

**BETWEEN****BRENNANSTOWN PROPERTY CONSULTANCY SERVICES LIMITED AND KILLINEY ESTATES LIMITED****PLAINTIFFS****AND****C.J.****DEFENDANT****JUDGMENT of Mr Justice Binchy delivered on the 14th day of December, 2017**

1. This matter comes before the Court pursuant to an order made by me on 19th December, 2016, whereby, in response to an application made by the defendant pursuant to s. 55 of the Land and Conveyancing Law Reform Act 2009 (the "Act of 2009"), I directed that the reliefs claimed by the plaintiffs at para. 4 of the general endorsement of claim to a plenary summons issued by them on 10th May, 2016 should be determined in a summary manner as provided for by s. 55 of the Act of 2009. I will return, in due course, to the reliefs claimed by the plaintiffs in the plenary summons issued by them, but firstly it is preferable to set out the background to the issue of the proceedings. Since much of the background to these proceedings is intertwined with family law proceedings involving the defendant, this decision has been drafted in such a way as to avoid, as best possible, disclosing the identities of the parties to those proceedings, including the defendant.

2. The parties entered into a contract for sale on 29th July, 2015 (the "contract"), whereby the defendant agreed to sell to the plaintiffs her one undivided moiety in the property described in the particulars and tenure to the contract, which I will hereinafter refer to as the "subject property". The purchase price stipulated by the contract is €5,122,000. The plaintiffs paid a deposit of €256,100. The contract was entered into between the parties following a tender process, during the course of which the plaintiffs' solicitors had an opportunity to review the title on offer, raise queries and consider and negotiate (to some extent, at least) the terms of the contract. The closing date was specified to be 16th October, 2015. The title to the subject property is unregistered freehold land.

3. In the usual way, documents of title were set out in the documents schedule in the contract. The subject property had been acquired by the former husband of the defendant, B.A. and another person (the "co-purchaser") pursuant to an indenture conveyance dated 21st February, 2003. By this deed, B.A. and the co-purchaser each acquired an undivided moiety of the subject property. However, they did not enter into a co-ownership agreement governing their relationship as regards the subject property. The subject property was acquired with the assistance of funds provided by Ulster Bank Limited. Following the purchase of the subject property, B.A. cleared his borrowings with that financial institution but the loan provided to the co-purchaser was subsequently sold by Ulster Bank Limited to other parties. The title documents to the subject property are held by the solicitors now acting on behalf of the co-purchaser, namely Messrs Arthur Cox.

4. As alluded to above, the defendant and B.A. were married to each other, but that marriage ended in divorce, and a decree of divorce was granted by this Court in 2001. Following the grant of that decree of divorce, B.A. married A.A.. By deed of conveyance dated 15th December, 2008, B.A. conveyed his undivided moiety in the subject property to A.A. (the "2008 deed"). While that deed of conveyance is expressed to be for consideration, the expert retained by the plaintiffs for the purpose of these proceedings, Mr Rory O'Donnell, solicitor, opines that the 2008 deed has all the characteristics of a voluntary conveyance from B.A. to A.A., and that opinion is not disputed by the defendant.

5. At some point in time, the defendant became concerned that B.A. had not, in the course of the divorce proceedings, made full or proper disclosure of his assets to the defendant. As a consequence, she re-entered the divorce proceedings, seeking a variety of reliefs, but in particular seeking additional financial provision for her by B.A. arising out of the non-disclosure of assets by B.A. in the course of the those proceedings. By order made on 24th July, 2009 the High Court (Irvine J.) ordered B.A. to pay the defendant an additional sum of €2,500,000 and further ordered that A.A. would lodge with her solicitor the title documents to the subject property and execute an irrevocable power of attorney over her interest therein in favour of her solicitor but to the clear intent that the subject property should be made available to discharge the liability of B.A. to the defendant in the sum of €2,500,000. This decision was appealed by B.A. to the Supreme Court.

6. Before the delivery of the decision of the Supreme Court, B.A. had been adjudicated a bankrupt both in this jurisdiction and in another jurisdiction where he had substantial assets. He was adjudicated a bankrupt in this jurisdiction on 29th July, 2013 and in that other jurisdiction on 29th March, 2013. The Supreme Court delivered its judgment on 30th July, 2014, by which it substantially affirmed the decision of Irvine J. and in particular insofar as it related to the subject property. In its judgment, the Supreme Court directed the matter to be sent back to the High Court for the determination of certain issues and on 28th October, 2014 Irvine J. handed down a further order. By this time the Official Assignee in bankruptcy had been joined as a respondent to the divorce proceedings. In this order, Irvine J. directed the solicitors for A.A. to execute all documents necessary to transfer her interest in the subject property to the defendant. The defendant was authorised to sell the subject property and to discharge, *inter alia*, the judgment in her favour in the sum of €2,500,000. The Official Assignee did not object to the making of this order and it appears that the treatment of the balance of the proceeds of sale of the subject property remains a matter in dispute as between the Official Assignee and C.D., but that is of no concern to the defendant.

7. Following the decision of the Supreme Court, B.A. issued a motion on 10th March, 2015 seeking an order to set aside the decision of the Supreme Court of 30th July, 2014 on grounds of objective bias or apprehended bias. In a detailed judgment handed down by Laffoy J. on 9th November, 2015, the Supreme Court rejected that application. For the purposes of these proceedings, the relevance of this decision is twofold. Firstly, at the hearing of that application, the Official Assignee submitted that B.A. had no *locus standi* to bring forward the application in view of the fact that the entirety of B.A.'s estate has been vested in the Official Assignee since 29th July, 2013, the date upon which he was adjudicated a bankrupt in this jurisdiction. In very simple terms, the Supreme Court accepted this argument and rejected B.A.'s application. Secondly, the trustee in the other jurisdiction where B.A. was adjudicated bankrupt (whom I will refer to as the "overseas trustee"), was aware of this motion, and also of the earlier litigation between B.A. and the defendant, and at no time sought to intervene or give any indication of an intention to claim an interest in the subject property. However, he did, in a letter dated 5th June, 2013, confirm to solicitors acting on behalf of B.A. that he had no objection to B.A.'s appeal from the order of Irvine J. to the Supreme Court, because, as he saw it, if B.A. was successful it might well have the effect of

increasing assets available for creditors. The defendant relies upon this apparent acquiescence on the part of the overseas trustee in support of an argument made on her behalf in these proceedings that that trustee is not claiming any interest in the subject property

8. Following upon the order of Irvine J. of 22nd October, 2014 the attorney of A.A. executed, in her name, a deed of conveyance of the subject property to the defendant (the "2014 deed"). The documents schedule in the contract refers to the following documents:-

