underlying proceedings issued on the 28th September 2012. Two reliefs are sought in those proceedings and they are precisely the same as the reliefs sought in the interlocutory application that gave rise to the order now under appeal. The Court is informed that the underlying proceedings nevertheless remain extant before the Circuit Court on the basis that it is proposed to try there a question between the parties as to the title to, or possession of, the family home, pursuant to s. 36 of the Family Law Act 1995- specifically the question of the nature and extent of the appellant's beneficial interest in that property.

5. For completeness, reference must be made to two orders of the County Registrar that are included in the papers furnished to the Court. The first such order, made on the 2nd October 2012, granted the applicant leave to issue a motion returnable before the Circuit Court on the 5th October 2013 seeking relief under s. 5 of the Family Home Protection Act 1976 and s. 36 of the Family Law Act 1995, and, pursuant to s. 36 of the Family Law Act 1995, restrained the registration of any judgment mortgage against the family home pending the hearing of that motion. The second order, made on the 5th October 2013, ordered the temporary transfer of the family home into the sole name of the appellant pending the determination of the underlying proceedings. The fact that an order is being sought in this appeal in essentially the same terms as the second order of the County Registrar would appear to suggest either that the County Registrar's second order was intended to remain in effect only pending the determination of the appellant's motion (and not pending the determination of the underlying proceedings) or that it was implicitly rescinded by the Circuit Court when that court ordered instead a restraint on any judgment mortgage against the property without the leave of the court.

6. The respondent did not appear at the hearing of the present appeal, nor did he seek to take any part in it. However, affidavits of service have been sworn and filed that permit the Court to be satisfied that the respondent is properly on notice of the appeal, in particular because one of those affidavits exhibits a letter dated the 11th October 2013 from the respondent to the appellant's solicitors expressly noting that fact.

7. On behalf of the appellant it is submitted that the present application is an urgent one, because the appellant understands that an application for judgment against the respondent is due to be heard within days. The present judgment has been prepared under that time constraint.

The evidence

7. The only evidence before this Court is that contained in the affidavit of the appellant, sworn on the 7th September 2012, which grounded the application made to the Circuit Court.

8. In summary, the appellant avers as follows. She married the respondent in 1989 and that they have three children: one in secondary school; one who had just completed the Leaving Certificate; and one attending university. The property at issue is the family home. It is held by the parties in joint names and is subject to a mortgage in favour of a particular financial institution on which there is a balance outstanding of €160,000. The appellant is a homemaker. The respondent is a professional person and businessman. In the latter capacity, the respondent engaged in property dealings. The appellant is a stranger to the respondent's business dealings generally. In recent times, the appellant has become aware that certain unidentified lending institutions that had advanced monies to the respondent to facilitate his property dealings have issued proceedings against him for the recovery of a significant indebtedness of approximately €3.5 million, in consequence of which the appellant fears for the security of the family home and the future security of herself and her children. There is no suggestion that the respondent secured, or ever sought to secure, any of the relevant borrowing against the family home.

9. While it is reasonable to infer that the existence of a significant personal indebtedness on the part of the respondent must be placing a significant emotional strain on both parties, there is no suggestion on the evidence before the Court that the marriage between the parties has broken down or that they are not both still residing in the family home with their dependent children. Nor is there any suggestion that the mortgage on the family home is in arrears. Nor is it suggested that the respondent is unwilling to address his personal indebtedness, although insofar as the appellant apprehends that a judgment against the respondent in that regard is imminent, it would appear that the Court is being invited to infer that he is unable to do so. There is no evidence concerning the respondent's assets or income before the Court. Nor is there any evidence before the Court concerning the value of the family home.

The Law

10. Section 5(1) of the Family Home Protection Act 1976 ("the 1976 Act") provides:

> "Where it appears to the court, on the application of a spouse, that the other spouse is engaging in such conduct as may lead to the loss of any interest in the family home or may render it unsuitable for habitation as a family home with the intention of depriving an applicant spouse or a dependent child of the family of his residence in the family home, the court may make such order as it considers proper, directed to the other spouse or to any other person, for the protection of the family home in the interest of the applicant spouse or such child."

11. The appellant contends that the evidence submitted is sufficient to establish that the respondent "is engaging in such conduct as may lead to the loss of any interest in the family home...with the intention of depriving the appellant or [their] dependent [children] of the family of [their] residence in the family home", such that the Court should order, as a temporary measure (pending the hearing necessary to establish the extent of the appellant's beneficial interest in the family home), that the property be transferred into the sole name of the appellant.

