

## THE HIGH COURT

[2002 No: 10626P]

BETWEEN

DECLAN MCCOURT

PLAINTIFF

AND  
FRANCIS TIERNAN

DEFENDANT

Judgment of Mr. Justice Clarke delivered 29th July 2005.

**1. Introduction**

1.1 he plaintiff ("Mr. McCourt") is a solicitor practising in Dundalk. For a number of years the defendant ("Mr. Tiernan") was a client of Mr. McCourt. In recent times, however, significant disputes have arisen between the parties which are the subject not only of the proceedings with which I am currently concerned but also other proceedings.

1.2 In these proceedings Mr. McCourt seeks, principally, a declaration that he is entitled "to a legal and beneficial interest" in certain properties at Dundalk as set out in the pleadings. The basis upon which that claim, and certain supporting claims, are advanced is in reliance on an alleged agreement made between Mr. McCourt and Mr. Tiernan in January 2001 whereby it is alleged Mr. Tiernan agreed to give an interest in the property to Mr. McCourt in return for the payment of certain monies by Mr. McCourt for or on behalf of Mr. Tiernan. On any view the agreement was not, therefore, a simple purchase. It should also be noted that the existence of any agreement is hotly contested. However on the basis of Mr. McCourt's case the agreement was that he would be required to make a variety of payments for or on behalf of Mr. Tiernan and that as a result thereof he would, in the words of paragraph 4 of the statement of claim, "acquire an interest in the said property to the extent of the monies invested by the plaintiff in accordance with the market value of the premises as at January 2001". Thereafter, and over a period of some sixteen months, Mr. McCourt contends that he paid a total sum of €309,666.14 to and on behalf of Mr. Tiernan and, on that basis, it is said that he is entitled to an interest in the property.

1.3 While much of the facts surrounding this case are hotly disputed it appears to be clear that Mr. Tiernan originally purchased the property which comprises of lands at Hill Street know as the former Reynolds Electronic site and lands at Marsh's Upper know as the former Boyne Motor site from Dunloe Management Services Limited ("the Property") for IR£1,500,000 in early 2001. While there was an initial suggestion that the purchase occurred a year earlier that does not seem to be now advanced. Equally it is common case that a significant portion of the funding for that purchase came by way of an advance from the Irish Nationwide Building Society ("the Society") in the sum of IR£1,350,000. As security for that loan the Society were to obtain a mortgage over the property and in support thereof Mr. McCourt gave undertakings in the usual way to the Society concerning the stamping of the purchase deed by which Mr. Tiernan acquired the property and in respect of lodging the title deeds with the Society (which deeds would necessarily include an executed version of the agreed form of mortgage of the property in favour of the Society).

**2. The initial hearing**

2.1 This matter first came before me on foot of a motion dated 22nd March 2005 in which Mr. Tiernan sought orders requiring Mr. McCourt to comply with those undertakings.

2.2 When first moved before me the position adopted by Mr. McCourt in relation to that application was to indicate that he was, in principal, happy to comply with his undertaking to stamp the relevant deeds out of funds which he would provide (without prejudice to his contention that as and between himself and Mr. Tiernan he was not obliged so to do). However he expressed concern about lodging all of the title deeds with the Society on the grounds of a stated fear that by so doing he would place Mr. Tiernan in a position where he would be able to sell the property without reference to himself. For reasons which it will be necessary for me to analysis in greater detail in this judgment he asserted that he had a reasonable fear that in those circumstances Mr. Tiernan would act so as to prevent him from obtaining what he claimed was the appropriate proportion of the net proceeds of sale that were attributable to his interest.

