Neutral Citation Number: [2008] IEHC 207

THE HIGH COURT ON CIRCUIT

2007 No. 180 CA

DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

IN THE MATTER OF THE PARTITION ACTS 1868 – 1876

BETWEEN

MARIE SHEEHY

RESPONDENT (PLAINTIFF)

AND
THOMAS TALBOT

APPELLANT (DEFENDANT)

Judgment of Mr. Justice John Edwards delivered on the 3rd day of July, 2008

Introduction

1. This is an appeal against the judgment and order of the Circuit Court given in this matter on 9th July, 2007. The appeal was by way of a full rehearing.

2. The proceedings are in the nature of a partition suit and for ease of reference it is proposed to hereinafter refer to the respondent (plaintiff) simply as the plaintiff and the appellant (defendant) simply as the defendant. The case involves a dwelling house property co-owned by the plaintiff and the defendant. At the time of its purchase the parties were not married but were in a domestic relationship and were living together as a couple. The property in question is registered land consisting of a leasehold estate under a long lease. The ownership of that interest is registered in the joint names of the plaintiff and the defendant. Accordingly, they are legally speaking joint tenants. However, as the parties contributed to the acquisition and subsequent improvement of the property in unequal shares the maxim that "equity leans against joint tenancies" comes into play so that in equity the parties are presumed to have acquired the property as tenants in common with beneficial interests proportionate to their respective contributions. Of course, this is only a presumption, and this presumption is open to rebuttal, but as neither of the parties in this case has sought at any time to argue in favour of its rebuttal the court intends to proceed on that basis.

3. Unfortunately, unhappy differences have arisen between the parties and the plaintiff now seeks an order from the court directing the sale of the property and a division of the proceeds as between the parties in proportion to their respective beneficial interests. The plaintiff relies primarily on s. 4 of the Partition Act, 1868, but in the alternative seeks the same relief at the discretion of the court under s. 3 of the Partition Act 1868.

The Law Relating to Partition or Sale in Lieu of Partition

4. The law in this regard is succinctly stated in Wylie's Irish Land Law, 3rd Ed. at paras. 7.35 and 7.36 thereof (pages 442 - 445 inclusive). Professor Wylie states:-

> "[7.35] First, all the co-owners may voluntarily agree to put an end to their co-ownership and to partition the property in the manner they agree. By statute, such a voluntary partition by joint tenants or tenants in common must be by deed. If, however, the joint tenants or tenants in common could not agree on such a partition, there was no right at common law in any one of them to force a partition on the others. Such a right was first introduced by a statute passed by the Irish Parliament in 1542, which enabled a joint tenant or tenant in common to force the partition of the property on the other co-owners, whether or not it was sensible or convenient to have such a partition. This position was improved considerably by the passing of the Partition Acts, 1868 and 1876, both of which applied to Ireland.
>
> "[7.36] These acts gave the court power to order a sale of the property instead of physical partition and to divide the proceeds amongst the co-owners in accordance with their shares. The obvious situation where this power would be invoked would be where the co-owners had held a single item of property, such as a house or other building which could not be easily partitioned so as to give each co-owner a viable part. Several points should be noted about the jurisdiction conferred by the Partition Acts. First, a distinction is drawn between cases where the interest of the applicant for partition or sale, or of the applicants collectively, comprises at least half the value of the property co-owned and cases where it does not. In the case of the former the applicant is entitled to a direction for a sale unless the court 'sees good reason to the contrary'. In the other cases the applicant must establish circumstances justifying a sale in lieu of partition such as the nature of the property or the number of interested parties, and convince the court that the sale 'would be more beneficial for the parties interested' for it to exercise its discretion to order a sale"…"Secondly, it is not entirely clear what the parameters of the jurisdiction under the two provisions is, a matter which has come under consideration by the Irish Courts recently in cases where one co-owner's interest has been mortgaged or charged and the mortgagee or chargee has invoked the jurisdiction to enforce its security against the other co-owner. For example, the suggestion that a court must order either partition or, if that is inappropriate or impracticable, a sale has been rejected on the basis that the jurisdiction confers a wider discretion, including the power to refuse both applications. Furthermore, the view has been taken that the court has a discretion, in cases where it is minded to order a sale, to postpone making an order pending enquiries about the feasibility of a sale or to make the order but to postpone the date of its becoming effective. Thirdly the jurisdiction can be invoked only by a party or parties "interested" in the co-owned property. This clearly includes a mortgagee of a co-owner's interest, including a judgment mortgagee." …"Lastly, in making an order for partition or a sale the court is to give 'all necessary or proper consequential directions'. It has long been settled that the courts will employ principles of 'equitable accounting' and make appropriate adjustments to ensure each co-owner is treated fairly. Costs of the sale are usually borne out of the proceeds, but special costs incurred in respect of a particular co-owner may be ordered to be borne by his share."