1. The deed of conveyance dated 25th November, 2014 made between C.D. and the defendant (i.e. the 2014 deed).
2. A solicitor's certificate dated 25th November, 2014 re the Family Home Protection Act Declaration of C.D.
3. Copy order of the High Court, dated 28th October, 2014.
4. Certified copy of power of attorney, dated 19th August, 2009 of C.D.
5. Copy deed of release dated 25th November, 2008 and made between Ulster Bank Ireland Limited of the one part and B.A. of the other part.
6. Certified copy indenture of a conveyance dated 21st February, 2003 and made between Irish Glass Bottle Company Employees Sports and Social Club Limited of the one part and B.A. and the co-purchaser of the other part.
7. Certified copy family home declaration of a Michael Weaver on behalf of the Irish Glass Bottle Company Employees Sports and Social Club Limited dated 21st February, 2003 re: 2003 conveyance to B.A. and the co-purchaser.
8. Certified copy statutory declaration of Michael Weaver re memorandum and Articles of Association of the Irish Glass Bottle Company Employees Sports and Social Club Limited.
9. Copy certificate of incorporation of the Irish Glass Bottle Company Employees Sports and Social Club Limited.
10. Copy memorandum of Articles of Association of the Irish Glass Bottle Company Employees Sports and Social Club Limited.
11. Certified copy deed of conveyance dated 14th October, 2002 and made between a John Tunstead of the one part and the Irish Glass Bottle Company Employees Sports and Social Club Limited of the other part.
12. Certified copy family home declaration of John Tunstead sworn on 4th February, 2003 and for the benefit of the Irish Glass Bottle Company Employees Sports and Social Club Limited.
13. Certified copy statutory declaration of John Tunstead dated 14th October, 2002.
14. Certified copy grant of probate in the estate of John Esmund Allen.
15. Certified copy death certificate of Michael O'Reilly dated 6th November, 1962.
16. Certified copy deed of conveyance 19th April, 1966 and made between the Irish Glass Bottle Company Employees Sports and Social Club Limited of the first part, James Esmund Allen of the second part, the Royal Bank of Ireland Limited of the third part and James McIlvenna of the fourth part.
17. Certified copy lease of Easements, dated 22nd November, 1957 and made between George C.M. Thompson and Philip T. Brookes of the first part, Jane Thompson of the second part, James McIlvenna of the third part.
18. Certified copy deed of conveyance 1st August, 1958 and made between George C.M. Thompson and Philip T. Brookes of the first part, Jane Thompson of the second part and James Esmund Allen and Michael O'Reilly of the third part and endorsements thereon, dated 10th February, 1959.
19. Copy deed of conveyance dated 15th December, 2008 between B.A. of the one part and C.D. of the other part. (i.e. the 2008 deed)
20. Draft land registry compliant map.

9. There was also reference to searches in a separate searches schedule within the documents schedule which it is not necessary to set out here.

10. Special condition 4.1 of the contract provides that "the title to the property shall commence with the 1958 conveyance and shall be deduced therefrom". It is clear that this is the root of title to the subject property.

11. Special condition 4.6 of the contract provides that the vendor (the defendant) "will attend to the registration of the 2014 conveyance in the registry of deeds." It further states that the purchaser shall not be entitled to delay the closing of the sale pending the registration of that deed.

12. Special condition 4.7 of the contract states:-

"Without prejudice to the provisions of special condition 4.1 all documents of prior and/or intermediary title in the vendor's possession shall be delivered to the purchaser at completion."

13. Special condition 9 of the contract states the following:-

**"Purchaser on notice of documents**

Copies of the documents referred to in the documents schedule have been made available for inspection by the purchaser or the purchaser's solicitors prior to the execution of this contract and the purchaser (whether availing of such

opportunity of inspection or not) shall be deemed to have purchased the property with full knowledge of the contents of the documents furnished and notwithstanding any partial or incomplete statement of such contents in the particulars and tenure or in the general conditions or in these special conditions. No objection or requisition or enquiry shall be made by the purchaser in respect of the said documents or to the execution of stamping thereof or any other matter pertaining thereto and the purchaser shall conclusively accept and assume that the vendor has good and marketable title to the property."

14. Special condition 13.2 of the contract provides:-

"registration of the title in the property registration authority is a matter entirely for the purchaser and the vendor shall not provide any undertaking to the purchaser to assist the purchaser with such registration whether in relation to the production of any documents that may be required to effect such registration or otherwise. No objection or requisition or enquiry shall be raised or entertained in this regard."

15. Special condition 13.3 provides that general condition 28 of the general conditions of sale is deleted and shall not apply to the contract. The effect of this special condition is to exclude the obligation that the defendant would otherwise have under general condition 28, to procure first registration of the subject property in the Property Registration Authority prior to the completion of the sale.

16. Following upon execution of the contract on 29th July, 2015, the parties' solicitors entered into correspondence typical of the kind of correspondence exchanged between solicitors in relation to investigation of title and with a view to progressing the transaction forward to completion. The solicitors for the plaintiffs, Matheson sent a letter on 2nd September, 2015 enclosing requisitions and title. Replies to requisitions were delivered by Messrs Crowley Millar solicitors for the defendant on 7th October, 2015. So far as is relevant to these proceedings, the following are the requisitions raised and the replies given:-

**(i) Requisition 14.5**

**Question:** is there any litigation pending or threatened or has any court order been made in relation to the property or any part of it or the use thereof or has any adverse claim thereto been made by any person?

**Answer:** the vendor says no.

**(ii) Voluntary dispositions/bankruptcy**

(1) **Question:** is there a voluntary disposition of title?

**Answer:** yes.

(2) If so furnish now in respect of each such disposition:

(a) a statutory declaration from the disponent that the disposition was made *bona fide* for the purpose of benefitting the disponent and without fraudulent intent or if this is not within the reasonable procurement of the vendor confirmation that the vendor is not aware of any such fraudulent intent.

**Answer** declined. We are not in possession of a declaration of solvency of B.A. in respect of the deed of conveyance dated 15th December, 2008 between B.A. of the one part and A.A. of the other part.

**(iii) Unregistered Property**

(4) Where may the originals of all title documents be inspected?

**Answer:** items 1, 2, 19 and 20 of the documents schedule may be inspected at our offices.

(5) Which of them will be delivered to the purchaser on completion?

**Answer:** As per the contract for sale.

(6) If applicable who will give the purchaser the usual statutory acknowledgement and undertaking for the production and safe custody of those documents not handed over?

**Answer:** See conveyance 19th April, 1966.

17. The requisitions on title raised also included the standard form requisitions relating to the Family Law Act 1981, the Family Law Act 1995, the Judicial Separation and Family Law Reform Act 1989 and the Family Law (Divorce) Act 1996. Within those requisitions, the vendor was asked to furnish statutory declarations verifying that there had not been any dispositions affected by specified provisions of the foregoing legislation, and draft declarations verifying this to be so were requested in the usual way provided for by these requisitions. In reply, the solicitors for the vendor referred the solicitors for the purchasers to a draft declaration of the defendant, as vendor of the subject property.

18. Requisition 44 of the standard form of requisitions on title is headed "completion". The opening line of that requisition states, "hand over and closing the following documents" and thereafter it is a matter for the solicitors acting on behalf of a purchaser to insert those documents that they consider will be required to be delivered at completion. Of relevance to these proceedings is the following:-

1. Such documents as arise from the foregoing.

Reply: agreed.

4. The originals (or where specifically stated, certified copies) of each of the documents listed in the documents schedule to the contract.