2.3 On an initial hearing of the motion I indicated that it seemed to me that not only was it necessary that the deed be stamped but that also the *prima facie* position was to the effect that Mr. McCourt was obliged to comply with his undertaking to lodge the deeds with the Society. Given that that process would take some little time I indicated that if Mr. McCourt wished to interfere, in any way, with the freedom of any party to deal with the property thereafter he should bring an appropriate application before the court. On the initial hearing it also appeared that an issue might arise between the parties as to the registration of a *lis pendens* by Mr. McCourt on the property as a result of his claim in these proceedings. I further directed that in the event that Mr. Tiernan wished to apply to have that *lis pendens* vacated he should do so on the same occasion as any application brought by Mr. McCourt to restrict the freedom of the parties to deal with the property. I also adjourned further consideration of the original motion insofar as it related to a requirement to lodge the title deeds.

**3. The Issues**

3.1 In substance there are, therefore, before the court a series of motions which, in reality, are all concerned with the same matter. These are as follows:-

1. The remaining aspects of the original motion of the 22nd March 2005 in which Mr. Tiernan seeks compliance by Mr. McCourt with his undertakings in relation to the lodgement of the title deeds with the Society;
2. A motion dated 24th June 2005 in which Mr. Tiernan seeks an order vacating a list pendens and also, as a necessary precursor to that, seeks an order pursuant to the inherent jurisdiction of the court dismissing as frivolous and vexatious and/or as an abuse of the court process so much of Mr. McCourt's claim as suggests that he is entitled to an interest in the property as distinct from an interest in the proceeds of sale thereof; and
3. A motion brought by Mr. McCourt seeking an order that the Society retain possession of the deeds to the property pending the determination of the proceedings or in the alternative an order that in the event of a sale of the property that Mr. Tiernan be required to lodge 50% of the net proceeds of that sale into court. In anticipation that a motion of that variety was likely to be issued I directed that in the event of Mr. McCourt bringing such a motion the Society should be placed on notice. This was done and the Society duly appeared at the hearing before me.

3.2 While procedurally complicated, in reality all of the matters which require determination under the various motions come down to two. These are:-

(a) Has Mr. McCourt an arguable case to the effect that he has an interest in the property. If he has such an arguable case then he is entitled to retain the *lis pendens*. Furthermore in such circumstances he would have established at least one element of the grounds necessary to entitle him to some form of protection concerning a potential sale of the property.

(b) What is the extent of any claim which Mr. McCourt can be said to have. In that context it is important to note that counsel on behalf of Mr. Tiernan has accepted that it would be appropriate that in the event of a sale of a property a certain portion of the net proceeds (the amount whereof being an issue to which I will necessarily have to return) should be retained pending the resolution of these proceedings. The real issue between the parties on this aspect of the case is as to the extent of any such retention.

It is clear therefore that any analysis of the entitlements of the parties at this stage is dependent, in turn, on an analysis of the extent to which Mr. McCourt can now make a potentially sustainable claim. That, in turn, requires an analysis of the background to the position of the parties in relation to the issues between them.

#### **4. Factual background**

4.1 As indicated above it is common case that Mr. Tiernan purchased the property for IR£1,500,000. It is also common case that IR£1,350,000 of that sum was provided by the Society with the balance of IR£150,000 being provided by Mr. Tiernan personally.

4.2 The question of whether Mr. McCourt actually made payments of in excess of €300,000 for the benefit of Mr. Tiernan is somewhat more problematic. Mr. Tiernan has indicated that he is somewhat bereft of documentation which fact, he says, is due to the fact that Mr. McCourt has refused to hand over to him documentation in relation to the history of a series of property and business transactions with which, he says, Mr. Court dealt with on his behalf. However he does not go so far as to necessarily state that Mr. McCourt did not, in fact, make the payments concerned or at least most of them. What he does say is that as a result of a lengthy series of business transactions between 1996 and 2002 in which Mr. McCourt acted as solicitor for both he (Mr. Tiernan) and his wife. Substantial amounts of money were received and held by Mr. McCourt on behalf of Mr. Tiernan either solely or in conjunction with his wife. In those circumstances it is contended by Mr. Tiernan that any sums which were paid out by Mr. McCourt either to him or at his direction were not from funds of which Mr. McCourt was the beneficial owner but were from funds which Mr. McCourt held as solicitor for the benefit of Mr. Tiernan. Similarly Mr. Tiernan contends that those funds so held were more than adequate to meet the stamp duty which required to be paid so that, in that sense, Mr. McCourt was already in funds to meet the stamp duty which would also, on that basis, be coming from funds held by Mr. McCourt on behalf of Mr. Tiernan as client.