Various authorities are footnoted in Professor Wylie's text in support of the propositions advanced. However, it is not necessary to refer to them as the court accepts without reservation that the passages just quoted accurately summarize the law.

5. However, for completeness I think it would be appropriate to quote in full ss. 3 and 4 respectively of the Partition Act, 1868 and I now do so. Section 3 is in the following terms:-

> "In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any

other circumstance, 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 or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions".

Section 4 is in the following terms:-

> "In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct the sale of the property accordingly and give all necessary or proper consequential directions."

6. Though the lawyers in the case will understand this, it is necessary to state for the benefit of the parties, and in particular for the benefit of the defendant who is not legally represented, that the word moiety means a half, especially in legal or *quasi* legal use. Where the word is used with the intention of referring to an interest in property, it means a half-part, unless more than two persons are interested in the property in which case it refers to an equal part or share.

The issues

7. In the present case the plaintiff claims to be entitled to a legal and beneficial interest in the premises in question and, though she does not plead it in express terms in her Equity Civil Bill, counsel on her behalf opened the case on the basis that the plaintiff owns "a moiety or more of the premises". The defendant's defence is a handwritten document and was, I think, correctly characterized by counsel for the plaintiff as representing a plea *de coeur*. It does not expressly address the question of whether the plaintiff's interest amounts to "a moiety or more". Neither does it address the question as to whether the defendant has "a moiety or more". However, as the defendant is lay litigant and no point is taken by either party in respect of pleadings, I have approached the case on the basis that the defendant joins issue with the plaintiff in respect of all claims made by her. Furthermore, as it emerged in the course of the evidence that the defendant was himself contending for a 70% interest in the property as against a 30% interest in favour of the plaintiff, it is appropriate to treat him as effectively counterclaiming for a declaration that he is entitled himself to a least a moiety "or more" in the property. Moreover, the defendant's case is that the court ought, in the exercise of its discretion, to refuse to order either a partition or a sale. The defendant explained in evidence, and I understand it to a central plank of his case, that neither of these steps requires to be taken because for some time the parties have been successfully co-existing and living separate lives under the one roof without unduly interfering with each other, such that *de facto* the property is already partitioned in the "virtual" sense, although obviously not in the physical sense. Quite simply he contends that the *status quo* should be maintained.

The Evidence

8. The plaintiff produced the copy of her folio which shows that the property in question, namely the dwelling house situate at No. 8 Inbhir Íde, Malahide, in the County of Dublin is registered in Folio No. 58590L of the Register of Ownership of Leasehold Interests for the County of Dublin. The folio shows that on the 12th May, 1994, the plaintiff and the defendant respectively were registered as full owners. She also produced her Certificate of Rateable Valuation which confirmed that the property has a rateable valuation of €15.87, which is well within the €254 upper jurisdictional limit of the Circuit Court. She explained that she and the defendant first got to know each other back in the 1960's. They went their separate ways for a while and were reintroduced in 1990 by a mutual friend. At that time the plaintiff was living at 25 Strand Road in Sutton, a premises otherwise known as the "Tuck Shop". It was in fact a newsagents and grocery shop with living accommodation overhead. The defendant came to reside with the plaintiff upon their reintroduction in 1990 and they co-habited there until 1992 when they purchased the premises the subject matter of the present proceedings. Her evidence was that the purchase price of No. 8 Inbhir Íde was in the order of IR£48,000 or IR£49,000. In addition there was a stamp duty liability and fees were due to solicitors and surveyors and there were certain other expenses associated with the transaction. The total cost of acquiring the property came to in or about IR£56,000. The plaintiff and the defendant each contributed IR£28,000 towards this. The plaintiff paid her IR£28,000 from savings. The defendant borrowed from his then employers, General Accident Insurance Co, to fund his contribution. However, the issue is complicated slightly by the fact that in order to be able to borrow IR£28,000 from General Accident, the defendant needed to clear a pre-existing debt. To do that he borrowed IR£3,300 from the plaintiff in a side deal. Once the purchase was completed the parties took steps to renovate the property. The total costs of the whole deal including both acquisition and renovation came to IR£73,382. The cost of the renovations, being IR£73,382 – IR£56,000 was therefore IR£17,382 and it was agreed that they would split this cost 50/50. Accordingly the defendant's liability for the renovations came to IR£8,691. He did not pay this to the plaintiff immediately. The plaintiff paid for the entirety of the renovations on the understanding that the defendant would pay him later. The total sum owed by the defendant to the plaintiff was in fact IR£11,991 being the IR£8,691 due in respect of the renovations and the IR£3,300 loaned by the plaintiff to the defendant and previously mentioned. This outstanding sum of IR£11,991 was only paid by the defendant to plaintiff in 2001.

