

THE HIGH COURT

2009 2200 P

BETWEEN/

JUSTIN KEOGH

PLAINTIFF

AND

BRIAN P DOYLE TRADING AS HERITAGE SOLICITORS

DEFENDANT

Judgement of Mr. Justice Roderick Murphy, delivered the 1st day of July, 2009.**1. Motion and grounding affidavit**

1.1 By notice of motion returnable on 23rd March, 2009, the plaintiff sought a mandatory injunction compelling the solicitor for Laura Sherwin with whom he had purchased an apartment known as 213, Little Place Paddocks, Blanchardstown, Dublin 15, as joint registered owners to deliver up the plaintiff's share of a sale of that property out of the proceeds of the subsequent sale of the property.

1.2 The affidavit of the plaintiff sworn 28th February, 2009, averred that the defendant had carriage of sale of the property which he owned jointly with Laura Sherwin. The defendant acted as solicitor for Ms. Sherwin. The property was purchased in 1998. By agreement dated 24th February, 1998, having recited the loan of £67,000 from Irish Permanent and the contribution by Laura Sherwin of the sum of £20,000 towards the purchase of the house and that the plaintiff and Laura Sherwin were the parents of Cian Sherwin, it was provided that the house should be held by the plaintiff and Laura Sherwin as joint tenants; that Laura Sherwin and Cian Sherwin should be the sole and exclusive occupiers of the house and that Laura Sherwin should have the option to have the house sold at a price to be agreed by her and the plaintiff or in default by a reputable valuer to be appointed by both.

It was further provided that on the sale of the house and out of the proceeds thereof the mortgage, estate agent and legal costs should be discharged, the sum of £20,000 should be paid to Laura Sherwin and the balance divided equally between the plaintiff and Laura Sherwin.

It was further provided that each would contribute equally to the repayment of the mortgage by way of monthly instalments and that the plaintiff's payment in this respect should be deemed to discharge his legal responsibility for the financial maintenance of Cian Sherwin.

1.3 By letter dated 2nd October, 2008, the defendant, acting as solicitor for Laura Sherwin, wrote to the solicitors for the plaintiff, referring to the option of Ms. Sherwin and her acceptance of an offer for the sale of the property for €300,000. The plaintiff delayed authorising the delivery of the title deeds.

1.4 By letter dated 16th December, 2008, the defendants confirmed that the sale of the property concluded on 12th December, 2008 and sought clarification in relation to the agreement that "Justin Keogh and Laura Sherwin shall contribute equally to the repayment of the mortgage by way of monthly instalments and that Justin Keogh's payment in this respect shall be deemed to discharge his legal responsibility for the financial maintenance of Cian Sherwin." It was stated that that was contradictory and asked for confirmation if the plaintiff had paid any money towards the mortgage over and above and whether or not the plaintiff had paid any maintenance to Ms. Sherwin since 24th February, 1998.

Solicitors for the plaintiff confirmed that the plaintiff had paid at least 50% of the mortgage repayments since 24th February, 1998.

1.5 The defendant on behalf of his client wrote on 17th December, 2008, stating that no payments had been made to his client in respect of maintenance and that a District Court order existed in respect of €100 per week for maintenance. A claim in respect of retrospective maintenance and birth costs had been adjourned by the court. The defendant was not in a position to release the monies until that matter had been resolved. Based on eleven years arrears a sum of €57,200 together with €5,000 in respect of birth costs, a sum of €62,200 was due and owing.

The net balance for distribution, having deducted £20,000 (€25,426.40), and costs, amounted to €211,826.20.

The defendant calculated that the plaintiff was entitled to €105,913 less €62,200 out of the proceeds and requested confirmation that the plaintiff would continue to pay maintenance at a rate of €100 per week as agreed by the District Court order.

The defendant stated that he did not act for the plaintiff nor had any obligation towards him.