4.3 In relation to his claim in respect of such funds Mr. Tiernan has issued separate proceedings in which he is plaintiff and Mr. McCourt is defendant (Record No: 2004 No: 1476P). Those proceedings were commenced by plenary summons issued on the 5th February 2004 with a statement of claim being delivered on the 1st July 2005. Those proceedings allege that significant funds were derived from a series of 11 property transactions, which funds were held by Mr. McCourt on Mr. Tiernan's behalf.

It will, therefore, be seen that in essence the key question as to whether Mr. McCourt was providing his own funding to assist Mr. Tiernan or whether he was simply paying out money that was Mr. Tiernan's in the first place, requires a detailed reconciliation of the account maintained on behalf of Mr. Tiernan by Mr. McCourt. If on a proper analysis of that account, Mr. Tiernan's account with Mr. McCourt was always in credit sufficient to fund the various payments made by Mr. McCourt on Mr. Tiernan's behalf (or directly to him) then it is difficult to see how there could be any basis for Mr. McCourt's contention that there was an agreement which would entitle him to an interest in the lands. He could hardly acquire such an interest simply by giving Mr. Tiernan his own money.

4.5 On the other hand if it is clear that, to a material degree, Mr. Tiernan's account with Mr. McCourt was not in sufficient funds to meet all relevant payments (including the stamp duty) then that would at least be evidence from which a court might infer that it was unlikely that Mr. McCourt would have made such payments without there being some agreed basis for them. While it would not, of course, necessarily establish an agreement in the form contended for by Mr. McCourt it would, at least, be a material factor in the courts consideration in relation to that issue.

4.6 It seems, therefore, clear, on the basis of the information currently available on affidavit, that the key question (though not necessarily the only question) that will arise at the substantive hearing of these proceedings is as to the state at all relevant times of the account of Mr. Tiernan with Mr. McCourt arising out of the variety of business which they conducted. Given this fact it has to be said that it is surprising that Mr. McCourt has not put before this Court details of the position in respect of that account at all material times. Given the obligations which Mr. McCourt, as a solicitor, has in relation to accounting for client's funds it would be surprising if the relevant information were not readily available. If the information is readily available then it is surprising that it was not put before the court for if Mr. McCourt is correct it should be relatively easy to demonstrate that Mr. Tiernan's contention as to his account always being in sufficient funds to meet any payment made was simply incorrect. While there might, notwithstanding such account being put before the court, nonetheless remain some issues of contention between the parties they would be likely to be very much more precise and focused rather than the extremely vague situation with which the court is now confronted in which Mr. McCourt says that the money was his and Mr. Tiernan says that Mr. McCourt simply paid out his (Mr. Tiernan's) money.

In this context I note that Mr. McCourt has deposed to the fact that his accountants have told him that there is no money standing to the credit of Mr. Tiernan in his client account. Without in anyway doubting that that is a correct current statement of fact it does, as was pointed out by counsel for Mr. Tiernan, quite frankly beg the question as to what has happened any moneys which came into Mr. Tiernan's client account. It may well, of course, be that all such receipts can be properly accounted for in a manner which is inconsistent with Mr. Tiernan's contention that his account was always in sufficient credit to meet any payments made by Mr. McCourt. It may, on the other hand, not be possible for Mr. McCourt so to do. Obviously a resolution of this issue can only occur at a full trial. There is, therefore, sufficient evidence before the court from which I must conclude that it is arguable that Mr. McCourt made payments on behalf of Mr. Tiernan out of his (Mr. McCourt's) funds. In so doing I have, for the reasons indicated above, felt it appropriate to comment that the matter might be much clearer if Mr. McCourt had chosen to place before this court a statement of the movements at all relevant times in Mr. Tiernan's client account.