9. When the renovations were completed the parties moved into the premises in 1995. According to the plaintiff, difficulties arose in their relationship after they moved into No. 8 Inbhir Íde. To adopt that somewhat clichéd phrase used in family law litigation, unhappy differences arose between the parties. Moreover, relations between the plaintiff and defendant continued to deteoriate over several subsequent years until they reached the point of being, in the plaintiff's view, non-existent. According to the plaintiff she and the defendant lived separate lives within No 8 Inbhir Íde in as much as was physically possible having regard to the fact that it is an end of terrace house. The plaintiff's evidence was that in 2002 an extension was added to the house. She stated that when the house was purchased, the kitchen was in very poor condition. However, they left it as it was and let the house for a brief period. When they moved into the house themselves the plaintiff considered that the kitchen needed an upgrade. However, the defendant would not agree to up-grade of the kitchen. The plaintiff states that relations between them became worse and worse because they were living in a very confined space and eventually she commissioned the extension that was built in 2002 so as to add a new kitchen and a living room at the back of the house. She explained that she had these built with a view to alleviating the unhappy situation in the house by providing both parties with more space. The total cost of the extension was €53,841.19. The defendant contributed a sum of €2,890 towards these works and the plaintiff paid for the rest of it. The basic building works were carried out by Mr. Ryan, a building contactor (who gave evidence later on). The plaintiff's recollection was that Mr. Ryan was paid a total sum of approximately €38,000. The plaintiff said that it was not €38,000 even and that Mr. Ryan would be in a position to confirm the exact figure. The balance of the total cost of €53,841.19 went on painting, decorating, tiling, a fitted kitchen and so on. The plaintiff confirmed that she had receipts in respect of all of the additional expenditure with her in court. (However, she was not in fact called upon to produce them.)

10. The plaintiff went on to describe her occupation as a financial controller with a firm in Balbriggan. Her present nett weekly income is €358, that is €25,000 per annum less tax and RSI. She is physically challenged and unable to work full-time. Nevertheless she works as much as possibly can. She will be 65 years old on the 7th September of this year and she does not how much longer she will be able to work for. She confirms that the Tuck Shop was sold in 1995. She does not have any pension arrangements, although she does

have some savings. She was asked about her knowledge of the defendant's financial circumstances. She confirmed that she was in court on a previous occasion when the defendant stated that his current income consists of the State Old Age Pension in the sum of €208 per week. The plaintiff does not believe this to be correct. She pointed out that the defendant was an employee at an insurance company (General Accident, now Hibernian) for forty odd years. Upon retirement he was entitled to a defined benefit pension consisting of two-thirds of his final salary. Arising out previous matrimonial proceedings between the defendant and his estranged wife, he is required to pay his wife one third of his pension entitlement and he is entitled to keep two-thirds of it. The plaintiff was unable to say for certain whether or not the defendant has ever collected his pension entitlements from his former employers. She stated that while she was still communicating at some level with him she did become aware that he was in dispute with his former employers in respect of a particular matter. While she was not completely sure of the current position, to the best of her knowledge he has not collected his pension entitlements. She confirmed that the defendant retired at age 65 or 66 and that he is now aged 71. She believes he went on sick benefit before his actual retirement and she does not know the actual date of his retirement. She was asked if she knew what the amount of his pension was. She stated that when he retired he was entitled to something in excess of €16,000 per year. Of that he is entitled to two thirds himself and he is liable to his ex-wife for the other third. She believes that the defendant has being allowing his pension entitlements to accumulate pending the outcome of his dispute with his former employers. She believes that that dispute is before the courts. The plaintiff also testified that to the best of her knowledge, the defendant was the recipient of money due on foot of insurance policies that he had contributed to during his working life. She believes that he has that money invested with Friends Provident. She thinks it was a sum amounting to approximately €200,000 at the time that he invested it. It is not due to mature until 2018, at which time his youngest child will be fifty. He has four children from his marriage. At that stage the defendant himself will be eighty-two years of age. The plaintiff was asked whether the defendant received a gratuity from his former employers upon his retirement. The plaintiff stated that she does not know. However, he had another policy of some sort that he did encash. He used that money to return the money that he owed to the plaintiff. In addition it also enabled him to buy a Mercedes Motor home for the sum of €58,000 or €60,000. He subsequently sold this.