12. The appellant argues that that the amount of the respondent's apparent indebtedness is sufficient in and of itself to establish conduct engaged in with the intention of depriving his family of their residence in the family home. In support of that argument, the appellant relies on a number of judgments of the High Court. In particular, the appellant points to her apprehension or understanding that the respondent's creditors are imminently likely to obtain judgment against him and invokes the following dictum of Barron J in *O'N v O'N*, unreported, High Court (Barron J), 6 October 1989:

> "As a matter of construction of this subsection, I do not think that the claimant spouse must wait until there is a fait accompli. If he or she has to, then much of the remedy provided by the subsection would be lost."

That dictum was cited with approval by Lavan J in *MC v AC*, unreported, High Court, 31st July 1992.

13. *O'N v O'N* was a case in which a husband was seeking an Order under s. 5(1) of the 1976 Act transferring his wife's interest in the family home to him. The marriage between the parties had failed and the wife had left the family home to embark on another relationship. The husband and the two children of the marriage remained in the family home. The wife sought the sale of the family home in order to realise her beneficial interest in it, but that relief was refused. The wife subsequently borrowed money for her own use that she was unable to repay, mainly because of her inability to retain employment due to ill health.

She again sought the sale of the family home and that relief was again refused. Judgment was obtained against her by the relevant lending institution, which was subsequently registered as a judgment mortgage against the family home.

14. In that part of the judgment that directly precedes the dictum set out above, Barron J found as follows:

> "In the present case the wife is short of money and has been since she left the family home. She clearly wishes to realise her financial interest in the family home but has been refused the necessary order which would enable her to do so. The debt which has resulted in the registration of a Judgment Mortgage against her interest in the home was not incurred with the express intention of depriving her husband and children of their residence in the family home, and since it has not yet deprived them of such residence, the conditions for relief under Section 5 subsection (2) have not been fulfilled.
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> Nevertheless the Defendant is putting the residence of her husband and children in the family home at risk since she is making no effort to pay off the Judgment Mortgage. This may be owing to her poor financial circumstances, but does indicate a wish to retain the financial benefit of the loan at the expense of her family. *Indeed, it is probable that the same financial circumstances will lead her to borrow again. If she does so, there could be no doubt of her intention to obtain a personal benefit at the expense of her family*.
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> *I regard these circumstances as coming within the terms of Section 5(1).*" (emphasis added)

15. It seems to me that, in expressing the view that the applicant in *O'N* was not obliged to wait until there was a fait accompli, the apprehended fait accompli was the loss of the respondent's interest in the family home due to her past and probable future conduct (from which course of conduct an intent to deprive her husband and children of their residence in the family horne could reasonably be inferred without the need to wait until that conduct had finally resulted in the loss of her interest in the family horne as an established fact). It does not seem to me that the apprehended fait accompli in that case was the possibility that a judgment mortgage would be registered against the respondent's beneficial interest in the family horne by a third party, since that had already occurred.

16. In my view, the distinction just drawn is a vital one for two reasons. The first is that the respondent's conduct of which the appellant now complains is past conduct. It appears that he has accumulated a substantial indebtedness of approximately €3.5 million at some unspecified time in the past to unidentified financial institutions arising from certain property transactions. There is no suggestion that he intends to engage in any further property transactions. Nor is there any suggestion that the finance is available from any source to permit it, should he wish to do so.

17. The second reason is that s. 5(1) is clearly directed towards the protection of one spouse against the conduct (and intention) of "the other spouse". The effect of the order that the appellant now seeks under that sub-section would be to shield the respondent's beneficial interest in the family home from the respondent's existing creditors by temporarily transferring the whole interest in that property into the appellant's sole name. It is difficult to see what incentive a litigant in the appellant's position would have to prosecute the underlying proceedings (concerning the nature and extent of her beneficial interest in the family home) if the family home is transferred into her sole name as an interlocutory measure. It is more difficult still to identify what incentive a respondent would have to bring such litigation against him to finality if an interlocutory order was in place pending that event, shielding from his

creditors his beneficial interest in the family home where he and his family continue to reside.

18. Viewed in this light, it is not as difficult as is sometimes suggested to reconcile the approach adopted in the *O'N v O'N* and *MC v AC* cases referred to above, with the earlier decision of Finlay Pin *CP v DP* [1983] ILRM 380. In that case, the wife contended that the accrual of substantial debts and overdrafts by her husband and the lodging by him of the title deeds of the family home as security for certain of those overdrafts constituted a course of conduct on his part that would lead to the loss of the family home, and that the Court should presume the husband so intended. Against that background, Finlay P stated:

