Neutral Citation Number: [2008] IEHC 463

THE HIGH COURT

2007 79 CA
Circuit Ct. No. 7013/02

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN
IN THE MATTER OF THE PARTITION ACTS 1868-1876 AND
IN THE MATTER OF THE PREMISES SITUATE AT 39 LC DUBLIN 15

BETWEEN

M. C.

APPLICANT

AND
B. S.

RESPONDENT

Judgment delivered by Mr. Justice Herbert on the 17th day of June, 2008.

1. The first issue requiring to be addressed in this appeal is a jurisdictional one. In the amended Equity Civil Bill, issued on the 17th December, 2004, the applicant/appellant claims an Order pursuant to the provisions of the Partition Acts 1868 and 1876, providing for the sale, in lieu of partition, of the lands and premises in the title hereof, together with an Order permitting the applicant to purchase the same and the contents therein by paying the defendant/respondent such portion of the equity of redemption as this Court should determine.

2. The court was referred to the decision in *O'D. v. O'D.* (Unreported, High Court, Murphy J., 18th November, 1983) and, to the decision in *F.F v. C.F.* [1987] 1 I.L.R.M. 1, per Barr J.

3. In my judgment, this Court undoubtedly has jurisdiction to grant the relief claimed in these proceedings.

4. The common law writ, "*de participatione facienda*" entitled co-parceners at common law or by the custom of gavelkind, to compel a division of the land (Vide: E.J. Foster, "*The Law of Joint Ownership and Partition of Real Estate*" 1878), (Stevens and Sons). It is referred to by the author of Britton (1290-1292) Bk. 3 CAP 7 (Vide F.M. Nichols, (1983) Reprint). It is also considered by Sir Thomas Littleton, a judge of the Court of Common Pleas in the Reign Edward IV in his famous work "The New Tenures" considered it have been written between 1450 and 1460, (Vide W.S. Holdsworth, "*History of English Law*", Vol. 8 (3rd Ed. Rewritten)),

5. The Statute 31, Henry VIII Cap. 1 [1539] which applied only to England, Wales or the Marches of the same, extended the benefit of this writ to joint tenants and tenants in common "of any estate or estates of inheritance". The Statute 32 Henry VIII Cap. 33 [1540] which had a similar territorial application, gave to joint tenants and tenants in common for a term for life, or year or years and to joint tenants or tenants in common where some one of them held for life or years with another who held an estate in inheritance or freehold, a right to seek partition by Writ of Partition before the Court of Chancery upon their Case or Cases.

6. Similar legislation was enacted in Ireland by the Statute 33 Henry VIII Cap. 10 [1542]. This statute provided, in the first section, that all joint tenants and tenants in common who held an estate in inheritance "within this land of Ireland", were compelled by virtue of the Act to make partition,

> "By writte de participatione facienda, in that case to bee devised in the King our soveraign lord's court of chancerie of this land, in like manner and forme as coparcioners by the common lawes of this land have been and are compelled to do, and the same writte to be pursued at the common law".

7. In the third section of this Statute, it was provided that in the case of joint tenants or tenants in common for life, year or years, or where one has an estate of inheritance and the others for life or years, partition should be compellable from thenceforth by writ of partition, "to bee pursued out of the King's court of chauncerie upon his or their case or cases".

8. The Irish Statute 9 William III [1697] Cap. XII, was a procedural Act only, "for the more easy obtaining partition of lands in co-parcenary, joint tenancy and tenancy in common", upon writs of partition. The Statute 3 and 4 William IV Cap. 27 [1833], "an Act for the limitation of actions and suits relating to real property and for simplifying the remedies for trying the rights thereto", by s. 36 provided that no writ of partition should be brought after the 31st December, 1834. By s. 44 of that Act, the legislative provision was stated to apply to Ireland.

9. In Foster, (opus cited) p. 89, it is stated that prior to this date the Court of Chancery had assumed jurisdiction over partition, "the Common Law jurisdiction having, however, been rendered practically obsolete by the concurrent jurisdiction which had sprung up in Equity was finally abolished by Act 3 and 4, William IV Cap. 27 S. 36". The history of this 'usurpation' is discussed by Foster (opus cited) at Chap. 10, pp. 103 to 109; by Holdsworth (opus cited) Vol. 15, and by an extant author, H. Conway, "*Co-Ownership of Land*", 1st Ed. November, 2000, Butterworths Cap. 3, para. 3.20, p. 27 and 28. I am satisfied from a consideration of the references cited, in these works, that the opinion of each of these learned authors and the expert opinion of Dr. H. Conway is correct and that this represented the state of the domestic law of Ireland, as regards partition, immediately prior to 1868.

10. In, "*The Principles of Equity as Applied in Ireland*", (1936), (The Fodela Press, Dublin), T. O'Neill Kiely states as follows at p. 7:-

> "The reports of the Court of Chancery in Ireland do not extend back much further than the year 1800. But from that date, a comparison of the English and the Irish reports shows that the system of Equity was the same in broad principle in both countries as was natural having regard to the history of the matter and to the fact that the Irish Chancellors were men who had, as a rule, been outstanding advocates at the English Bar in their day. To conclude, the main difference between Equity as administered in England and Ireland at the present day is due not to the origin of the two systems but to different statutory provisions applying to the respective countries. Subject of course to this: Irish Courts sometimes arrived at a conclusion different from that of their English prototypes."