11. The plaintiff was asked what living arrangements she envisaged making if the property was sold in lieu of partition as she was requesting the court to do. It was suggested to her by the court that the proceeds of sale might not yield enough for both parties to buy a new home. In response to that the plaintiff stated that other options exist. She suggested that they could each use their respective equity from the home and, subsidising that from their other resources, buy a smaller property. She stated that she would prefer to take her chances on going forward in a situation where she would no longer be stressed from morning to night. She further stated that her health is very badly affected by endeavouring to live in a situation that is untenable. She later characterised the present living arrangements as intolerable. She accepted that it would not be possible to rent property on €400 a week and live out of that sum as well. She further accepted that neither herself nor the defendant would get a mortgage at their respective ages. She stated that she would cut her cloth according to her measure and go and live wherever she could purchase and she believed that the defendant should do the same. The plaintiff expressed the view that various suggestions that had been put forward by the defendant were totally impractical, such as tossing for who stays. However, for better or worse she wants to achieve a severance of her ties with the defendant. The plaintiff confirmed that she also has the benefit of a widows pension amounting to €190 per week. In relation to her future plans she has not given any consideration to perhaps buying premises and renting a portion of it. She confirmed that in addition to the defendant's State pension of €208 per week, and the pension that she believes he is entitled to if he were to draw it down, he also earns €120 a month from doing a small job for the same company that she herself works for.

12. Under cross examination by Mr. Talbot the plaintiff agreed that their friendship went back to 1962, a period of forty six years or thereabouts. She would not accept that they were friends still at this stage. She explained that they had become friends in 1962 and knew each other for a year or so. However, life moved on and they were not in contact for many years. They re-met in 1990. The defendant was in trouble and she was anxious to help. She allowed him to come to live with her, free gratis and for nothing. He had no car, he played his golf in Hermitage. He played his golf every Saturday and Sunday. He used her car for fishing. He did exactly what he wanted. She acknowledged that he had been very helpful with regard to getting up in the morning and bringing in the newspapers and all of that sort of stuff. She felt at the time that living with the defendant was the ideal solution to their respective needs, what with her living alone and him needing refuge. However, it has transpired that it has not been possible for the plaintiff and the defendant to remain friends. She characterises the defendant's every word and motion towards her as demeaning. The defendant put to the plaintiff that he had paid his way from the time that they had commenced living together. The plaintiff denied this. She asserted that he was in a lot of debt and that he paid absolutely no contribution to living expenses for a number of years. The defendant put to the plaintiff that they had been lovers and she agreed that they had. He asked if she could identify a particular point in time at which the relationship between them had begun to deteriorate. She replied that "the total nail in the coffin was the purchase of the motor home". She stated that she cried, pleaded and begged him not to purchase it. She alleged that he widened the gate of the property in total disregard for her needs and parked the motor home in the driveway. She then stated that even before that they had been going through very unhappy times and that she had arranged for them to go and see a counsellor in ACCORD. This was in 2001 or 2002 and they went to see this counsellor three times. The defendant put it to the plaintiff that the change in the nature of their relationship, that is the deterioration of it, coincided with the plaintiff finding once again her son whom she had put up for adoption at birth. The plaintiff disagreed with that. It was put to the plaintiff by the defendant that she could get vacant possession if she was prepared to rent a two bedroom furnished apartment for him. The defendant put it to her that he had suggested this previously. The plaintiff stated that she had asked the defendant to put his proposal in writing, but he had refused to do so. She stated that there was in fact an add-on to the proposal. The add-on was that he would still keep ownership of half of No 8 Inbhir Íde and this was not acceptable to her. When asked by the judge to explain why the defendant's proposal would be unacceptable she stated that first of all she would not have enough money to pay the defendant's rent. Secondly, she could not anticipate for how long that might go on for and what penury that might put her in as time went on. The defendant suggested that the arrangement would only be a temporary one until the appeal to the Supreme Court in his matrimonial litigation was disposed of, at which time he hoped to have sufficient funds to buy out the plaintiff. The plaintiff would not agree that this was a viable proposition. The plaintiff was asked by the defendant if she was being vindictive. She stated absolutely not, that she wished the defendant every joy and happiness in his life. She stated that her only wish and desire was that the matter could be resolved in a way that would enable both parties to move on with their lives. The defendant then asked the plaintiff where the figure of £28,000 which he had contributed towards the purchase of the property had come from. The plaintiff stated that she could not remember. It was then put to the plaintiff by the defendant that the reason he contributed £28,000 was that he was asked for £28,000. He stated that he had had a free hand and could have borrowed £28,000 or £58,000 - it did not matter. He claimed he had said to the plaintiff "Tell me how much I need to borrow. It is a once off situation. I will be retired soon and I may not get another chance to borrow." The plaintiff disagreed with this. She stated that the defendant had told her that he only had the capability of borrowing IR£28,000 and that he would not be able to pay for the refurbishment until after he had got some money that was coming to him from policies and in connection with his retirement. The plaintiff was then asked how much she realised on the sale of the Tuck Shop. She stated that she had received £159,000 in 1995. The defendant then put to the plaintiff that when he was living with her at the Tuck Shop he "worked his butt off" while she stayed upstairs resting. He put it that he worked in the shop every minute and hour, alternatively he was up on the roof fixing slates or doing the garden or making shelves in the back or painting outside or inside. He suggested to her that she has a very leisurely lifestyle and has always had. He suggested that she only works when it suits her, that she would ring up practically every morning to say she is not well and he would then bring her breakfast in bed, although he had stopped doing that