1.6 By letter dated 19th December, 2008, the plaintiff's solicitor stated that the defendant had an obligation to the plaintiff as solicitor, having carriage of sale of the property, and held the plaintiff's share of the sale proceeds in trust for him. He further stated that their letter of 16th December did not confirm that the plaintiff had repaid the remortgage repayments only and that he did not pay any money at all towards the maintenance of Cian. He paid at least 50% of the mortgage repayments since 24th February, 1998. No reference was made to maintenance payments and they had no instructions in relation thereto.

By letter dated 18th February, 2009, the plaintiff's solicitors enclosed a schedule of payments made to Permanent TSB in his and Ms. Sherwin's name indicating the amount of repayments he made.

2. Replying affidavit of defendant

Mr. Brian P. Doyle referred to his instructions to sell the house that she and the plaintiff jointly owned on 24th June, 2008, and referred to the agreement of 24th February, 1998.

He referred to a letter dated 30th October from the plaintiff's solicitors saying that the plaintiff would cooperate with the sale upon the condition that Ms. Sherwin would not seek maintenance from him following the completion of the sale and into the future.

Requests by the defendant to have the plaintiff sign an authority for the release of the title deeds were delayed from 24th June, 2008 to 30th October, 2008 and then on condition that Ms. Sherwin would not seek maintenance from the plaintiff following the completion of the sale and into the future.

By letter of 31st October, 2008, the defendants wrote to the plaintiff's solicitor as follows:-

"In relation to your client's suggestion that our client reaffirm the agreement in which our client now confirms that the agreement did confirm that your client was discharged from his liability for the payment of maintenance in respect of Cian due to the fact that he contributed money towards the mortgage repayments.

Our client reconfirms this.

We would appreciate if you would now please return the signed authority."

On 20th November, the plaintiff's solicitors stated that that paragraph was not clear. They required confirmation from Ms. Sherwin that she would not be seeking maintenance from the plaintiff, their client, for Cian following the completion of the sale of the premises into the future.

On 8th December, 2008, the defendants wrote to the plaintiff's solicitors requesting them to deal with matters on behalf of their client directly with them as their client did not want to talk to the plaintiff. There was evidence that the plaintiff was and was still intimidating and bullying their client. Moreover their client who had advised them that the plaintiff's solicitors had acted for both Ms. Sherwin and the plaintiff at the time of the signing of the agreement and referred to a possible conflict of interest.

3. Interim maintenance order

Mr. Doyle's affidavit exhibited a Dublin Metropolitan District Court order dated 20th May, 2004, whereby that court ordered:-

"That the maintenance debtor pay the maintenance creditor a weekly sum of €100 first payment from 28.05.2004 by standing order, *i.e.* €60 to mortgage account as presently stands and €40 to Irish Permanent account in the name of Laura Sherwin (whose bank account was detailed).

Case adjourned to Balbriggan District Court on 14th October, 2004, to clarify if court entitled in law to backdate payments to date of application *i.e.* 09.12.2003.

Adjourn application for birth expenses to 14.10.2004."

4. Second affidavit of Justin Keogh

The plaintiff said and believed that the defendant deliberately delayed the raising of the issue of maintenance payments allegedly due to his client until after the sale had closed knowing that the matter would have been contentious and having previously agreed to the formula for distributing the proceeds of sale of the properties contained in that agreement. The defendant found it contradictory and contended that his payments of the half share of the mortgage accrued no benefit on his client and did not satisfy his maintenance obligations. However the defendant failed to acknowledge that he was not in occupation of the property rent free and that he was in effect making a maintenance contribution.

He referred to orders for maintenance and under the Guardianship of Infants Act and averred that he was frustrated in the exercise of his access rights and accordingly stopped paying the additional maintenance of €40. He had not seen his son since the end of 2006 and had incurred legal costs of in excess of €30,000 in endeavouring to obtain joint custody and access.

He said that the defendant had never sought birth costs and never sought to enforce the District Court order. The defendant acted for him in the sale of the property insofar as he was a joint owner and was obliged to pay half of the fees. While the defendant never gave him an undertaking to pay him his share of the proceeds he acknowledged the manner in which the proceeds of sale were to be distributed and is entitled to the proceeds of sale. The monies held by the defendant were on trust for him. The defendant did not have a beneficial interest in those monies. He had been

deprived of the monies since the sale of the property closed on 12th December, 2008.