11. Reference may also be had to H. Delany "*Equity and the Law of Trusts in Ireland*", (4th Ed. – 2007, - Thomson, Round Hall), Cap. 1 pp. 4-12 inclusive.

12. Significantly in this context the Statute 31 and 32 Victoria c. 40 [1868] "an Act to amend the law relating to Partition", in s. 2 provides that "in this Act 'the Court' means the Court of Chancery in Ireland and the Landed Estates Court in Ireland". The provisions of this Act were manifestly directed to the Court of Chancery only and, extended the powers of that court in dealing with partition

suits. The Partition Act, 39 and 40 Victoria c. 17, [1876] is merely a procedural Act relating to the Act of 1868. In my judgment the provisions of these Acts and the equity jurisdiction which they extended, was not in any way affected by the repeal of 33 Henry VIII Cap. 10 [1542], by s. 1 and the Schedule of the Statute Law Revision (Pre Union Irish Statutes) Act 1962,

13. By s. 36(5) of the Supreme Court of Judicature (Ireland) Act 1877, (40 and 41 Victoria c. 57), jurisdiction in respect of the partition or sale of real estate, including chattles real was assigned to the chancery division of the High Court of Justice. This jurisdiction was transferred to the High Court of Justice of Saorstat Éireann by s. 17 of the Courts of Justice Act, 1924 and Article 73 of the Constitution of Saorstat Éireann 1922. It was not argued before me that this law is inconsistent with any of the provisions of the 1937 Constitution of Ireland and, in my judgment it was carried over and continued in full force and effect by virtue of Article 50, s. 1 of the 1937 Constitution and, is vested in the High Court by virtue of s. 2 of the Courts (Establishment and Constitution) Act 1961 and by s. 8 of the Courts (Supplemental) Provisions Act 1961.

14. Insofar as the present jurisdiction in this Court to grant partition or sale in lieu of partition, "may have been in any manner derived from" 33 Henry VIII Cap. 10 [1542], repealed by the Act of 1962, it is expressly provided by s. 2(1) of the Act of 1962, that "any existing principle or rule of law or equity, or any established jurisdiction, form or course of pleading, practice or procedure", shall not be affected by the repeal.

15. For these reasons, I am fully satisfied that this Court retains full jurisdiction to grant the relief sought in the amended Equity Civil Bill.

16. I find on the evidence that the pertinent facts of this case are as follows:-

17. MC and BS went through a ceremony of marriage on the 1st January, 1979. Two children were born of their union, a daughter and a son, both of whom are now adults. They initially lived in a premises held from Dublin Corporation under a Tenancy Agreement, in which they were both named as tenant. Though it is pleaded by BS in his amended defence and counterclaim that MC was not working at any relevant period and, made no direct or indirect contribution to the purchase of the dwelling house and premises at issue in these proceedings, I find on the evidence that MC was employed in each of the years 1983 to 1993 inclusive. Though she continued in employment from 1995 onwards, this is not relevant to these proceedings. Mr. BS was employed from the 1st January, 1992 to the 18th March, 1994. Prior to the 1st January, 1992 and after 18th March, 1994 he appears to have been in receipt of Social Welfare Payments of various types. In 1999, he obtained employment and returns of income were discovered on oath up to 31st December, 2002.

18. I find on the evidence that early in 1992, MC and BS decided to change their accommodation and to purchase a dwelling house. They consulted a Mortgage Broker and on advice received, they each opened a separate account with a Credit Union. On the 17th June, 1992, Mr. BS secured a loan of £3,000 and on the 11th August, 1993 a further loan of £3,000 from that Credit Union, for the purpose of purchasing a house. On to about the 29th July, 1993 MC and BS entered into a contract to purchase a freehold three bedroom semi detached house, the subject matter of these proceedings, for £35,000. A deposit of £1,000 was paid. On execution of the transfer MC, and BS were registered on the appropriate Land Registry Folio of Freeholders as joint owners of the property. On or about the 14th October, 1993, they executed a joint mortgage over the property in favour of the Irish Permanent Building Society to secure an advance of £32,200, repayable over a term of 300 months. The fee due to their Solicitors, together with Search fees and Commissioner's fees, and such VAT as was payable thereon, amounted to £566. The Solicitors Outlay Account inclusive of VAT amounted to £1,784.50.

19. On the 12th October, 1993, MC and BS jointly applied to the Local Authority for a mortgage allowance. They received a Certificate of Approval dated the 13th December, 1994, for the following amounts: 1st year £1,000, 2nd year £800, 3rd year £600, 4th £500 and 5th year £400. It was a condition of their obtaining this approval that they surrendered tenancy and discharged any arrears of rent due in respect of the former property. On the 31st March, 1994, Mr. BS paid a sum of £200 in respect of such arrears of rent and on the 24th November, 1994, MC and BS paid a further sum of £140.90. A Certificate dated the 24th November, 1994 confirmed that MC and BS had no outstanding arrears of rent in respect of the property of which they were formerly the tenant.