#### **5. The Agreement**

5.1 I have to confess that I have considerable difficulty in understanding the precise way in which Mr. McCourt says that the agreement which he alleges was entered into between himself and Mr. Tiernan was to operate. At a general level no difficulty arises. Mr. McCourt says that he was to pay money out of his own funds and that in return he was to obtain an interest in the property. However on closer analysis considerable difficulties arise. The agreement, as pleaded by Mr. McCourt, was to the effect that

he (Mr.McCourt) "would acquire an interest in the said property to the extent of the moneys invested by the plaintiff in accordance with the market value of the property as at January 2001".Mr.McCourt does not appear to assert that the appropriate calculation was to compare his contribution to the net purchase cost (that is net of the Society's loan).If the appropriate calculation was to be based on such net contribution then it would be clear, on the figures, that Mr.McCourt would in fact have ended up paying the entirety of the net contribution in that the amount which he claims to have paid would appear to exceed the amount which Mr.Tieman had in fact put up for the purchase and which represented the net value of the property in January 2001.

5.2 It is common case that Mr.Tieman paid a sum of IR£150,000 being the balance of the purchase price net of the amount borrowed.This comes to approximately €190,000.On that basis Mr.McCourt would appear to have paid the entire net purchase price.Put another way he paid a sum which exceeds the net market value of the property as of January 2001.In those circumstances it is difficult to understand the basis upon which Mr.McCourt now claims to be entitled to a 50% interest.I have to say that, despite being asked, no adequate explanation was tendered at the hearing as to the basis upon which Mr.McCourt claims to be entitled to a 50% interest in the property on the facts which he alleges.Assuming that an agreement of the broad type alleged by Mr.McCourt occurred then it must either have been intended to operate on the basis of giving Mr.McCourt an interest in the property based on the percentage his contribution bore to the overall gross value as of the time of purchase or to the net such figure.On the latter basis it would seem that Mr.McCourt would be entitled to an interest of approximately one sixth being the relationship between €300,000 to IR£1,500,000.

If the agreement was that Mr.McCourt was entitled to a percentage based on the relationship between what he paid and the net value then the reality is that, on his case, by the time Mr.McCourt had finished making the payments which he claims to have made, he would have paid the entirety of the net value.

On either basis it is impossible to see how a claim to one half arises.

5.3 Furthermore Mr.McCourt has not set out precisely how he contends the obligations of the parties in respect of the servicing of the Society's borrowings were to occur.While he does indicate that the initial agreement arose in the context of a request by Mr.Tieman that he (Mr.McCourt) should provide assistance in servicing those borrowings it would be essential that any agreement whereby Mr.McCourt was to obtain an interest in the lands to any given percentage would also deal with the relative responsibilities of the parties to servicing.For example if Mr.McCourt were to obtain (say) a 20% interest by making appropriate payments did he thereby become liable to pay 20% of the interest charges to the Society.In fairness to Mr.McCourt it should be noted that on the basis of his case (which is again strongly denied) it was at all times suggested to him (and he says fraudulently) that there was a purchaser in the wings for the property so that the servicing, in the medium term, of the borrowings from the Society might not have been a particularly important issue.Nonetheless for there to be a concluded agreement in place it would have been necessary that some arrangement had been entered into by the parties as to how those borrowings would be serviced in the event that the property was not the subject of an early sale and that, thus, the Society would, on foot of the loan, be entitled to receive interest payments.

## **6. The Law and its application**

6.1 Against that somewhat confusing and difficult factual background it is necessary to set out the relevant legal principles by which I should approach resolving the issues currently before the court.