Reply: agreed as per contract.

19. In an additional requisition under the heading "additions/notes" the following question is asked:-

"(C) Please confirm that the original of the deed of conveyance dated 15th December, 2008, B.A. to A.A. will be delivered on closing (the documents schedule of the contract lists a copy)."

Reply: agreed.

20. Under the same heading the following additional requisitions are raised:-

"(K) please furnish the legal statement from the solicitor for the donee of the power of the attorney dated 19th August, 2009 as required by the Property Registration Authority Legal Office No. 3 Notice of 2010."

Reply: we will revert to your requisition under separate cover.

"(L) Please clarify the references in the judgment of the Supreme Court para. 11.5 to the total financial award of €2,500,000 and subsequent decision of Irvine J. on 28th October, 2014 authorising the said [defendant] to take all steps necessary to realise this asset and to discharge therefrom ... judgment in the sum of €2,500,000 as well as the other amounts referred to."

Reply: not applicable. Doesn't affect the sale herein.

21. Also on 7th October 2015, Messrs Crowley Millar sent an email to Matheson stating the following:-

"legal proceedings have recently been issued against our client by A.A. seeking an order prohibiting the disposal of [the defendant's] interest in [the subject property]. These proceedings were issued approximately ten days ago. We had no prior notice of this litigation and no prior communication from A.A.. A.A. has registered a *lis pendens* against the [subject property]. We are in communication with the solicitors representing A.A. and have made certain proposals to them towards addressing the issue. This would not involve your client and will allow the sale to proceed in the normal way. Part of the proposed resolution is that we would hold the proceeds of sale pending the outcome of that litigation."

22. Arising out of this development, it was agreed that completion of the sale would be deferred until 23rd November, 2015. It was further deferred, by agreement, to 16th December, 2015. In the meantime, the Supreme Court delivered its decision referred to above on 9th November, 2015, dismissing the application of B.A. to set aside its decision of 30th July, 2014 which had the effect of removing any doubts about the validity of the order of Irvine J. of 28th October, 2014, and, by extension, the 2014 deed. Nonetheless, the problem remained that there was still a threat of litigation from A.A. and the *lis pendens* that she had registered remained registered against the subject property.

23. On 15th December, 2015, the solicitors for the defendant sent to the solicitors for the plaintiffs a copy of a letter from Messrs McCarthy Johnston, solicitors for A.A. which stated that:-

"We wish to again advise that our client is still considering the judgment of the Supreme Court delivered by Laffoy J. on 9th November last and she may yet make an application to the Supreme Court with respect to it.

Notwithstanding the above and without prejudice to it we can confirm that our client is prepared to immediately vacate the *lis pendens* with respect to the above proceedings on the basis of the undertakings provided by you and your client in your letter of 26th November last."

24. Unsurprisingly, the threat of proceedings by A.A. and the *lis pendens* registered on her behalf continued to be an obstacle to completion of the transaction and was the subject of correspondence between solicitors for the parties in the weeks that followed. However, the *lis pendens* was vacated on 22nd December, 2015 and the solicitors for the plaintiffs resumed investigation of title by raising rejoinders to the replies to requisitions on title.

25. Correspondence between the solicitors for the parties ensued but they were unable to reach agreement in relation to the documents required for completion of the transaction. On 28th January, 2016, Messrs Crowley Millar solicitors served a completion notice upon Matheson solicitors, stating that the defendant was able, ready and willing to complete the sale and specifying a completion date of 11th February, 2016. This was served pursuant to general condition 40 of the contract. Matheson replied on 4th February, 2016 stating that it was not accepted that the defendant was able, ready and willing to complete the sale and identifying issues that required to be addressed to their satisfaction before the manner could progress to completion. Further correspondence ensued and the date nominated by Messrs Crowley Millar for completion of the sale, 11th February, 2016, came and went. Another completion notice was served on 26th February, 2016, this time nominating a completion date of Friday 11th March, 2016. Correspondence between the solicitors for the parties continued, and while the issues of difference between them narrowed, agreement could not be reached. On 21st April, 2016, Messrs Crowley Millar solicitors served a notice pursuant to general condition 41 of the contract forfeiting the deposit of the plaintiffs. Opinions from Senior Counsel were obtained by each party and exchanged, but still agreement could not be reached. Ultimately, the within proceedings were issued and served on behalf of the plaintiffs on 10th May, 2016. This was not done by way of vendor and purchaser summons as would frequently be the case in such matters (and as had been suggested by the solicitors for the plaintiffs in February, 2016, but rejected by the defendant). Instead, the plaintiffs issued a plenary summons seeking specific performance of the contract and the following additional reliefs:-

"(2) A declaration that the purported completion notice dated 28th January, 2016 served on behalf of the defendant is invalid and of no force or effect.

(3) A declaration that the purported completion notice dated 26th February, 2016 served on behalf of the defendant is invalid and of no force or effect.

(4) A declaration that the defendant is not able, ready or willing to complete the sale pursuant to the contract by reason of her non-compliance with the requirements of the plaintiffs pertaining to:-

(a) custody of title documents under general condition 34 of the contract and requisition 20.6 of the objections and

requisition on title;

(b) family law declarations under requisitions 22.3, 24.2, 25.2 and 44.3;

(c) requisition 15.2(a) and on the production of an acknowledgement from the Official Assignee regarding the validity and efficacy of the indenture dated 15th December, 2008 and made between B.A. of the one part and A.A. of the other part and

(d) requisition 14.5 and the production of an acknowledgment from A.A. that she does not claim ownership of the Property.

(5) A declaration that the purported notice of forfeiture of deposit contained in the letter from the defendants' solicitors dated 21st April, 2016 is invalid and of no force or effect.

(6) A declaration that the defendant has no entitlement to forfeit the deposit of €256,100 paid by the plaintiffs pursuant to the contract."

26. The plaintiff also claimed damages for breach of contract.

27. It is apparent from a review of the correspondence leading up to the issue of the proceedings (which it is not necessary to set out or summarise here) and the plenary summons itself that the issues of difference between the parties had narrowed and the issues in dispute reduced to those identified in the plenary summons, and while correspondence ensued after the issue of proceedings, no further progress on narrowing those issues was made by the time the solicitors for the defendant issued the motion to which I referred at para. 1 of this judgment seeking an order that the reliefs claimed by the plaintiffs at para. 4 of the plenary summons be determined in a summary manner as provided for by s. 55 of the Act of 2009.

28. However, by the time the matter came up for hearing before me on 23rd May, 2017, there were developments that caused the issues in dispute to narrow, but another issue had been introduced. The Official Assignee, through his solicitors, had on 5th February, 2016 written to Messrs Crowley Millar seeking confirmation that all sums in excess of those which Irvine J. had directed should be paid out of the proceeds of sale would be remitted to the office of the Official Assignee. Undoubtedly, this letter made it clear, without saying so expressly, that the Official Assignee was not claiming any interest in the subject property and that there would be no threat from him to the title to be transferred to the plaintiffs. For some reason that was never explained, this letter was only disclosed by the solicitors for the defendant to the solicitors for the plaintiffs in an affidavit on 7th December, 2016. In any event, by reason of this letter, this is no longer an issue of concern to the plaintiffs. That removed item 4(c) of the indorsement of claim in the plenary summons as an issue in the proceedings.