20. Unhappy differences arose between MC and BS and, at the end of November, 1994, MC left the property the subject matter of these proceedings. In a Consent Order made in proceedings under the Guardianship of Infants Act 1964, in which MC was the applicant and BS the respondent, and bearing Record No. Dublin Circuit County of the City of Dublin, No. 229/95, (the matter having been compromised by an agreement entered into between the parties and reduced into writing, dated 30th July, 1995 and signed by MC and BS in the presence of their respective solicitors), the Court ordered as follows:-

> "That the Applicant and Respondent do have joint custody of the infants and it is agreed between the parties that they should continue to reside in the family home at 39, LC, Dublin 15 with the Respondent (which premises and contents to remain in joint ownership of the parties until further otherwise agreed or ordered)."

21. In proceedings in the High Court, Record No. 1995 No. 73 M, in which BS was the petitioner and MC (otherwise M.S.), the respondent, by Order made the 30th November, 1998, the court found that the purported marriage solemnised on the 1st January, 1979, between MC and BS was null and void and of no legal effect and pronounced and declared accordingly.

22. I find on the evidence that BS and MC with a view to purchasing the dwelling house, in the period 1st January, 1992 to 30th November, 1994, pooled their respective incomes. On the oral evidence of BS, corroborated by a letter dated 3rd July, 2003 from his employers and, a PAYE Cessation Certificate in respect of the period 6th April, 1993, to 18th March, 1994, his net income during that period was £10,370.73 in the year 1992 - 1993 and, £11,112.56 in the year 1993 – 1994. By reference to a letter dated 26th November, 2002 from the Department of Social Community and Family Affairs, the earnings of MC in this period were £3,120 in the year 1992 - 1993 and, £2,820 in the year 1993 – 1994.

23. The Permanent TSB mortgage loan account statement, produced on discovery of documents by BS and proved in evidence by him at the hearing of this Appeal, discloses that from the 14th October, 1993, to the 28th November, 1994, total payments in the sum of £3,064.70 were made on foot of the mortgage. It was accepted at the hearing before me that after MC left at the end of November, 1994, she made no more payments of any sort, direct or indirect towards the purchase of the property.

24. MC gave evidence that from 1990 to 1994 part of her weekly wage was paid in cash. She said that she paid this cash also into the common fund between January, 1992 and the end of November, 1994. It is not improbable that MC did in fact receive some payment in cash, but she was unable to give any specific details as to dates or amounts. The name of the particular business employer was disclosed to the court but no witness from that firm was called to give evidence that such payments were made to MC, nor were any documents produced which might substantiate this claim. MC stated that she had opened an account with a Credit

Union, but no account statement was discovered or produced in evidence. I am not prepared to accept on this evidence that any sums over and above those to which I have already referred were added by MC to the family pool.

25. In a letter dated 20th April, 2005, from BS reference is made to, "my personal TSB Account (35000744)" and to "a Joint Account in the Irish Permanent (23/66674816)". No statement for these accounts was discovered or produced in evidence. A statement of account in respect of Account No. 3503 of Mr. BS in the Credit Union was not discovered or produced in evidence. I understood from the evidence that MC also had a Credit Union Account in the years 1992, 1993 and 1994, but no statement giving details of any transactions on this account was discovered or produced in evidence. MC gave evidence that she had borrowed £1,000 from the owner of the business where she was employed and that she gave this to BS to assist in the purchase of the property the subject matter of these proceedings. No contemporaneous record of this loan was produced in evidence. However, a letter on its face appearing to have been written by the owner of the business (who was not called in evidence) some ten years after the event confirms this alleged loan. Not without some considerable hesitation I am prepared to accept that MC did in fact borrow £1,000 from her employer and, did give it to BS to assist in the purchase of the property the subject matter of these proceedings.

26. A Valuation Report, obtained by the Irish Permanent Building Society on 24th March, 1993, and admitted into evidence, valued the property on that date at £35,000.

27. I find on the evidence of Mr. BS, corroborated by the mortgage loan account statements, that from 28th November, 1994, to 6th October, 2005, BS with very great difficulty and, with the assistance of the Money Advice and Budgeting Service (MABS), who negotiated on his behalf with various creditors, has paid approximately €41,703 on foot of the mortgage. The principal sum advanced on the 14th October, 1993, was €40,885.57 (£32,200). As of 6th October, 2005, the total balance outstanding on foot of the mortgage was €37,654.38. Mr. BS was then €6,423.45 in arrears with the monthly payments. I find on the evidence that BS paid the sums of £1,784.50 and £566 due to the solicitors who acted on behalf of himself and MC in the purchase of the property. In addition BS repaid the sum of £6,000 borrowed by him from the Credit Union. I find on the evidence that out of this borrowing, BS paid the deposit of £1,000 on the purchase of the property, the above mentioned sum of £1,784.50 and, a sum of £1,800 being a balance due on foot of the purchase price. This latter figure is confirmed by a letter dated 12th October, 1993, from their solicitors to BS and MC. Other than these payments, and the sum of £346.90, which I find on the evidence was paid by BS in discharging a claim for, "undercharge rent" in respect of the former property, as per a letter from Dublin Corporation Housing Department dated 25th February, 1994, the evidence does not enable me to conclude on the balance of probabilities that the remainder of the £6,000 was applied directly or indirectly in the purchase of the property the subject matter of these proceedings.