recently. Mr. Talbot contended that what had started in the Tuck Shop continued when they were living in No. 8 Inbhir Íde. The plaintiff agreed that the defendant had performed many tasks in the nature of what might be described as "general maintenance", and that he had thereby made an indirect contribution.

13. The plaintiff was then re-examined by her counsel and confirmed to him that the £159,000 realised on the sale of the Tuck Shop was saved. None of it was invested in pension funds.

13. The next witness was a valuer called by the plaintiff, a Mr Sean Nolan. He confirmed that he is principal in the firm known as Nolan & Fahey, Auctioneers, Valuers and Estate Agents in Donabate, Co. Dublin. He confirmed that he had been engaged by the plaintiff's solicitors to conduct an examination of No. 8 Inbhir Íde, Malahide, Co. Dublin and that he did so on 15th May, 2008. He prepared a report for the court and a copy of the report was handed in. He was asked about his qualifications and experience and the court was satisfied with respect to his credentials. He then stated that he had been asked to inspect and value the premises on two different bases. Firstly, as the premises stood and secondly without the extension that had been added in 2002. He confirmed that the title to the property is leasehold but that that would not have great bearing on the value having regard to the length of the lease. He ventured the opinion that the freehold could be purchased for relatively small money, perhaps €500. His opinion as to the current market value of the property, in the condition in which it now is, was €515,000. The valuation of the property without the extension added in 2002, would be in region of €475,000. He then described the premises and it is not necessary for the purposes of this judgment to rehearse in full the relevant description. He confirmed that while it might be technically possible to effect a physical partition of the premises it would not be economically viable to do so. He suggested that it could cost anywhere between €200,000 and €250,000 to physically partition the property. Moreover, such alterations would have a negative impact on the value of the premises. In addition to that, he was highly sceptical that it would be possible to secure planning permission from Fingal County Council for such alterations. He anticipated that if a planning application was lodged for that purpose it would provoke objections from neighbours whose dwellings would be affected.

14. Mr. Nolan was cross examined by the defendant. It was put to him that one bedroom was three times the size of the other. Mr. Nolan replied that bedroom 1 measured 2.3m x 4m; bedroom 2 measured 2.23m x 2.69m and bedroom 3 measured 2.34m x 2.86m. He agreed that it was clear that one of the rooms was significantly larger than the other two. The defendant then indicated agreement with Mr. Nolan that it would be totally impractical to partition the house but suggested to him that two people could live amicably, without too much trouble, with the way that the house is constructed at the moment, namely with two separate bedrooms, two separate dining room cum sitting rooms, and with entrances at the back, to the front and to the side. Mr. Nolan agreed that that was possible, if the parties wished to live in that way. He was then asked about the garden and agreed that the gardens were very nicely maintained. He was asked what value the gardens would add to the house and he said that he would not be able to put a precise figure on that. He agreed that by virtue of the defendant having knocked down the pillars that existed at the front entrance, two cars can now conveniently get through the entrance. He commented that a lot of houses today have to widen their drives because most houses would have two cars.