He was unable to comply with the terms of purchasing his wife's share of the family home, following recently obtained proceedings unless he received his share of the proceeds of sale of the property from the defendant.

He denied the defendant's client's entitlement to arrears of maintenance insofar as she had failed to enforce the maintenance order since 24th May, 2004. In any event this was a matter for the District Court.

The plaintiff's exhibits in relation to fees come to circa €20,000.

The order in respect of the Family Law (Divorce) Act 1996 was made on 19th March, 2009 and provided, *inter alia*, as follows:-

"3. An order pursuant to the provisions of s. 9(1)(a) of the Family Law Act 1995 directing the applicant to transfer to the respondent her entire legal and equitable interest in the family home of the parties situate at 16 Lambay View, Rush, Co. Dublin, upon payment to her by him of the sum of €95,000 and further directing that both the transfer and the payment is to take place contemporaneously."

5. Further correspondence

While not on affidavit, and there being no objection, the plaintiff opened the written instruction of Ms. Sherwin to the defendants, dated 17th December, 2008, and letters of 29th May, 2009 and 11th June, 2009.

5.1 Instructions of Ms. Sherwin

Laura Sherwin instructed Brian P. Doyle, solicitor to retain the sum of €105,764.48 from the proceeds of 213, Little Place Paddocks, which might be due and payable to Justin Keogh, in the following terms:-

" ... there is an issue to whether or not I have received from Justin Keogh my entitlement in respect of maintenance in respect of our son, Cian since the date of the agreement dated 24th February, 1998.

If the above sale of proceeds are released to Justin Keogh then he would be receiving the net half share of the value of the house and I would not have received any maintenance at all from Justin Keogh from February, 1998.

I HEREBY INSTRUCT Brian P. Doyle to retain the monies due to Justin Keogh until the investigation as to whether or not the last paragraph of the above mentioned agreement is valid and that Justin Keogh is entitled to pay his maintenance liability due to me as a credit of his mortgage liability.

Justin Keogh may issue proceedings to force me or Brian Doyle solicitor to release (proceeds). (H)owever we should defend those proceedings and argue that Justin Keogh is not entitled to the full 50% balance of the sale of 213, Little Paddocks but he must make a compensation payment to me in respect of the non payment of maintenance.

Dated 17th December, 2008.

Laura Sherwin."

5.2 On 29th May, 2009, the defendant referred to the claim of the plaintiff that he had contracted with Ms. Sherwin, by agreement dated 24th February, 1998, that his maintenance obligation would be satisfied if he were to pay one half of the mortgage liability. The plaintiff was thereby confirming that the maintenance obligation was €250. The maintenance liability was due and owing from 24th February, 2008. The maintenance amount of €250 instead of being given to Ms. Sherwin was paid to Permanent TSB to pay the plaintiff's half of the mortgage liability. There remained a current maintenance obligation of €400.00 per month.

The total claim calculated at €250.00 per month and €400.00 after 20th May, 2004, comes to €45,000.

Ms. Sherwin's contribution of £20,000 at the time of the purchase should have been converted to a percentage of the purchase price which percentage was 23.2% which would amount to €70,760 on the date of sale.

5.3 On 11th June, 2009, the plaintiff's solicitors wrote referring to instructions that their senior counsel made contact with the defendant's senior counsel to try to agree terms of settlement. It was intended to exhibit and show that letter to the court on 15th June. The letter stated that there was no reference in the agreement of February 1998, that their client was obliged to pay the sum of €250 per month. Their client's actual maintenance obligation on foot of the District Court order of 20th May, 2004 adjourning the case to Balbriggan to clarify if the court was entitled in law to back-date payments to the date of the application. Their understanding was that the court decided that it was not entitled to back-date the maintenance payments.

A payment of €60 per week was to be paid into the mortgage account and was to be a continuation of the payments that the plaintiff was already making.