28. I find on the evidence that in the years 1992 - 1993 and 1993 – 1994 BS and MC were experiencing considerable financial difficulties. Apart from themselves there were two young children to support. Arrears of rent were owing (total £340.90) in respect of the former property and, on the 29th December, 1994, the monthly repayments of £251.03 on foot of the mortgage on the present property was in arrears in the sum of £1,914.32. Ms. Mary Tighe of MABS (now retired) gave evidence that Mr. BS sought her advice in 1994 because the building society was then threatening to take repossession proceedings in respect of the property because of the arrears of instalments. Her evidence was that MC attended the initial meeting only. Ms. Tighe was successful in arranging a temporary compromise with the building society. Proceedings for possession were taken by the building society on the 18th May, 1998, in the Dublin Circuit Court. Again, it appears that MABS was able to negotiate a settlement on behalf of Mr. BS with the solicitors for the building society. As appears from the correspondence admitted into evidence, MABS continued to mediate with the building society on behalf of BS up to September, 2004. The evidence leaves it somewhat uncertain as to whether this invaluable organisation continues to assist BS in dealing with the mortgage repayments.

29. BS and MC were registered on the Land Registry Folio as joint owners of the property, as permitted by the provisions of s. 91 of the Registration of Title Act 1964, (No. 16 of 1964). As such joint tenants the execution of the mortgage by both of them did not serve to sever the joint tenancy. They both joined in the mortgage and there was no evidence of any intention on their part to sever the joint tenancy in the equity of redemption and no inference of such an intention arises from the transaction itself, (see *Re. Haye's Estate* [1920] 1 I.R. 207, where it was held that an agreement for sale by six joint tenants to the Congested Districts Board did not in itself, absent evidence of intention to the contrary, operate as a severance of the joint tenancy in the purchase money resulting).

30. I am satisfied that the rider in parenthesis in the Consent Order of the Circuit Court made on the 3rd July, 1995, that the premises and their contents were to remain in the joint ownership of the parties until otherwise agreed or ordered, did not constitute and, was not intended to constitute an agreement by MC and BS that they held the legal interest in the Equity of Redemption in trust for each other as tenants in common in equal undivided shares. On the contrary, I am satisfied that the purpose of this rider was to affirm the status quo, especially in circumstances where a Decree of Nullity had not yet been sought, issues under s. 36 of the Family Law Act 1995, had not been raised and, the parties were proposing to enter into a formal Deed of Separation as provided for by Clause 3 of the Consent Agreement, in which the issue of property rights between them would most probably have been addressed and resolved.

31. The High Court by Order made 30th November, 1998, pronounced and declared that the marriage solemnised between BS and MC on 1st January, 1979, was and is null and void by reason of duress and lack of fully informed and free consent. The consequence of this decree, in my judgment, is that the marriage is deemed in Law never to have existed. This must be contrasted with a situation where the marriage is considered voidable, that is, one regarded as a valid marriage until it is dissolved by the court. In *Soar v. Foster* [1858] 4 K. and J. 152, Page Wood V.C., having considered the development of the presumption and the several reasons offered to support it, held as follows:-

> "The law has confined the rule as to a presumption of this description to certain clear and definite propositions which are easily understood; and I should be opening a very wide field if I were to hold that the mere circumstances of the ceremony of marriage having been gone through between persons who must have known that they were incapable of contracting a valid marriage, raises such a presumption as to intention with which a purchase of this description was made, as to throw the onus of proof upon those who rely upon the ordinary rule in such cases, viz., that there is a resulting trust for the purchaser.
>
> Various motives might be suggested as leading to a purchase of this description; and there is no necessity to resort to the supposition that it was intended as an advancement.
>
> That being so, the onus of proof is with the Defendants to shew that the purchase was intended as they contend it to have been."

32. Counsel for MC referred to the decision in *Dunbar v. Dunbar* [1909] 2 Ch. 639, - a case where the manner in which the purchase was funded was not entirely dissimilar to the instant case. However, in that case Warrington J., held (at p. 644), that the marriage was not void *ab initio*, but only voidable and, therefore the presumption of advancement remained and, was based on the presumed

intention of the donor at the time the gift was made and, did not in any way depend upon whether the marriage which was then existing would or would not continue until the death of either party.

33. At the time the property, the subject matter of this appeal was purchased and transferred into the joint names of the MC and BS, I am satisfied on the evidence that the intention of BS was to provide for the person he mistakenly believed to be his lawful wife, and vice versa. I find on the evidence that this belief that they were lawful husband and wife, in which belief they were mutually mistaken, was integral to the entire transaction and to all the arrangements entered into by MC and BS in relation to this property. It was perfectly plain on the evidence that BS and MC would never have entered into this transaction if they had known that they were not lawfully married. I find on the evidence that MC and BS were not and never intended to be co-habitees. In this very material respect the instant case is distinguishable on its facts from the case of *Stack v. Dowden* [2007] 2 W.L.R. 831 (House of Lords).

34. In my judgment the true inference to be drawn from the evidence, is that MC as the assumed wife of BS insisted, or they both may have agreed, or have been advised by the solicitors acting for them both, that as his wife (as everyone then mistakenly believed) and, particularly because she had contributed to the common pool, her name should be on the title. I am satisfied on the evidence, that even though the mortgage was a joint mortgage, - something which I have no doubt the mortgagee insisted upon having regard to the joint tenancy in the property and to the provisions of the Family Home Protection Act 1976, - the intention of MC and BS was that it was really Mr. BS who had purchased the property and, who would be responsible for the mortgage repayments. As was pointed out by Warrington J., in *Dunbar v. Dunbar* (above cited) at p. 646, the repayment of the mortgage instalments was nothing more than BS providing the purchase money, though it was done at subsequent dates. (see also *W. v. W.* [1981] I.L.R.M. 202 at 204 per. Finlay P. (as he then was)).