29. Secondly, although the *lis pendens* registered on behalf of A.A. over the subject property had been vacated on 22nd December, 2015, there had remained the lingering threat of A.A. that she might yet claim an interest in the subject property. This threat was removed unambiguously by a letter from her solicitors, Messrs McCarthy Johnston, dated 30th May, 2016 to Messrs Crowley Millar. This letter constituted the acknowledgement referred to in para. 4(d) of the plenary summons.

30. However, that same letter of Messrs McCarthy Johnston introduced a new issue of contention between the parties. It referred to the overseas bankruptcy of B.A. and stated that the trustee in that bankruptcy was making a claim for the "property" in B.A.'s overseas bankruptcy. This was the first time that such a claim on the part of the overseas trustee had ever been intimated and of course it appears not in a letter from or on behalf of the overseas trustee, but in a letter from the solicitors acting on behalf of A.A. It is clear from the terms of this letter that the reference to the "property" is a reference to the subject property.

31. In a replying affidavit delivered by Mr Brian Doran of Matheson Solicitors, and dated 14th December, 2016, for the purposes of opposing the application for a summary trial, Mr Doran states that he understands the defendant's position as regards the claim of the overseas trustee to be that that claim cannot succeed. He says that the plaintiffs are willing to accept that position if there is a declaratory order issued by an Irish court confirming this to be so. However, the order made by me on 19th December, 2016 refers only to the reliefs sought by the plaintiffs in their plenary summons at paras. 4(a) – (d) of the indorsement of claim therein and does not refer to this additional issue. Nonetheless, this issue was fully canvassed before me at the summary trial and neither party made reference to the fact that it was not encapsulated by the perfected order.

32. One other matter that should be mentioned by way of background is that Messrs Crowley Millar, in an effort to deal with the requirement of the plaintiffs' solicitors to deliver an acknowledgement and undertaking as to title documents, made contact with Messrs Arthur Cox, solicitors for the co-purchaser. On 13th July 2016, Messrs Arthur Cox sent a short email to Messrs Crowley Millar stating: "Further to our telephone call, I confirm that my client is amenable to lodging the original title documents in respect of this property to the PRA to be held to our order by the PRA and to be returned to Arthur Cox or [the co-purchaser]." However this email did not resolve the matter to the satisfaction of Matheson, for reasons that are explained below.

33. On the opening day of the hearing, counsel for the plaintiffs, Mr McCullough S.C., confirmed that the matters referred to at paras. 4(c) and (d) of the indorsement of claim to the plenary summons were no longer issues of concern for the reasons given above. But he drew attention to the new issue, i.e. the possible claim of the overseas trustee to an interest in the subject property. I think it is clear that the parties intended that I should adjudicate upon this issue also, notwithstanding that it is not referred to in that order.

### **The Evidence**

34. The only evidence advanced by either party was that of Mr Rory O'Donnell, consultant solicitor, who gave evidence on behalf of the plaintiffs. Mr O'Donnell has been a solicitor for more than 55 years and is now a consultant in the firm of Eversheds Solicitors (formerly Eversheds O'Donnell Sweeney) and was for many years, up to 31st January, 2009 a senior partner in that firm specialising in conveyancing, planning and construction law for over 40 years and his expertise in these areas is well known and indeed accepted by the defendant.

35. Mr O'Donnell prepared two reports for the purposes of these proceedings, each of which was put into evidence. He also gave evidence in person. His first report is dated 30th November, 2016 and his second report is dated 15th February, 2017. The latter report was prepared in light of developments, following upon preparation of the former report and specifically the contents of the letter of 30th May, 2016 sent by Messrs McCarthy Johnston Solicitors to Messrs Crowley Millar, which in turn was sent by Messrs Crowley Millar to Matheson on 7th December, 2016. As might be expected, the oral evidence of Mr O'Donnell was entirely consistent with his written reports.

36. While Mr O'Donnell's reports were prepared from the point of view of what constitutes good conveyancing practice, he did acknowledge that the parties may vary such practice by contract, but where they have not done so or where a particular line of inquiry has not been precluded by contract, then good conveyancing practice is what dictates the investigation of title and the documents to be considered consequent upon that investigation. As far as the contract is concerned he identified special conditions 4.3, 4.4, 4.5 and 4.8 as operating to limit the scope of investigation of title in this instance.

**Custody of deeds, requirement to furnish undertaking for safe custody and delivery of copies from the party entitled to the other moiety of the property**

37. Mr O'Donnell stated that he has been asked to say what good conveyancing practice is in the circumstances of this case, where the defendant is selling an undivided moiety of the subject property, and there is no co-ownership agreement governing relations between those parties, dealing in particular with custody and production of title deeds. Mr O'Donnell said that while the circumstances in this case are very unusual, it is not at all unusual for the vendor of a property not to have possession of a deed or deeds which form part of the title to a property being sold, and there is a long standing practice in conveyancing that a vendor explains who has possession of the deeds, on what basis they are held and who will furnish a statutory acknowledgement and undertaking for safe custody and, if necessary, production of the same.

38. The purchasers in this case will be obliged to register their interest in the Property Registration Authority (the "PRA") following completion of the purchase, and Mr O'Donnell says that as part of that application process, the PRA will always require production of the original title deeds and will also require to know if such deeds are held subject to a *lien* or charge. He says that it is therefore essential for the plaintiffs to be able to fulfil their obligations to procure the production of and lodgement of the original title deed in the PRA. He says that the normal way of enabling a party to do so (when they are not being delivered at completion) is to have a statutory acknowledgement and undertaking as to the safe custody and production of the title deeds and that insisting on such a statutory acknowledgement and undertaking is very much in accordance with good conveyancing practice.

39. He said that if as a purchaser's solicitor you are not to be furnished with original title documentation, there is usually a special condition dealing with the issue. In the ordinary course of events you would expect some kind of alternative and in the case of property owned jointly you would expect to be furnished with a copy of a co-ownership agreement. In this case, and somewhat unusually, there is no co-ownership agreement.

40. Mr O'Donnell said that in general terms a person purchasing a property will require original title documents for any one or more of three purposes:-

- (i) to secure registration of the property concerned in the PRA;
- (ii) for borrowing purposes;
- (iii) in order to sell the property onwards prior to completion of registration in the PRA.

Mr O'Donnell stated that without a doubt, first registration of a title in the PRA can be expected to take several years and so the issue of onward sale or the raising of funds by providing the subject property as security cannot be considered to be academic.

41. Mr O'Donnell was asked what in his opinion was the effect of special condition 13.2 of the contract. He said that the effect of this special condition was to replace general condition 29 of the standard form contract for sale which imposes on a vendor, for a period of two years following completion of a sale, an obligation to supply (at the expense of the purchaser) any additional information which the vendor may reasonably be able to supply and to produce and furnish any documents in his possession that may be required to effect first registration of the property in the PRA. Mr O'Donnell said that he did not think that special condition 13.2 obviates the need to produce the original title deeds to the purchaser – he considered it as being only relevant to the issue of first registration of the subject property in the PRA.