The plaintiff's agreement to sell the property was on the basis of repeated representations by Ms. Sherwin to the defendants that the plaintiff was to be paid half of the balance of the proceeds following the discharge of the mortgage fees and the sum of €25,426.40 payable to Ms. Sherwin.

6. Decision of the Court

This is an application for a mandatory injunction compelling Ms. Sherwin's solicitor to deliver up the plaintiff's share of the proceeds of sale of property held jointly by the plaintiff and Ms. Sherwin.

The premises were sold on 12th December, 2008, for the sum of €300,000.

An agreement of 24th February, 1998 made at the time of the purchase of the house jointly, gave exclusive occupation to Ms. Sherwin and their son who is now twelve years of age. Ms. Sherwin contributed the sum of £20,000 towards the purchase of the premises which it was claimed amounted to some 23.2% of the purchase price. While no evidence was given of the purchase price in 1998 this percentage indicates a purchase price of over £86,000. The mortgage was £67,000 and Ms. Sherwin contributed £20,000. If there were no agreement and the plaintiff's contribution were considered as maintenance then the entire equity would be held by Ms. Sherwin.

However, the agreement of February, 1998 indicates that Ms. Sherwin had an option to sell the house and to deduct the mortgage costs and £20,000 to which she was entitled from the proceeds and that the remainder would be divided equally between the parties.

It would appear that that agreement was drafted by solicitors for the plaintiff and that Ms. Sherwin was not separately advised.

The agreement further provided that both should contribute equally to the repayment of the mortgage by way of monthly instalments and that the plaintiff's payment in that respect should be deemed to discharge his legal responsibility for the financial maintenance of Cian Sherwin.

Section 27 of the Family Law (Maintenance of Spouses and Children) Act 1976 provides as follows:-

"An agreement shall be void insofar as it would have the effect of excluding or limiting the operation of any provision of this Act (other than section 21)."

Section 21, in turn provides as follows:-

"Any allowance made by one spouse to the other spouse after the commencement of this Act for the purpose of meeting household expenses, or any property or interest in property acquired out of such allowance, shall, in the absence of any agreement, whether expressed or implied, between them to the contrary, belong to the spouses as joint owners."

Allowance is not defined in section 3 of the Act but is clearly not maintenance and would appear to be voluntary payment.

In any event it is clear from section 27 that the provisions of the Act generally cannot be excluded by way of agreement.

Either the payment made by the plaintiff was to Ms. Sherwin, as maintenance or contribution to the mortgage. It would appear that they cannot be both. What is unclear is the amount of maintenance before 2004 when it was fixed at €100 per week. Solicitors for the plaintiff believe that the District Court at the resumed hearing in Balbriggan did not back-date that payment from the date of the court order and, accordingly, what is due and owing is from the date of that order to the present date. It would also appear that that order should continue in force after the resolution of the amount due and owing after the sale of the premises on 12th December, 2008.

Another complication is whether the agreement of February, 1998 is in the light of s. 27 a void agreement to the extent of the maintenance provision and to the extent that Ms. Sherwin may not have been independently advised.

To the extent that the payment on the mortgage was equal to or less than the maintenance payment then, it would appear that there was no contribution by the plaintiff to the mortgage.

Moreover, if it were to be sustained that the agreement was voidable there is an argument that the payment of £20,000 by Ms. Sherwin should be represented by some 23% of the net proceeds of the sale in December, 2008.

In any event, it does not seem that there is evidence, given the exclusive right of Ms. Sherwin and her son to reside exclusively in the house that her contributing to the payment of the mortgage, cannot be said that she occupied the house "rent free" or that there was any value foregone in the plaintiff not residing there.

The court makes these observations on the basis of raising but not of determining the issues between the plaintiff and Ms. Sherwin who is not a party to these proceedings.

However the Court is merely asked to deal with the issue of the notice of motion requesting interlocutory relief against Ms. Sherwin's solicitor.

It is clear that such interlocutory relief cannot be granted notwithstanding the urgency of the matter from the plaintiff's point of view. It is clear that the defendant cannot pay out any balance until the issue has been resolved between the plaintiff and Ms. Sherwin.

In the circumstances the Court refuses the relief sought.