35. To borrow the words of Henchy J. in *R.F. v. M.F.* [1995] 2 I.L.R.M. 572, to hold in this case that MC acquired the beneficial interest she claims would be based on a false interpretation of the arrangement made by the parties. In my judgment in the most unfortunate circumstances of this case, the just and correct approach for this Court to adopt is to regard the property as having been purchased by strangers, - in the sense of persons who are not in some special relationship with each other to which the law attributes specific rights and obligations, - who have provided the purchase money in unequal shares. In such a case equity presumes that the person who paid the greater share did not intend to make a gift of the difference to the other person and, that they therefore hold the joint tenancy in trust for themselves as tenants in common in proportion to the amounts contributed. (See *O'Connell v. Harrison* [1927] I.R. 330 per. Kennedy C.J. at 335-6). In the instant case, of course, one is concerned only with the equity of redemption.

36. This presumption is rebuttable, but, I am quite satisfied that there is nothing in the evidence to suggest that Mr. BS intended to benefit MC in any way whatsoever other than as his lawful wife and vice versa. Despite the pleading at para. 5 of the Amended Counterclaim that MC made no contribution direct or indirect to the purchase of the premises, in cross examination Mr. BS accepted that she probably had made some indirect contribution to the purchase by making contributions to the family pool in the period 1st January, 1992, to 30th November, 1994. He was not prepared however, to concede that she was entitled to the return of this money or, to have it reflected in a beneficial ownership of the property, because he insisted she had done nothing whatever to help him rear or provide for their two children. I am satisfied however, that this admission by Mr. BS avoids the difficulty in this sort of case expressed by Lord Pearson in *Gissing v. Gissing* [1971] A.C. 886 at 909, cited with approval by Gannon J., *in McGill v. L.S.* [1979] I.R. 283 at 291, where he said (p. 909):-

> "Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in cases where the court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which can be inferred as referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift."

37. I have already found that the net income of Mr. BS in the period 1st January, 1992 to 28th November, 1994, was £21,483.29 up to 18th March, 1994. In the same period the earnings of MC (disregarding any alleged payments in cash), was £5,940. I am satisfied that MC in this period also borrowed £1,000 from her employer and gave it to BS to assist in the purchase of the property, - probably to meet mortgage repayments. In the period 14th October, 1993, to 28th November, 1994, a total sum of £3,064.70 was repaid to the mortgagee. I find on the evidence that all the above earnings were paid by MC and BS into a common family pool. From this pool all the ordinary living expenses of themselves and their two young children had to be paid in addition to meeting the monthly mortgage repayments. That this pool was insufficient for that purpose is demonstrated by the fact that as of 29th December, 1994, the monthly mortgage repayments were in arrears in the sum of £1,914.32. Therefore, the contribution of MC to the common fund was particularly important (see *E.N. v. R.N.* [1992] 2 I.R. 117 at 123 per. Finlay C.J.).

38. In my judgment it would not be equitable to "pick apart this common fund" in order to establish proportionate shares in MC and BS by crediting to each his or her earnings. This would be inconsistent with the clear intention of the parties, as to which there was no dispute on the evidence, to create a common fund to enable them to finance the purchase of the purchase of the property. In my judgment therefore, they should each be credited with the payment of half of this sum of £3,064.70 repaid prior to the end of November, 1994, to the mortgagees. Therefore, I find that the sum contributed by MC to the purchase of the property, the subject matter of this Appeal, was £2,532.35 (€3,216.08) which includes the £1,000 borrowed by MC from her employer and paid to BS. *In Jones v. Maynard* [1951] 1 Ch. 372, - a case in which, following upon a decree of divorce the former wife claimed a 50% interest in a joint banking account where there was no agreement between the parties as to mutual rights in that account, - Vaisey J. at p. 575, held as follows:-

> "In my view the money which goes into the pool becomes joint property. The husband, if he wants a suit of clothes, draws a cheque to pay for it. The wife, if she wants any housekeeping money, draws a cheque, and there is no disagreement about it. It follows that when monies were taken out of the joint account for the purpose of making an investment, the intention which I attribute to the parties is equality and not some proportional entitlement to be arrived at by an inquiry as to the amounts contributed respectively by the husband and wife to the common purse …"

39. I have already found that in the period 28th November, 1994, after MC had left the property, to 6th October, 2005, Mr. BS paid approximately €41,703 to the mortgagees in repayment of the loan, leaving a balance then outstanding of €37,654.38. I find that in addition, he paid €2,350.50 to the solicitors in respect of their fees and outlay in relation to the purchase. He further paid the £1,000 deposit on the purchase and a closing balance of £1,800, out of the £6,000 which he had borrowed personally from the Credit Union and had personally repaid. This money was not paid out of the common fund or pool and, was almost entirely paid by Mr. BS after MC had left the property and, the differences had arisen between them which ended with the Decree of Nullity on the 30th November, 1998. Such of these sums as were paid prior to the end of November, 1994, were paid out of personal borrowings by Mr. BS from the Credit Union secured on his shares and by a promissory note and, which he repaid in full himself. In my judgment MC has no right to any interest or benefit from these payments amounting in total to €48,244.