15. Mr. Nolan was asked by the judge whether, on a 50/50 division of the valuation figure of €515,000 that he had mentioned, it would be possible for the parties to each buy a one bedroom apartment in his area of North Dublin for their respective €257,000 shares. He stated that it was possible, that indeed they could comfortably buy one at this moment in time. He suggested they might even have a small surplus. Pressed on this matter he indicated that one bedroom apartments in his area of North Dublin were running from €225,000 upwards, and that the figure of €257,000 would provide sufficient to ensure that associated costs such as stamp duty, legal fees, surveyor's fees etc. were also covered. The defendant was afforded the opportunity to ask the witness some further questions in cross examination arising out of the issues raised by the judge. The witness confirmed that the type of property that he was talking about would not come with a car space. However, there are properties available on the market that are not a five minute walk from the train station. The witness was then asked to put a figure on what it would cost to acquire a two bedroom house, alternatively a two bedroom apartment, furnished, within two miles of the Four Courts. The witness responded that the defendant was speaking about a very diverse area. He was then asked to answer the question with reference to Chapelizod. He stated you might be able to get something for a sum in the region of €250,000 there. When asked to clarify if he was speaking of two bedroom properties he said maybe not two bedroom properties. He was unable to put a specific price on a two bedroom apartment within Chapelizod because he did not have details to hand relating to prices in that district. However, he confirmed that it was unlikely that the defendant would be able to buy either a two bedroom house, or a two bedroom apartment, together with garden and parking, for half the proceeds of the sale of No. 8 Inbhir Íde. Mr. Nolan was then asked about what it would cost to rent a two bedroom property in the same general area as that in which the plaintiff now resides and he suggested that it would cost €1,200 per month on the basis of a twelve month lease. He agreed that a rental subsidy might theoretically be available to somebody in Mr. Talbot's position, although he would have to be means tested in respect of that. However, he stated it was probably not realistic to expect that he would qualify for a state subsidy. He was then asked about the possibility of income being generated by the rental of part of a property to a lodger. He was unable to offer a view on this, as his work did not involve letting property on that basis.

16. The next witness was Mr. Patrick Ryan, a building contractor. Mr. Ryan confirmed that he built the kitchen extension that was added to the property in 2002. The extension amounted to 240 square feet and he looked after constructing the floors walls and roofs, as well as plumbing, electrics and the constructing of decking to the rear of the building. It took twelve weeks to do the work. The contract price was €34,000 and he was paid in stage payments. There were also extras and he was paid a sum of €3,632 in respect of extras, principally the decking. He did not install the fitted kitchen nor did he do the tiling or paving. He was asked about the cost of partitioning the house. He was reluctant to volunteer an estimate of the cost but when pressed suggested that you would be talking of a sum of in or around €200,000.

17. Under cross examination by Mr. Talbot, Mr. Ryan agreed that the old kitchen was functional but not beautiful. Mr. Ryan confirmed that he dealt solely with the plaintiff. He said that he was not asked to the opening of the extension. Indeed, he was not aware that there had been an opening. That concluded the plaintiff's case.

18. The defendant was then asked if he wished to go into evidence and he stated that he did. He was invited into the witness box and was sworn. He then commenced to read from a document which he had provided to the court in advance. It is in the nature of a written submission. It was pointed out to the defendant that there is a difference between giving evidence and making submissions. He was informed that if he wanted the court to take into account any matter with respect to the facts of the case, the court would have to receive sworn testimony on oath so that he could be cross examined if necessary by counsel for the respondent. In addition, he would have an entitlement to make any submissions that he might wish to make at the end of the case. It does not appear that the defendant appreciated the distinction being made and proceeded in any event to read his pre-prepared submission into the record as though it were evidence. As the "submission" in question contained a mixture of factual and legal assertions, the court decided, in the exercise of its discretion, to allow the procedure, albeit that it was an irregular one. However, counsel for the plaintiff was allowed to cross examine him when he had finished.

19. The defendant's submission commenced with a request "for judgment and transcript." He also asked for costs under the "Litigants in Person Act, 1975", though there is no such Act on the statute books in this country. He then asked that in the event of a sale being ordered that carriage of the sale would be granted to his solicitor, Neil Blaney of Portmarnock, who holds the deeds to the property. The defendant then referred to an application made by him to the Supreme Court on 19th June, 2008, for a priority hearing of the appeal in his matrimonial litigation. He stated that he had been informed that the court cannot allocate him a date at this time because the list is already full. He stated that he had been told that while it remains possible, it is also unlikely, that he will get a hearing this term, or even next term.