42. Mr O'Donnell was asked if the email from Messrs Arthur Cox of the 13th July, 2016 was sufficient for the purposes of a purchaser. He said that it was a good starting point insofar as it enables the plaintiffs to get the title deeds to the subject property for registration purposes, but it does not identify the specific title documents nor does it deal with issues such as *liens* or the nature of any security given to lenders by the co-purchaser, which matters would be of concern to the PRA. In Mr O'Donnell's opinion, for the purposes of first registration, the problem looks like it can be easily resolved (because of the email from Messrs Arthur Cox) but nonetheless the plaintiff should be given either the original deeds to the subject property or a statutory undertaking and acknowledgement for production of the same in case they are required for an onward sale pending registration or for the purposes of giving security to a lender.

**Submissions of Counsel (on this Issue)**

43. Counsel for the plaintiffs refers to para. 18.102 of Wylie and Woods, *Irish Conveyancing Law*, 3rd Ed. where it is stated:-

"As a general rule, on a conveyance of land the vendor must hand over the documents of title to the purchaser."

He submits that that obligation has not been excluded by contract in this case. He submits that there is an obligation on the part of the defendant to show title and to prove it, and that this is necessary in order for the plaintiffs to achieve a good and marketable title in order to sell the property onwards or to use it as collateral to raise finance. In cases where prior title documentation is not being handed over at completion, such as arises most frequently where there is a sale of part only of a property, this obligation is met by the vendor providing a legally binding statutory acknowledgement and undertaking for the safe custody of the title deeds, from whomever retains the deeds. This obligation is given statutory force by s. 84 of the Act of 2009 which substantially reproduces the corresponding obligation in s. 9 of the Conveyancing Act of 1881. It is not necessary to set out s. 84 of the Act of 2009 in full here. Suffice to say it describes the obligations imposed upon a person who gives an acknowledgment and undertaking as to production of documents, and prescribes certain rights in favour of persons to whom such an undertaking is given.

44. Mr McCullough accepts that this obligation may be varied by contract, but submits that it is not open to a vendor to curtail his obligations to prove and deliver title so much as to require a purchaser to take a bad title, or no title at all. He again refers to Wylie and Woods, at para. 14.07:-

"It is important to note that this duty operates with full force only in respect of an open contract. There is no reason why the vendor should not restrict this duty, or possibly even exclude it, by the terms of the conditions of sale, and this is often done. But the greatest caution must be exercised in framing such conditions, as we saw in an earlier chapter. The vendor must take care not to be fraudulent, nor ambiguous, for the courts will construe the conditions in favour of the

purchaser.”

45. The reference in this passage to the earlier chapter is to chapter 9, at paras 9.36 and 9.37 in which Wylie and Woods state:-

“9.36 there is nothing to prevent the parties, or one of them, inserting special conditions of sale in the contract, as the Law Society’s standard form expressly recognises. However, before considering the standard conditions of sale on the subject, some general principles may be mentioned.

9.37 The first is that the vendor must take care in framing conditions purporting to restrict what would otherwise be his liability under the general law. The reason was stated by O’Connor M.R. in *Re White and Hague’s Contract*:-

“It is a well-recognised cannon of construction that if conditions are ambiguous they are to be construed in favour of the purchaser.”

The second, which is not unconnected with the first, is that the vendor must not frame his conditions deliberately to mislead the purchaser, for otherwise the court is likely to hold that the purchaser is not bound by the conditions in question and may, therefore, pursue his remedies under the general law unrestricted in any way. Thus, again in *Re White and Hague’s Contract*, O’Connor M.R. had this to say about conditions of sale in that case which purported to relieve the vendor of the duty to disclose his title to the property and to require the purchaser to assume that the title was good:-

“There is nothing unreasonable in cases like these, nor anything to suggest dishonesty, if the vendor offers to a purchaser only such title as he may have, and a contract on this basis may be enforced. But in a case like that with which I am dealing, which suggests no reason for not disclosing the vendor’s title, except an effort to foist upon the purchaser a worthless title, or mere perversity on the part of the vendor, I entertain the gravest doubt that the contract would be enforceable. It seems to me to be against common right and common honesty that a purchaser should be obliged to pay his purchase money without any assurance of getting value when no fair reason is alleged for not given at least some evidence of title.”

46. Mr McCullough also referred to the following further passage of O’Connor M.R. in *Re White and Hague’s Contract* [1921] 1 I.R. 138:-

“And there is also authority for a further proposition that a contract by a purchaser to take such title as the vendor has does not relieve the vendor from the necessity of showing a *bona fide* title and producing the best title he can from the material in his power, a proposition which has special application to a case in which no explanation can be offered for refusal to make title except dishonesty or perversity.”

47. Mr McCullough does not suggest that these explanations are of any application in this case, but cites this passage to emphasise the general duty upon a vendor to show good title and then to prove that title. Mr McCullough further submits that a purchaser has a duty to investigate the title produced by the vendor and that unless he does so, the purchaser will be fixed with constructive notice of such defects in title which would have been discovered had he carried out an investigation.

48. Turning then to the contract itself, Mr McCullough submits that the delivery of documents of title to the purchaser is not precluded by way of special condition in the contract. He submits that production of title is essential in order for the purchaser to obtain a good and marketable title to the subject property and that access to the original deeds is necessary in order to deal with the property generally, and not just in the context of having the property registered in the PRA. That being the case, it is submitted, the Court does not need to be concerned about the true meaning of special condition 13.2 of the contract, which, it will be recalled states, *inter alia*, that the vendor will not provide any undertaking to the purchaser to assist the purchaser with registration in the PRA, whether in relation to the production of documents that may be required to effect such registration or otherwise.

49. In reply to these arguments, Mr Ó Dúlacháin S.C., for the defendant says that the defendant has at all times remained able and willing to deliver all the documents that she contracted to deliver at completion. He submits that the contract is not an open contract. The defendant will execute a deed of conveyance of an undivided moiety of the subject property in fee simple, and beyond that the parties are free to agree amongst themselves what will be delivered. Moreover, the defendant will at completion deliver the originals of the 2008 deed and the 2014 deed as well as certified copies of other conveyances on title. He says that this is what the defendant has contracted to do, and the defendant, having placed these limitations on her obligations, cannot be compelled to do more. He points to the fact that the contract was entered into between the parties following a tender process in the course of which the plaintiffs’ solicitors entered into negotiations with the solicitors for the defendant as regards the precise terms of the contract. Included in that correspondence is a letter of 27th July, 2015 in which the solicitors for the defendant stated, *inter alia*:-

“The deeds are presumably held by Ulster Bank as security over the [co-purchaser’s] interest in the property, Ulster Bank having released their charge of [B.A.]’s interest in the property by deed of release dated 25th November, 2008. In order to obtain colour copies of the 1957 and 1966 deeds, it would be necessary to contact [the co-purchasers] solicitor requesting the same. If his solicitors need to take up the deeds on A.T.R. from Ulster Bank, this would necessitate [the co-purchaser] executing a letter of authority to do so. We confirm that the original 2008 deed and the original 2014 deed (when registered) will be handed over to the purchaser.”