40. As appears from the Certificate of Approval No. DC 15F, dated 13th December, 1994 the Mortgage Allowance Scheme payments made by the Local Authority were subject to MC and BS returning to the Local Authority, their former rented dwelling and otherwise fulfilling the conditions of the Scheme, (which included discharging arrears of rent as I have previously indicated in this judgment). In such circumstances and, even though the payments were made over a period of five years commencing in 1993, in my judgment MC and BS were entitled to be credited with the payment of one half each of the total amount of £3,300 (€4,191) or €2,095,50 each.

41. I therefore find on the evidence, that MC and BS as joint tenants hold the equity of redemption in trust for themselves as tenants in common, as to one undivided tenth share in the case of MC and, as to nine undivided tenth shares in the case of BS.

42. MC seeks a sale of the lands and premises in lieu of partition. She also seeks a declaration that she is entitled to a 50% beneficial interest in the premises and in the contents of the premises. In her Amended Equity Civil Bill, (and also in the former Equity Civil Bill), MC has failed to identify the particular section of the Partition Act 1868, under which she is making her claim. At paras. 6 and 7 of the Amended Equity Civil Bill, MC sets out the reasons why a sale should be granted in lieu of partition. Having found that MC is not interested to the extent of at least one moiety in the property as alleged, it would be open to the court to dismiss the appeal as no claim is made in the alternative under s. 3 or under s. 5 of the Act of 1868. However, as none of the three sections is cited as the basis for her claim, it seems to me that the most appropriate and just course for this Court to adopt, reserving the position as to costs, is to treat the application as made under s. 5 of the Act of 1868, (Vide *Evans v. Evans* [1883] 31 W.R. 495), since MC cannot bring her claim within the provisions of s. 4 and, the pleading is in no manner sufficient for the purpose of a claim based upon the provisions of s. 3 of the Partition Act, 1868.

43. Section 5 of the Partition Act 1868, provides as follows:-

> "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates, requests the Court to direct a sale of the property and distribution of the proceeds, instead of a division of the property among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct the sale of the property, and give all necessary or proper consequential directions; and in case of such undertaking being given, the Court may order a valuation of the share of the party requesting a sale, in such manner as the Court thinks fit, and may give all necessary or proper consequential directions."

44. This section and ss. 3 and 4 of the Partition Act, 1868 were considered by the House of Lords in *Pitt and Others v. Jones and Others* [1880] 5 A.C. 651, (Lord Blackburn and Lord Watson, - Lord Hatherley dissenting). At p. 658 of the Report, Lord Blackburn refers to the fact that the construction of the Act of 1868 could not properly be said to have been settled by authority, even in the Court of Appeal, before that case. At pp. 659-660, Lord Blackburn then proceeds to construe ss. 3, 4 and 5 of that Act in the following terms:-

> "Each one of the three sections begins with the same phrase, 'In a suit for partition where if this Act had not been passed a decree for partition might have been made then …….' They are, in form at least, independent enactments, though, no doubt, all to be construed together. The 4th and 5th sections are not, either of them, in form at least, nor, as I think, in substance, provisoes on the 3rd, though it comes first in order. Indeed, I think the intention would have been more obvious if the order in which the enactments have been placed had been reversed, and the 5th section placed as 3rd, and the 3rd as 5th. Sect. 5 says, that in every case of a suit for partition (whether the sale would or would not be more beneficial to the parties than a partition), if any party (whether owning more or less than a moiety) requests a sale, the Court shall have a discretion to order such a sale, unless the parties opposing a sale are willing to take his share at a valuation. But it does not say, nor do I think it was intended to say, that a party who requests a sale of the whole must take that valuation; I think it means that if a party presses for a sale, and the Court thinks that the opposing parties in fairness ought either to buy him out or to consent to a sale, it may order a sale unless they will agree to take his share at a valuation, in which case the party requesting a sale may either accept that valuation or not. If he does not choose to accept that valuation, he cannot be forced to do so; but will then have his common law right to a partition. This is what was decided in *Williams v. Games* L.R. 10 Ch. Ap. 204, and it is what I understand to be the opinion of Lord Justice Mellish in that case.
>
> But, I think, the party declining to accept this undertaking for a valuation is not hereby prevented from pressing for a sale under the other sections of the Act if he can bring himself within them. The Court cannot, under sect. 5, order a sale merely on the request of a party if the opposing party is willing to buy him out. It may make such an order under the 3rd section if the case is brought within it. It must, under sect. 4, unless it sees good reason to the contrary, do so where the party requesting a sale is owner of a moiety or more. This was the construction put upon sect. 4 in *Pemberton v. Barnes* L.R. 6 Ch. Ap. 685. I see that in this case Vice-Chancellor Malins says he still thinks the view he took of the construction of that section preferable to the one put upon it by the Lord Chancellor. I cannot agree with him; but the Lord Chancellor (Lord Hatherley) did express an opinion that the 5th section was applicable to proceedings under the 3rd and 4th sections, and was intended to give the Court a discretionary power to prevent a sale under these sections if the opposing party was willing to bind himself to take the Applicants share at a valuation; and this is contrary to the opinion I have just expressed. I think if this had been intended it would have been properly expressed in the form of a proviso on the 3rd and 4th sections, and not by a fresh substantive enactment; and it would have been properly expressed by saying that the Court shall not direct a sale if the other parties undertake, and etc., and not by saying that the Court may direct a sale, unless, and etc. But I cannot think it was intended; a sale by valuation is a very different thing from an open sale, and I do not see why a party should be forced to sell his property at a valuation; and I think the words used here give him an option to accept such a valuation, if offered to him, but do not compel him to do so."