> "The question which must arise, however, is as to whether there is evidence before me on which I would be entitled to hold in the words of s. 5, sub-s. 1 of the Family Home Protection Act 1976 that the husband was
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> > engaging in such conduct as may lead to the loss of any interest in the family home... with the intention of depriving the applicant spouse or dependent child of the family of his residence in the family home.
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> It has been submitted to me that I should construe the word 'intention' in this sub-section as not being equivalent with motive, but rather with the 'intention' which may be imputed to any person as the natural and probable consequences of their conduct. As part of this submission and as part of the general submission of the wife on the issue, I have been referred to a judgment delivered by Costello J on 16 December 1981 in *D v D* in which he made an order under s. 5 of the Act of 1976 directing the husband to execute a conveyance to the wife of a family home which was in his sole name.
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> After careful consideration, I am satisfied that I cannot construe the word 'intention' ins. 5 sub-s. 1 of the Act of 1976 Act as being equivalent to the implied or imputed intention which can arise from that natural and probable consequences of an act or omission. There must, in my view, as was found as a fact in the case of *D v D* by Costello J be an element of deliberate conduct. I have come to this view as to the interpretation of s. 5 sub-s. 1 largely by comparing the terms of that section with s. 5 sub-s. 2 of the same Act. The latter sub section which applies to the situation where a family home has been lost reads as follows:
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> > where it appears to the court, on the application of a spouse that the other spouse has deprived the applicant spouse our a dependent child of the family of his residence in the family home by conduct that resulted in the loss of any interest therein or rendered it unsuitable for habitation as a family home, the court may order the other spouse or any other person to pay the applicant spouse such amount as the court considers proper to compensate the applicant spouse...
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> It seems clear to me that if the Legislature had intended by the use of the words 'with the intention of depriving the applicant spouse' in s. 5 sub-s. 1 to involve only conduct the natural and probable consequences of which would be to deprive the applicant spouse that having regard to the terms of sub-s. 2 where the conduct that has actually resulted in the loss of family home gives rise to the discretion of the court, that the word 'intention' would also have been used in that sub-section. To put the matter in another way, having regard to the terms of s. 5 sub-s. 2 if 'intention' were to mean only a conscious and deliberate act the natural and probable consequence of which would be the loss of the family home in sub-s. 1 of s. 5 it would be quite an unnecessary proviso and quite an unnecessary phrase.
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> On the evidence in this case, I am not satisfied that there is any deliberateness in the sense of that word which I think must be equated with the concept of intention in the sub-section referred to on the part of the husband, in the acts and omissions which have occurred in the last few years and which do present a risk to the loss of an interest in the family home. I believe he has been struggling though possibly unsuccessfully with a difficult professional situation and with mounting debts arising in the way which I have outlined already in this judgment. I am therefore not satisfied that I would be entitled to make at this time any order under s. 5 of the Family Home Protection Act, 1976, in favour of the wife, and I must refuse at present at least to make any such order."

19. This Court respectfully adopts the foregoing analysis. To that conclusion I should add that, even if this Court were to accept instead that the respondent is to have imputed to him the natural and probable consequences of his conduct in borrowing approximately €3.5 million, significant additional evidence would be required concerning, for example, his asset base, his degree of leverage, the conduct of (or failure to conduct) any relevant risk assessment, the nature of the property transaction (or transactions) to which the borrowed finance was to be applied, and so on, before this Court could express any view on whether the natural and probable consequence of borrowing the sum of €3.5 million in those particular circumstances would be to deprive his wife and children of their residence in the family home.

20. It must also be remembered that the respondent's creditors are not parties to the present proceedings. There is no suggestion that they are on notice of the present application. It is well settled that the protection afforded to spouses by the 1976 Act is not absolute. In *Containercare (Irl) Limited v Wycherly* [1982] 1 LR. 143, Carroll J. identified no inhibition in the 1976 Act against the registration of a judgment mortgage against the estate of a judgment debtor in the premises that are his family home. Barrington J adopted the same view of the law in *Murray v Diamond* [1982] ILRM 113. That is not to say that a judgment creditor is necessarily entitled to an order for sale in respect of any well-charging order obtained on foot of a judgment mortgage registered against one spouse's interest in a family home. In *First National Building Society v Ring* [1992] 1 I.R. 375, Denham J (as she then was) exercised the Court's discretion under s. 4 of the Partition Act 1868 to refuse to order the sale of a family home in just such circumstances. In doing so, the Court stated (concerning the wife of the indebted person in that case):

> "The second defendant is an entirely innocent party, there is no judgment registered against her; the disruption to her and her family at this time would be immense. The second defendant has her property rights under law but, in addition, while the registration of a judgment mortgage is not a conveyance and is a security, the fact that the premises in question is a family home is a factor which I consider I can include as a relevant factor in exercising the discretion set out in s. 4 of the Partition Act 1868."

Conclusion

21. Accordingly, while there may be protections to which the appellant is entitled against the risk she apprehends to her security and that of her children in the family home, I am satisfied that it is not appropriate to make the order in that regard that is now sought in this appeal. I propose to affirm instead the interlocutory order made by Judge McDonnell in the Circuit Court on the 13th December 2012 on the assumption that the jurisdiction to make an order of that sort is necessarily incidental to the jurisdiction of the court

under s. 36 of the Family Law Act 1995.