50. Mr Ó Dúlacháin submits that it was very clear to the plaintiffs’ solicitors what originals were to be produced and not produced, and who was in possession of the originals of the older deeds, and how they might be obtained. In short, Mr Ó Dúlacháin says that the defendant agreed to produce the originals of such documentation as she had in her possession, and certified copies of other documentation. He submits that from the point of view of the contractual obligations of the defendant, that is the entire answer as regards the title deed issue.

51. Mr Ó Dúlacháin also submits that the plaintiffs must have been aware of this because in their requisitions on title at para. 44.4 the plaintiffs’ solicitors seek:-

“The originals (or where specifically stated certified copies) of each of the documents listed in the document schedule to the contract.”

52. Mr Ó Dúlacháin further submits that it is clear from the correspondence received from the solicitors for the plaintiffs that they are looking for the original deeds of prior title (or an acknowledgement and undertaking in lieu) in case they are required for compulsory

registration purposes, and that that is expressly excluded by the contract. Specifically, he refers to a letter from Matheson to Messrs Crowley Millar dated 4th February, 2016, in which this is the reason given by Matheson for insisting on production of the original deeds. Insofar as the purchaser's solicitors are looking for an acknowledgment and undertaking to produce the title deeds if required, Mr Ó Dúlacháin says that the PRA does not seek statutory acknowledgments and undertakings, but in any case the defendant has limited her obligations by contract.

53. Mr Ó Dúlacháin further submits that the delivery of an acknowledgment and undertaking for the production of the title deeds from the co-purchaser would not add anything to the rights that the plaintiffs will enjoy as co-owners of the subject property, following completion, because they will then in any event enjoy precisely that right by reason of being a co-owner of the property. He further relies upon a PRA practice direction on first registration applications which, while stating that original documents of title are to be lodged, provides a number of alternatives where they are not being lodged with an application for first registration. In addition, he draws attention to the power of the registrar of titles to demand production and delivery of title documentation. Finally, Mr Ó Dúlacháin drew the attention of the Court to s. 58(5) of the Act of 2009, which states:-

"The inability of a vendor to furnish the purchaser with an acknowledgment of the right to production and delivery of copies of documents of title is not an objection to title where the purchaser will, on the completion of the contract, have an equitable right to the production of such documents."

54. In his replying submissions, Mr McCullough emphasised that the need to have the original title documentation or an acknowledgment and undertaking for production of the same is not just driven by the need to produce original documents for the purpose of the application for first registration of the property, but is also driven by the possible need on the part of the plaintiffs to have access to the original documentation pending completion of a first registration application, which Mr O'Donnell said is likely to take a number of years. He submitted that the purchaser could not be expected to rely upon the exercise by the registrar of titles of his/her power to require production of original documentation. As to the entitlement of a co-owner of a property to require another co-owner to deliver title documentation, Mr McCullough submitted that this is not as strong as and should not be considered the same as an acknowledgement and undertaking, which has statutory force. Moreover, he submitted that it cannot be certain that an action against a co-owner to require production of documents would be successful. He refers to *Halsbury's Laws of England*, 3rd Ed., Vol. 32, at para. 360, where it is stated that absent agreement between co-owners, "... any owner of land comprised in the title deeds appears to have the right to require their production". Mr McCullough did not address s. 58(5) of the Act of 2009 in his submissions.

### **Conclusion on this Issue**

55. It is apparent from the summary above that unless the general obligation to produce and deliver title documentation at completion is circumscribed by contract, a vendor must produce the same or alternatively must deliver a statutory acknowledgment and undertaking for the production of same, in order that the vendor may deliver a good and marketable title to the purchaser. Mr Ó Dúlacháin does not appear to have disputed this general obligation, and relies upon the limitations that he submits are placed upon this general obligation in the special conditions of sale, and in particular special conditions nos. 4.7, 9 and 13.2 thereof.

56. It is further apparent from the authorities referred to above and from Wylie and Woods that in cases where a vendor has clearly excluded the general obligation, then the court must consider whether or not that exclusion may be relied upon by the vendor if the effect of not delivering such documentation may result in a purchaser not obtaining a good and marketable title. Furthermore, insofar as there is any doubt as to the interpretation of the conditions of contract any ambiguity must operate for the benefit of the purchaser, i.e. *contra preferentum*.

57. Before entering on a consideration of the applicable special conditions, I should first deal with the email from Messrs Arthur Cox upon which some reliance has been placed by the defendant. Mr O'Donnell described this email as ["a good start"]. However, it is something of a mystery as to why this correspondence was not developed so as at least to set out, with specificity, the documentation that Messrs Arthur Cox were agreeing to lodge, on behalf of the co-purchaser, in the PRA, for the benefit of the plaintiffs. Not only that, notwithstanding that the subject property is jointly owned by the defendant and the co-purchaser, this email states that the documents are to be held to the order of Messrs Arthur Cox and they are to be returned to Messrs Arthur Cox or their client. While it is not surprising that a firm of solicitors would assert their client's best interests, the fact is that the co-purchaser and the vendor have an equal entitlement to these documents, and furthermore upon completion of first registration in the PRA those documents will have very limited ongoing relevance. But, in any case this email falls a long way short of a statutory acknowledgment for production of title documentation and in the circumstances really cannot be relied upon by the defendant as meeting any obligation that she may have to produce original title documentation, or a statutory acknowledgment and undertaking for production of same in lieu.

58. Turning then to the special conditions themselves, special condition 4.7 states that all documents of prior and/or intermediary title in the vendor's possession shall be delivered to the purchaser at completion. Although this is stated to be without prejudice to the provisions of special condition 4.1, that condition is of little assistance one way or another. Special condition 4.7 does not identify those of the documents of prior and/or intermediary title that are in the possession of the vendor, and those that are not, and nor is this stated anywhere else in the contract. While it clearly obliges the defendant, at completion, to deliver those documents of prior title that are in her possession, this condition does not in my view relieve the defendant of the usual obligation of a vendor to produce and deliver good title, by producing either the original documents of title or a statutory acknowledgement and undertaking instead. Had this condition been intended to relieve her of the need to produce and deliver the originals of specific documents it should have said so in simple terms, and identified the documents concerned.

59. The next condition of relevance is special condition 9. This is quoted in full at para. 13 above. The first part of this condition merely serves to confirm general condition 6 of the conditions of sale which is that the purchaser is on notice of the documents described in the document schedule, and the contents of the same. The second part of that condition precludes the plaintiffs from raising any requisitions or making any objections in relation to the same, the execution of the same or any other matter pertaining thereto. It requires the plaintiffs to accept that the vendor has a good and marketable title to the property. While this clearly curtails requisitions and objections on title as regards the documents identified in the documents schedule, it does not exempt the defendant from her general obligation to deliver good title to the property, and in particular does not identify any documents the originals of which will not be delivered. While the documents schedule very clearly refers to a number of documents as being certified copies, nowhere in the contract is it stated that only those certified copies will be delivered at completion, and that the usual statutory acknowledgement and undertaking for production of such of the original documents as are not being delivered at completion, will not be provided.