45. Section 5 of the Partition Act, 1868 was further considered by North J. in *Richardson v. Feary* [1888] 39 Ch. D. 45 at 47 to 49 in the following terms:-

"In a proper case the Court could direct a sale under sect. 3 of the Act. The present application for a sale is not made under sect. 3 but under sect. 5, and it may be assumed that none of the circumstances mentioned in sect. 3 as justifying the Court in ordering a sale of the property exist here. It cannot be said that for any of the reasons mentioned in sect. 3 a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between them. Under sect. 4 it is not open to the Court to refuse a request for a sale made by a party or parties interested to the extent of a moiety in the property, 'unless it sees good reason to the contrary.' The words of sect. 4 are much stronger than those of either sect. 3 or sect. 5. Then sect. 5 says that, if any party interested requests a sale instead of a partition, the Court may, 'if it thinks fit', direct a sale, unless the other parties interested undertake to purchase the share of the party requesting a sale. I have been asked to construe this section as if it were expressed in the same terms as sect. 4, - as meaning that, if any party requests a sale, the Court shall direct a sale unless it sees good reason to the contrary. The difference between the language of the two sections is significant, and I have no doubt that sect. 5 was intended to give the Court a different power from that which is given by sect. 4. I do not think that *Williams v. Games*, Law Rep. 10 Ch. 204 has any application to the present case. In *Drinkwater v. Ratcliffe*, Law Rep. 20 Eq. 528, Sir G. Jessel , M.R., said: Law Rep. 20 Eq. 531

> 'The 5th section provides that, if any party interested in the property requests the Court to direct a sale of the property instead of a division, the Court may, if it thinks fit (this is discretionary again), unless the other parties interested in the property undertake to purchase, give all necessary and proper directions for such a sale. What does this mean? Under the 4th where the parties requesting a sale have got more than a moiety, you do not want that; it consequently applies to the case of the owners of less than a moiety making the request. Now that case is provided for by the 3rd section; in every possible case where the Court thinks a sale is proper and for the benefit of the parties interested. Therefore the 5th must apply to a case where the Court sees no reason for preferring a sale to a partition. That case is not provided for by the 3rd, nor is it provided for by the 4th section. Where the Court sees no reason at all, still any party interested may apply.'

That is quite a different thing from saying that, if the Court sees no reason at all for preferring a sale to a partition, it shall on the application of any party interested direct a sale. *Pitt v. Jones* 5 App. Cas. 651 is not a direct authority on the present question, though no doubt there are some observations made by Lord Watson which do give some colour to Mr. Farwell's argument. Those observations were addressed to an entirely different question, viz., whether, where one party desired to have a sale, and the other parties were willing to purchase his share, he could be compelled to sell his share at the valuation made of it. I do not think there is anything in *Pitt v. Jones* which obliges me to hold that, where a power is given to the Court to direct a sale 'if it thinks fit,' it is compelled to order a sale, especially having regard to what Sir G. Jessel, M.R., said in *Drinkwater v. Ratcliffe*, 19 Beav. 316. And in *Pitt v. Jones* Lord Blackburn said, [North J. then quotes the passage from the judgment of Lord Blackburn which I have already cited].

In those remarks, if I may say so, I entirely concur. But here the party who is pressing for a sale has not satisfied me that in fairness the parties who oppose a sale ought either to buy him out or to submit to have the property sold. The majority of the Judges in *Pitt v. Jones*, 4 Beav. 184 took the same view of sect. 5 as I do. Lord Watson no doubt went further than any of the other noble Lords, but he was not actually dealing with the present question. I think that sect. 5 is not synonymous with sect. 4, but the party who applies under sect. 5 for a sale must shew some reason for it. I think the Court has a discretion whether it will direct the sale, and no reason has been shewn to induce me to do so in this case."

46. I regret having had to cite so extensively from these two judgments, but I do so, because, as may be observed, the interpretation placed on these three sections of the Partition Act 1868, is quite elaborate and, I found that any attempt on my part to summarise or to restate in a shorter form the interpretation placed on these sections by Lord Blackburn and by North J. risked sacrificing precision for brevity.

47. In my judgment, MC must demonstrate to this Court that she has a good reason for wanting a sale. This does not have to be a non-subjective reason, but the reason must be reasonable, rational and *bona fide*. MC must further satisfy the court that in fairness, BS ought to purchase her share or submit to a sale. MC cannot be forced to accept an undertaking from Mr. BS to purchase her share in the equity of redemption at a valuation obtained by the court. However, as her share is far less than a moiety she must, if the court is to exercise its discretion in her favour, bring herself within the provisions of s. 3 and satisfy the court that because of the nature of the property, because of the parties interested in it, because no party is under a disability or for any other circumstance, a sale and distribution of the proceeds would be more beneficial for the parties than a partition. If so satisfied, the court may direct a sale instead of a partition despite the opposition of Mr. BS.