20. The defendant then referred to previous motions in the present proceedings, some of which were heard by Mr. Justice McGovern, and some of which were heard by this Court. These motions related to procedural issues and, strictly speaking, have no bearing on the merits of the case. However, as the defendant is clearly under a misunderstanding and misapprehension as to what in fact occurred in the course of these interlocutory hearings, and feels deeply about it, I think it is desirable to address these matters. Insofar as I have been able to ascertain what occurred in this case from a perusal of the file, the following seems to be the position. Following the Circuit Court hearing the defendant lodged a Notice of Appeal. That Notice of Appeal was lodged within time and after some months the matter came up in the High Court list of Circuit Appeals for hearing. It appears that both sides missed it in the list and it was struck out in default of an appearance by anybody on the hearing date. When the defendant discovered that the case had been struck out for no appearance he was anxious to have it reinstated. This could only be done on consent. In fairness to them, the solicitors for the plaintiff were willing to consent. In that regard they wrote a letter to the defendant dated 18th February, 2008, in the following terms:-

> "Dear Mr. Talbot,
>
> We confirm that we have discussed the matter of the extension of time for re-entry in the appeal with our client and she is agreeable to same provided the matter is applied for within the next week to ensure that there is no further delay in this matter and that the case gets on for hearing."

Unfortunately, this letter though it was intended to be helpful sowed the seeds of a misunderstanding.

21. It sowed the seeds of a misunderstanding because the letter referred, somewhat unfortunately, to "the extension of time for re-entry". The defendant did not need any extension of time. What he needed was the plaintiff's consent to the matter being re-entered. I am completely satisfied that the letter was intended to convey just that, namely that the plaintiff's solicitors were prepared to consent to re-instatement as long as it would be done promptly. However, the actual phraseology of the letter falls into the category of "things that could have been better put" and as a result it created unnecessary confusion, at least in the mind of the defendant.

22. The next thing that happened was that the defendant brought a motion before Mr. Justice McGovern on 3rd March, 2008, claiming:

> "That appeal set aside 14th January, 2008, without notice to, or knowledge of self- representing respondent, be instead allowed maximum time to proceed because of related matter outstanding in Supreme Court and unsuitability of Partitions Act 1868 to 1876."

This motion was grounded upon a handwritten affidavit of the defendant. That affidavit is in the following terms:-

> "I seek enlargement of time to appeal, agreed by the plaintiff, the facts being 9th July, 2007, was the first and only precipitant hearing before President C.C. sympathetic to the strong case for unequal sharing but restricted to 50/50 by Partitions Act 1868-76 which sits uneasily with common law principles of justice. Plaintiff's resources stretch far beyond those I can summon so that judgment leaves me homeless and destitute a second time. It is impossible to get Partitions Act 1868-76 to understand why 50/50 is mandatory and, although not married, why there is not recourse to provision in Family Law (d) Act 1996 for the safe and easy partitioning that already exists. Mr. Keane, at the time Chief Justice, said, "Equal division of assets is emphatically not mandated in Irish law". Mrs. Justice Susan Denham said, "The need is for proper provision not division". Only income @ 71 y.o. is €230 p.w. pension from Social Welfare. Once married, now single, I feel discriminated against unconstitutionally by outdated Partitioning Act 1868-76. Mr. David Neenan, Registrar, 14th January, 2008, accepts, as self-litigant, "I should have been forewarned of strike out prejudiced by not being present to object and conversely ask maximum enlargement of time when resolution of related matter before Supreme Court helps, hopefully, finances."

23. When the matter came on for hearing before McGovern J. on the return date, he reinstated the proceedings. It is clear that this much happened because the Registrar recorded the outcome in his notes with the single word "reinstated". However, the defendant appears to have mistakenly believed that McGovern J., who had been handed up the letter of the 18th of February 2008 as confirmation of the plaintiff's attitude, had also agreed to adjourn the proceedings until after the Supreme Court appeal in the defendant's matrimonial case had been concluded. What seems to have happened next was that, in apparent conflict with his belief that the proceedings had been adjourned for a lengthy period, the defendant received notification that the re-instated appeal would be heard on the 26th of May 2008. This undoubtedly provoked his ire. He then attempted to take up an order to the effect that "time" in the proceedings "had been extended". He claims that the Registrar refused to draw an order to that effect. Now it is clear to me from the defendant's submissions that he is confused in his own mind as to what the notion of "extension of time" involves, and that he erroneously equates it to adjournment of the proceedings. A perusal of the file establishes that no order has been drawn reflecting an adjournment of the present proceedings by McGovern J until after the Supreme Court has given judgment in the defendant's matrimonial proceedings. Moreover, there is no note of any such an order having been made. Of course, the Registrar could only draw such an order if McGovern J. had indeed made an order to that effect. I do not believe that McGovern J made any such order, and I consider that the defendant is mistaken in believing that he did.