6.2 As pointed out, the first issue which arises is as to whether Mr.McCourt has made out an arguable case to the effect that he is entitled to an interest in the property.In this regard it is necessary to consider Mr.Tieman's application to dismiss, as being certain to fail, so much of Mr.McCourt's case as seeks an interest in the property rather than an interest in the proceeds of sale.

6.3 Insofar as Mr.McCourt claims that he was entitled, on foot of the agreement between the parties, to have transferred to him a legal interest in the property I am not satisfied that he has an arguable claim.It was common case that the property was to be the subject of a first legal mortgage in favour of the Society.The legal interest would, therefore, vest in the Society.The height of any entitlement which Mr.McCourt could, even in theory, have had was as to an interest in the equity of redemption.Alternatively he would, quite clearly, on the basis of his case, have been entitled to an interest in the proceeds of sale.While such subtle distinction between the legal title in a property being vested in the "owner" on the one hand or a "mortgagee" on the other hand may well be a matter which persons with no legal experience would not fully understand, Mr.McCourt was, in fact, the solicitor acting in the sale and would have been entirely aware of precisely what was to happen in relation to the interest of the Society.

6.4 The jurisdiction of the court, in the exercise of its inherent jurisdiction, to order that all, or some appropriate aspect of, a claim be struck out is clear from *Barry v.Buckley* [1981] I.R.306.It is clear, however, that in considering whether to make such an order the court must treat the plaintiff's claim at its high water mark.While I have very grave reservations about the manner in which Mr.McCourt seeks to maintain his claim for an interest in the property I am not persuaded that it has been established that he has no chance of success in relation to being in a position to establish that he has an equitable interest (rather than a legal interest) in the property.However even on the basis of his own case it is clear that it was always in the contemplation of the parties that the property would be sold.In those circumstances, to the extent that Mr.McCourt has established an arguable case to the effect that he has a current beneficial interest in the property, I should make it clear that the trust upon which Mr.Tieman therefore, arguably, holds a portion of the property in favour of Mr.McCourt is such as entitles Mr.Tieman to sell the property at its open market value provided that he retains an appropriate proportion of the net sale proceeds for Mr.McCourt and pays same over to him.The consequences of this finding for the *lis pendens* will be dealt with later in the course of this judgment.

6.5 However having found that Mr.McCourt has made out an arguable case that he is entitled to a beneficial interest in the property subject to not being in a position, by virtue of that beneficial interest, to prevent a bona fide sale at open market value it remains necessary to determine the maximum possible extent of any such interest on the basis of the pleadings and the evidence put before the court.It is not, frankly, sufficient for Mr.McCourt simply to assert that he is entitled to a 50% interest.He must establish that he has a case capable of success to that effect.I am not satisfied that he has.In that regard it is important to refer back to the way in which the case is specifically pleaded.The proportion of the interest which Mr.McCourt claimed in the statement of claim to be entitled to was an interest "to the extent of the moneys invested by the plaintiff and in accordance with the market value of the premises as at January 2001".The claim as pleaded does not, therefore, relate to the net investment put in by Mr.Tieman or the net value as of that date.It relates to the market value.The market value is clear because the property had only just then been purchased on the open market a price of IR£1,500,000.

For the reasons indicated above Mr.McCourt would have very great difficulty indeed, in any event, in explaining how any arrangement which was based upon the net value rather than the market value would have worked.For the purposes of this application, however, I am content to rely on the pleadings and to indicate that on that basis the high water mark of Mr.McCourt's case is that he is entitled to an interest in the property (being a beneficial interest or, alternatively, an interest in the proceeds of sale) to a percentage not greater than the percentage which €309,666.14 bears to IR£1,500,000.