48. It is quite obvious from the pleadings and, the evidence given in this appeal that the reason why MC is seeking a sale in lieu of partition is in order to acquire the property and its contents herself on very advantageous terms. She is not seeking to realise her own beneficial interest in the property and the contents for some *bona fide* reason, - and there are very many reasonable and rational reasons why a person in her position might wish to have the value of their interest which otherwise could be unavailable for many years. Though still liable under the terms of the mortgage, on the evidence no claim has ever been made against her personally and, I have no doubt given the evidence as to her circumstances that the mortgagee would look to its security and not to a personal action in debt against her in case of a default in repayments and, an inability on the part of Mr. BS to deal with it. On the evidence, I am not at all satisfied that MC has expended such money on the premises that it would be fair and reasonable that she should be entitled to acquire the interest of Mr. BS. While the court can and, generally does, give liberty to the parties in Partition proceedings to bid at a sale directed by the court in such proceedings, this does not mean that a desire to purchase the property, particularly where, as in the instant case it is in the occupation of the other person interested as their sole residence, is either a good reason for wanting a sale in lieu of partition or sufficient to satisfy the court that the other person interested should submit to such a sale.

48. The evidence established that apart from a brief period, early in 1995, MC left this property at the end of November 1994 and, in due course formed a new relationship and established a separate life and residence. Mr. BS reared their two children and has at all times since 14th October, 1993, resided in this property and has spent considerable sums, having regard to his very limited means, in improving the property. The daughter of MC and BS and her child reside with BS in the property. A sale would leave all three homeless. Given the evidence of his age, health, limited education and skills and poor prospects of any form of continuous employment in the future, I am satisfied that Mr. BS would experience considerable if not insurmountable difficulties in re-housing himself from his own resources, if this property were to be sold and, it is probable that Mr. BS, his daughter and her child would become dependant upon the public housing programme. The evidence established that Mr. BS has with great difficulty struggled for the past fourteen years to retain possession of this property and, could not have done so without the admirable and invaluable assistance of the Money Advice and Budgeting Service (MABS), and, what must be fairly acknowledged as the very understanding attitude to his difficulties and to the constant and often serious arrears in repayments, adopted by the Permanent TSB. There was no evidence before the court that MC was suffering from any form of financial stringency or was in urgent need of housing. I am satisfied

that there was no evidence before the Court which would lead me to conclude that her motive in seeking this sale is vindictive, but I am satisfied that it is wholly mercenary. Even if I were to regard this self interest as a good reason for wanting this sale, MC has certainly not satisfied me that Mr. BS should be obliged to submit to such a sale. MC expressed no wish, either in the pleadings or in the evidence given before me to sell her share in the property and the contents to Mr. BS. I am not all satisfied that the court should exercise its discretion to direct a sale of this property in these circumstances.

49. It is clear from the decision in *Swan v. Swan* [1819/20] 8 Price. 518 at 519 and, *Sinclair v. James* [1894] 3 Ch. 554 at 556 per. North J., that the Court cannot oblige the mortgagee to agree to a partition of the property as it is entitled to the whole. However, it is clear that the court may make an order for partition in respect of the equity of a redemption, (*Sinclair v. James* [above cited]). To sell his or her interest in the equity of redemption after partition, MC or BS would have to discharge the entire debt outstanding to the mortgagee and secure separate conveyances from the mortgagee to each party in accordance with his and her undivided share as tenants in common.

50. Having regard to the wording of s. 5 of the Partition Act 1868, in my judgment, even though the court is not satisfied to exercise its discretion to direct a sale of the property, if Mr. BS were to voluntarily undertake to purchase the share of MC and MC were to accept that offer, the court could still order a valuation of her share, "in such manner as the court thinks fit". She would then have the option of accepting that valuation or not. If MC, as she is entitled to do, should reject this undertaking or this valuation, the court will make an Order for Partition of the equity of redemption in the shares hereinbefore indicated.

Other cases referred to in argument
M.C. v. M.C. [1986] 1 I.L.R.M. 1, Supreme Court.

C. v. C. [1976] I.R. 254, High Court.

Power v. Conroy [1980] I.L.R.M. 31, High Court.

Estate of Cahill deceased [2001] 1 I.R. 56, High Court.

Containercare (Ireland) Ltd v. Wycherley [1982] I.R. 143, High Court.

In *Re. D'Altroy's Will Trusts* [1968] 1 W.L.R. 120 per. Pennycuick J.

Thornely v. Thornley [1893] 2 Ch. 229 per. Romer J.

Mason v.Mason, otherwise Pennington [1943] N.I. K.B.D. 134 per. Andrews L.C.J.

Gillette v. Holt [2001] Ch. 210 C. of A.

J.C. v. J.H.C. (Unreported, High Court, Keane J. 4th August, 1982).

First National Building Society v. Ring [1992] 1 I.R. 375, High Court.

Also:
Duncan & Scully , "*Marriage Breakdown in Ireland*" pp. 264 – 267.

A.B. Babbington "*County Court Practice in Equity in Ireland*" – Osborne (2nd Ed. – 1910) Cap. IX