60. Finally, in this regard there is special condition 13.2. This deals with the obligation of the purchaser to register title in the PRA. By this condition the defendant makes it clear that she will not be providing assistance to the plaintiffs with their application for registration of the subject property in the PRA "whether in relation to the production of any documents that may be required to effect



such registration or otherwise". If the deeds were required only for the purpose of effecting registration in the PRA, then the plaintiffs would be precluded by this condition from insisting on production of the same. However, in the case of unregistered title, delivery of the title documents themselves has always formed part of the delivery of title. In the case of freehold land, this previously entailed the delivery of a root of title going back at least twenty years, together with the delivery of any intervening deeds between the root of title and the deed to the purchaser. That period of twenty years has now been reduced to fifteen years pursuant to s. 56 of the Act of 2009. In this case the root of title is stated to be the 1958 deed of conveyance referred to at item 18 of the documents schedule. While, in due course, these documents will for almost all practicable purposes become redundant following upon the registration of the title in the PRA, pending such registration the plaintiffs require either delivery of all original documents of title from 1st August, 1958 onwards, or a statutory acknowledgment and undertaking to produce the same in order to be able to deal with the interest in the subject property being acquired from the defendant, either to sell that interest onwards or to pledge the same as collateral. This obligation has not been excluded anywhere in the contract. This might be of less practical relevance were the consideration less than €1m, because in such a case, the solicitors for the purchaser could (if they considered it appropriate to do so) certify title to the registrar of titles who would then usually register the title in the PRA without further investigation. However, in cases where the consideration is in excess of €1m, the registrar of titles will conduct a full investigation of title and, as Mr O'Donnell said, will look for production of original documents of title.

61. Although it may well have been the intention of the defendant's solicitors to exclude the obligation to produce and deliver the originals of certain documents of title (or a statutory acknowledgment and undertaking in respect of same), this was not done expressly, and insofar as there is any ambiguity in the special conditions, I am obliged to resolve that ambiguity in the plaintiffs' favour. Accordingly, the plaintiffs are entitled to a declaration in the terms of para. 4(a) of the general indorsement of claim of the plenary summons.

62. In arriving at this conclusion, I have given consideration as to the possible effect of s. 58(5) of the Act of 2009 referred to above. It has not been proven, and indeed it was not even asserted on behalf of the defendant, that she is unable to furnish an acknowledgement of the right to production and delivery of copies of documents of title. Moreover, it must be the case that even if she is unable to procure such an acknowledgement, she must be in a position to obtain the deeds themselves in circumstances where, as Mr Ó Dúlacháin submitted, a co-owner has a legal entitlement vis-à-vis another co-owner to require the latter to produce title documentation for the use of the former. It seems to me that before the defendant could invoke this subsection, she would have had to have requested an acknowledgement and undertaking from the co-purchaser, and that request would have to have been refused. Far from that being the case here, Messrs Arthur Cox have indicated a willingness on the part of the co-purchaser to lodge documents of title in the PRA, even though this has not been developed to the point of an actual acknowledgement and undertaking and the specific documents have not been identified.

63. Finally, on this issue I would like to make one general observation. This relates to the documents schedule in contracts for sale. Historically, the documents schedule, in the case of unregistered title, usually identified just one or possibly two documents: the root of title and the deed to the vendor. Intervening title was then the subject of a full investigation of title post execution of the contract for sale. However, for some considerable time now it has been the practice to list most, if not all, of the documents in the possession of the vendor. But nobody would suggest that the itemisation of documents in the document schedule is intended to be a list of closing requirements. Furthermore, the manner in which conveyancers described the documents in the documents schedule (i.e. original, copy, certified copy, or no description at all) varies with some conveyancers paying more attention to the detail of this than others. Therefore, the description of a document in the documents schedule as a copy or a certified copy cannot, by itself, be taken to mean that the original of that document (or an acknowledgment and undertaking to produce the same) will not be delivered at completion. Where a vendor has only copies or certified copies of documents in his or her possession, and intends to deliver only such copies at completion, the special conditions should be drawn in such a manner as to make this clear and unambiguous.

### **Family Law Declarations**

64. The requirement to deliver the family law declarations referred to in para. 4(b) of the general indorsement of claim must also be considered in the light of the provisions of the contract. Firstly however, it should be observed that the parties are agreed that at no time has the subject property been a family home within the meaning of the Family Home Protection Act 1976 and therefore there is no question that any deed of conveyance already on title is voidable by reason of the provisions of that Act (as amended). Nor can any deed of assurance to the plaintiffs be at risk under this heading.

65. Secondly, Mr O'Donnell accepted in evidence that in circumstances where the conveyance to the defendant was executed pursuant to an order of the Court and where A.A. had withdrawn any claim that she might have in relation to the subject property (save as regards the balance of the proceeds of sale over and above those to be retained by the defendant for her own use and benefit), there is no need for any family law declarations as regards the 2014 deed. Accordingly, the controversy under this heading is limited to the 2008 deed.

66. That conveyance was of course entered into between B.A. and his then spouse A.A.. Clearly A.A. cannot have any objection to that conveyance and nor can the defendant. In the submission of the defendant there is therefore no person who could claim an interest in the subject property under what I will loosely refer to as family law legislation and in the particular circumstances of this case there is no need for such a declaration as regards the 2008 deed. Mr O'Donnell's position on this was that while he acknowledged that the possibility of anybody successfully laying claim to an interest in the subject property under family law legislation is remote, he said that fact can be stranger than fiction. He said that while a family law declaration does not of itself prevent a person from advancing a claim under the family law legislation, by obtaining a family law declaration in relation to each deed of conveyance on title, a purchaser of property becomes a *bona fide* purchaser for value for the purpose of the family law legislation, and to that extent at least is afforded some measure of protection against a claim from a person claiming an interest under the family law legislation.

67. Mr O'Donnell also said that in this case, if it is not possible to obtain a declaration from B.A. himself (who would of course be the appropriate declarant for the purposes of the 2008 deed), as a practitioner he would in the circumstances be willing to accept a declaration from the defendant that sets out, to the best of her knowledge, the marital or relationship status of B.A. at the time of the 2008 deed.

68. I think it is fair to say that on the evidence even the plaintiffs acknowledge that the risk of any claim coming forward under the family law legislation so as to impugn the title to be acquired by the plaintiffs is highly remote. And the risk of such a claim succeeding if it did come forward is even remoter still. In any event however, it is necessary to consider whether or not the requirement for the delivery of such a declaration has been excluded by the terms of the contract. In the submissions of the defendant it has been excluded by special condition 9. However, the plaintiffs submit that this special condition does not operate so as to exclude the normal requirement to deliver such a declaration as regards any deed of conveyance on title. The plaintiffs point to special condition 4.8 of the contract which expressly excludes any requisition in relation to an earlier family law declaration on title by reason of an

apparent error on the face of the declaration. Accordingly, it is submitted that if the defendant had intended to exclude the need to furnish a family law declaration in relation to the 2008 deed, she would and should have done so expressly.