6.6 It is at least arguable that that entitlement is in the entire value of the property in that it is open to the view that when the court has considered all of the evidence it might conclude that the essential arrangement between the parties (if there was any of the type contended for by Mr.McCourt), was that his interest is, to the extent of his contribution, in the gross value of the property rather than its value net of the loan.I would invite the parties to do a precise calculation of the percentage involved but it would appear to come something just under one sixth.On that basis, for the avoidance of doubt, I should make it clear that in the event of Mr.McCourt succeeding in establishing such an entitlement and in the event of the property selling for (say) €6m he, Mr.McCourt, would be entitled to just under €1m subject only to bearing his share of the transaction costs associated with the sale.It would be for Mr.Tiernan to meet out of his share the entire sum now due to the Society.I should, of course, emphasise that there are very many difficult issues of both law and fact which would need to be resolved in favour of Mr.McCourt before he would be able to establish such a claim.However I am satisfied that the high water mark of his case on the basis of the argument and evidence put before the court on this occasion is such an entitlement that is to say an entitlement to a percentage of just under one sixth (the precise amount to be calculated by the parties and informed to the court) in the entire sale price net only of transaction costs associated with the sale.

## **7. Consequences**

7.1 On the basis of that finding it is necessary to consider the effect of same on the various reliefs sought.

### **7.2 The *lis pendens* application**

It will be recalled that the motion which seeks the removal of the *lis pendens* also seeks a dismissal of Mr.McCourt's claim as being bound to fail insofar as it relates to a claim for an interest in the lands rather than an interest in the proceeds of sale.For the reasons indicated above I am satisfied that an order should be made in relation to so much of Mr.McCourt's claim as asserts an entitlement to a legal interest in the property but not insofar as it relates to a claim for a beneficial interest in the property.

Having come to that view it is clear that Mr.McCourt retains a claim to an interest in the property which is sufficient to support a *lis pendens*.However having regard to the fact that I have come to the view that the nature of Mr.McCourt's interest, even at its high water mark, is not such as could restrain a *bona fide* sale at open market value I should indicate that in the event of there being such a sale I would favourably entertain an application, at that time, to vacate the *lis pendens*.

### **7.3 The plaintiff's application**

It will be recalled that the plaintiff seeks an order which would, in effect, prevent the Society from ceasing to hold the title deeds or, in the alternative, an order requiring that in the event of sale Mr.Tiernan should be required to retain an appropriate proportion of the net proceeds pending resolution of the proceedings.In addition it is clear that Mr.McCourt also seeks the retention of certain funds, in the event of a sale, to cover other monies which he claims he is entitled to obtain from Mr.Tiernan, not least the stamp duty which he has been required to pay in order that the formalities of the purchase and the mortgage to the Society should be completed.It is, of course, a matter of significant dispute between the parties as to whether Mr.McCourt was in fact in funds to make the payment of the stamp duty.However on the basis of his case he is providing such monies out of his own funds.

Insofar as Mr.McCourt has established an arguable case for an entitlement to a beneficial interest in the property then it follows that he is entitled, in the event of a sale, to ensure that an appropriate sum is retained to cover the value of the interest in the property which he is entitled to claim in accordance with this judgment.For the reasons indicated above I have made clear that in the event of a *bona fide* sale on the open market occurring I would be prepared to vacate the *lis pendens*.However in that eventuality it follows that it will be necessary that an appropriate sum calculated in accordance with the provisions of this judgment should be retained and placed in a secure way to await the outcome of these proceedings.

7.4 It is now necessary to turn to the question of whether Mr.McCourt is entitled to have a further sum retained to cover the stamp duty.It was accepted by Counsel on behalf of Mr.McCourt that any such application necessarily was subject to the well established principles for the grant of *mareva* type injunctions.In *Treacy v.Bowen* (Unreported, High Court Clarke J.19th April, 2005), having reviewed the decision of O'Sullivan J.in *Bennett Enterprises Inc.v.Lipton* [1999] 2 I.R.221 and of Kearns J.in *Aerospace Ltd.v.Thompson and Ors.*(Unreported Judgment, High Court delivered 13th January, 1999) I said the following:

"It seems to me therefore that Bennett and Aerospace are authority for the proposition that in assessing the risk of dissipation the court is entitled to take into account all the circumstances of the case which can include, in an appropriate case, an inference drawn from the nature of the wrongdoing alleged which, if fraudulent, or unconscionable may lead to the establishment of a risk that further fraudulent or unconscionable actions will be taken so as to place any assets outside the jurisdiction of the court."

7.5 In this case Mr.McCourt has established an arguable case that the following occurred.It is contended that Mr.Tiernan went into the offices of Beausang Solicitors and, pretending to be someone else, indicated that he was interested in purchasing the property from the owner whom he, correctly, described as a Mr.Tiernan.It would appear that the official in the solicitor's office concerned was highly sceptical of the approach.It is also strongly denied by Mr.Tiernan that he ever attended at the office of Beausang Solicitors whether in the circumstances referred to above or in any circumstances.There is, however, evidence sufficient for the purposes of an interlocutory hearing such as this, which leads me to the conclusion that there is an arguable case to the effect that he did.When coupled with the fact that Mr.McCourt asserts that he was at all times informed that there was a purchaser available, that evidence is at least open to the inference that Mr.Tiernan, arguably, attempted to put in place a set of circumstances whereby he would fraudulently cause Mr.McCourt to believe that there was such a purchaser available.Whether any or all of that is borne out at the trial is, of course, another matter.However, I am satisfied on the basis of that evidence, that the test which I suggested in *Treacy*, is met and that I am entitled to infer that it has been established that there is a risk that further fraudulent or unconscionable actions will be taken so as to place any assets of Mr.Tiernan outside the jurisdiction of the court.

7.6 In those circumstances, I am satisfied that Mr.McCourt has met the criteria for the grant of a *mareva* injunction.Furthermore there is an arguable case that Mr.Tiernan is indebted to him in the amount of any stamp duty which he now has to pay.

While the matter does not really arise unless and until there is a sale of the property (given that there will remain in place a *lis pendens* until such time as an application is made to the court based upon their being a *bona fide* sale on the open market) I should indicate that in the event of a sale going through I would also be prepared to require that a sum sufficient to cover the stamp duty should be retained in addition to the sum represented by the appropriate share which Mr.McCourt claims as calculated in accordance with the earlier provisions of this judgment.

### **7.7 The original application**

Given the orders which I have indicated that I would make in relation to the two matters referred to above it appears to me that any legitimate interest which Mr.McCourt may have, will be adequately protected by the continuance of the *lis pendens* until a *bona fide*

sale on the open market and, in the event of such sale, thereafter by the retention from the purchase price of an appropriate sum to represent his claim to a beneficial interest together with an additional sum to represent the stamp duty. In those circumstances there does not seem to me to be any basis for not ordering Mr. McCourt to comply with his undertaking to lodge the title deeds with the society.

## **8. Conclusions**

8.1 In summary the orders which I now intend making are:-

- (a) dismissing that portion of Mr. McCourt's claim as contends that he is entitled to a legal (as opposed to a beneficial) interest in the property;
- (b) declining to dismiss any further aspects of Mr. McCourt's claim;
- (c) in the light of (a) and (b) declining to vacate the *lis pendens*;
- (d) making an order in accordance with para (iii) of the original notice of motion requiring Mr. McCourt to comply with his undertaking; and
- (e) at this stage making no order of a *mareva* type.

8.2 For the avoidance of doubt I should also make clear that in the event of there being a bona fide sale on the open market I would propose taking the following further steps:

- (a) vacating the *lis pendens* subject to;
- (b) appropriate measures being put in place to secure a sufficient sum to protect Mr. McCourt's beneficial interest as calculated in accordance with the terms of this judgment; and
- (c) similar measures being put in place to secure a sum equivalent to the stamp duty paid.