69. As I have said however, the defendant relies upon special condition 9. That condition refers to the documents identified in the documents schedule and clearly states that no objection or requisition or inquiry shall be made by the purchaser in respect of the said documentation or the execution or stamping thereof or *any other matter pertaining thereto* and the purchaser shall conclusively accept and assume that the vendor has good and marketable title to the property. This special condition could not be more clear. The fact that it is expressed in general terms and relates to every document referred to in the documents schedule does not make it any less clear. The fact that there is another special condition identifying specifically one of the documents referred to in the documents schedule and expressly precluding a requisition in relation to that document, does not mean and cannot mean that the clearly stated general prohibition on the raising of requisitions in relation to all documents referred to in the documents schedule does not apply, or is in some way unenforceable. All it means is that through an abundance of caution the solicitors for the defendant inserted what might be regarded as a redundant special condition in relation to an earlier deed of conveyance.

70. The plaintiffs expressly agreed not to raise requisitions or make objections in relation to any of the documents referred to in the documents schedule. Moreover, by the same condition, they accepted that the defendant has a good and marketable title to the subject property. And while it may not be relevant to say so, this condition was agreed to after the plaintiffs' solicitors had an opportunity to see the draft contract for sale and copies of all the title documentation, and to enter into correspondence with the solicitors for the defendant in regard to the same, in advance of execution of the contract. In other words this was not a situation in which the purchasers signed a contract at auction without the benefit of legal advice, or without their solicitors having an opportunity to review the contracts and title properly, although even if it were I doubt if it could make any difference.

### **Conclusion on this Issue**

71. The requirement for the delivery of family law declarations at the completion of a conveyancing transaction may be traced back to the Family Home Protection Act 1976. What was once a relatively simple declaration, has now become more complex and convoluted with the passing into law of so much family law legislation in the intervening period. The declaration is required, as Mr O'Donnell said, in order to ensure that a purchaser may be regarded as a *bona fide* purchaser by being able to demonstrate that he/she has conducted all reasonable inquiries to eliminate the possibility that a third party may have a sustainable claim (in the context of family law legislation) to the property in sale, such as would undermine the title being taken by the purchaser. There are now very many different versions of what may be described as standard form declarations, but the precise terms of a declaration in any given case requires particular consideration. This consideration is, in the first instance at least, conducted through the means of the requisitions on title. However, special condition 9 clearly operates so as to preclude any requisitions or objections being raised in relation to the documents identified in the documents schedule. While it may be argued that the plaintiffs could insist on the delivery of a family law declaration independently of the requisitions on title, in order to obtain a good and marketable title, the plaintiffs have accepted by special condition 9 of the contract that the defendant has good and marketable title to the subject property. I think it would be flying in the face of the true and clear meaning of special condition 9 to require the defendant to deliver any family law declarations other than those described in the documents schedule, and one from the defendant herself. In the circumstances the plaintiffs are not entitled to the relief claimed at para. 4(b) of the general indorsement of claim.

### **The "Claim" of the Overseas Trustee**

72. As I have said above, the reliefs claimed at para. 4(c) and (d) of the general indorsement of claim are no longer relevant, by reason of developments subsequent to the issue of these proceedings. However, another issue of concern to the plaintiffs surfaced when they were furnished with a letter from A.A.'s solicitors dated 30th May, 2016 by way of an exhibit to an affidavit sworn by Mr Hugh Millar of Messrs Crowley Millar Solicitors on 7th December, 2016. Although Messrs Crowley Millar must have had this letter from the end of May or early June 2016, they chose not to disclose it to Matheson until Mr Millar's affidavit of 7th December, 2016.

73. As already indicated, this letter puts beyond any doubt that A.A. is not maintaining any claim of any kind in relation to the subject property, and it would have been helpful to disclose this letter earlier from the point of view of disposing of that issue with finality. But perhaps the reason it was not disclosed earlier (and I am only surmising that this is so) is that the same letter states that "the [overseas] trustee in bankruptcy is making a claim for the property in [overseas] proceedings against our client". So the plaintiffs are now on notice, for the first time, of possible litigation being advanced by the overseas trustee which may affect the subject property, albeit the proceedings suggested by this letter would be against A.A.. In replies to requisitions on title delivered by the defendant's solicitors on 7th October, 2015, it is stated at Requisition 14.5 that there is no litigation pending or threatened in relation to the subject property. Of course on that date the defendant's solicitors were unaware of any possible claim by the overseas trustee.

74. It does not appear as though any effort has been made to explore this issue further. For example, Messrs McCarthy Johnston might have been asked to produce a copy of the proceedings being brought by the overseas trustee against A.A.. Alternatively, the overseas trustee could have been approached directly (by the solicitors for either of the parties) to inquire if he is indeed maintaining a claim against A.A. that might impact upon the title of the defendant to the subject property. But it appears that no such inquiries have been undertaken, perhaps out of fear that to do so would encourage the overseas trustee in some way.

75. Careful consideration of what is said in the Messrs McCarthy Johnston letter of 30th May, 2016 would not suggest that any claim is being made that could impact upon the title of the defendant to the subject property. If what is stated accurately reflects events overseas, then at most there is a claim by the overseas trustee against A.A.. It is very difficult to see how the outcome of any such proceedings could impact upon title to a property which was conveyed to A.A. by her husband, but which was subsequently, by an order of the High Court in this jurisdiction, and affirmed by the Supreme Court, conveyed to the defendant. Moreover, the overseas trustee had some knowledge of the proceedings in the Supreme Court that gave rise to its judgment in 2015, and even though he may not have been a notice party, one might have expected him to take the opportunity to mention at least any claims that he might wish to make in relation to assets with which those proceedings were concerned, including the subject property. So it seems like a very remote prospect indeed that there is anything that the overseas trustee could do that would impact in any negative way on the title of the defendant to the subject property. However, subject to what I say below, it is beyond the Court within these proceedings, in which the overseas trustee has no involvement at all, to make any declaration to this effect.

### **Conclusion on this Issue**

76. In my view, it is entirely reasonable for solicitors acting on behalf of the purchasers of a property, who have been put on notice of litigation that may affect that property, to require some evidence that whatever proceedings are in being or contemplated will not affect the title their clients have agreed to buy. While Mr Ó Dúlacháin argued that this opens up the possibility of threats being made by persons who have no interest in a property with a view to preventing the completion of property transactions, I cannot agree with that submission. On the particular facts of this case, the existence of proceedings have been indicated by a person who has previously been on the title to the subject property, and the proceedings are described as being brought against that person by a trustee in bankruptcy in the estate of the person who, along with the co-purchaser, originally purchased the subject property. There

is a sufficient nexus between the parties concerned and the subject property to require the vendor to produce proof to the reasonable satisfaction of the purchasers that these proceedings, if they are in fact in being, cannot impact upon the title to the subject property. A simple letter from the overseas trustee will suffice; if he is unwilling to provide such a letter then I am willing to allow the parties liberty to re-enter this application, insofar as it relates to this issue, and on notice to the overseas trustee, so as to permit him to explain his position, failing which I would be willing to give a declaration sufficient to deal with the issue.