24. What happened next was that the defendant then caused the matter to be re-entered before McGovern J. and it came on before him again on 21st May, 2008. It seems that on this occasion the defendant complained bitterly that he had been unable to take up an order after the previous hearing in early March. Further, that notwithstanding that the plaintiff had on that occasion "consented to an extension of time" this was now being disputed. In the circumstances, he requested confirmation from the court that "time had been extended". He further sought a stay on the present proceedings (presumably until after his appeal to the Supreme court in the matrimonial case had been dealt with). It seems that McGovern J, though possibly having little or no specific recollection of the particular case, and probably not fully appreciating the nature of the confusion then existing in the mind of the defendant, was happy to "confirm" whatever it was that he had done in March, but there was no question of him agreeing to stay the proceedings. The file discloses that following this hearing an order was drawn in the following terms:-

"And counsel for the applicant indicating to the court that the applicant consented to an extension of time for the issuing of the said notice of appeal on 3rd March, 2008, the court, for the avoidance of doubt, confirms that on consent that the time for the issuing of the notice of appeal had been extended.

And the court THUS REFUSES to stay the hearing of the notice of appeal on Monday 26th May, 2008."

25. The court as presently constituted was assigned the Circuit Appeals list on 26th May, 2008. When the case was called, the defendant made two applications to me. His first application was that the proceedings should be *in camera*. I refused that application because these are not proceedings brought under either the Judicial Separation and Family Law Reform Act 1989 as amended by the Family Law Act 1995 or under the Family Law (Divorce) Act 1996. The parties are not, in fact, married. Moreover, there is no other statutory provision on foot of which the defendant would be entitled to have the proceedings heard *in camera*. I pointed out to the defendant that the Constitution requires that justice be administered in public save where the Oireachtas has, by Statute, expressly provided otherwise and that, in the circumstances, the case would have to proceed in public. The defendant then applied to me for an adjournment of the proceedings. The grounds on which he sought his adjournment were two-fold. Firstly, he stated that he had understood that the case would not be proceeding as a result of McGovern J. confirming that time was being extended; secondly, he was not in any case ready to proceed. It was unclear to me at that point what exactly had happened previously and what exactly the defendant meant by his statement that "time had been extended". However, I was sympathetic to his application for an adjournment on the second ground advanced, namely that he was not ready, and I asked him how long he would need. At that point, he stated he would need two years. When I enquired as to why he would require two years in order to be ready to do the case, he informed the court about the pending appeal in the Supreme Court in his matrimonial proceedings. I informed him that I was not prepared to postpone the hearing of the appeal in the present proceedings until after the outcome of the Supreme Court appeal in his matrimonial proceedings but that, in the exercise of my discretion, I would give him a reasonable time within which to make the necessary preparations, given that he seemed to be under the impression that the case was not to proceed, possibly arising out of some misunderstanding. I informed him that I was willing to adjourn the case for four weeks to enable him to prepare and that the matter would be listed for hearing on 23rd June, 2008.

26. It is quite clear to me that the genesis of the problem is that Mr. Talbot seized upon the phrase "extension of time for re-entry in the appeal" which appears in the letter of 18th February, 2008 from the plaintiff's solicitors and mistakenly interpreted that as being consent on their part to a deferral of the entire proceedings herein until after the hearing of his Supreme Court appeal in the matrimonial proceedings. Perhaps it was a case of hearing only what he wanted to hear, but he seems to have been of the view that that was what McGovern J. agreed to as well. Manifestly, McGovern J. did not agree to this. Unfortunately, the defendant's misunderstanding in that regard has caused him to perceive conspiracies everywhere and he has regrettably been free and easy with robust and unfortunate allegations of deliberate obstruction on the part of officials, of bias on the part of members of the judiciary, of the telling of deliberate lies and untruths by his opponent's legal team, and of duplicity on the part of the plaintiff. I am satisfied that all of these allegations are groundless and I hope that this judgment will, in part, serve to reassure the defendant that there has simply been a misunderstanding on his part as to what it was that the plaintiff's solicitors were agreeing to. It is quite clear to me that notwithstanding the meaningless terms of the plaintiff's solicitor's letter of 18th February, 2008, and the incorrect reference therein to an extension of time for re-entry, McGovern J., when the matter was before him in early March 2008, interpreted this letter as representing the consent of the plaintiff to the reinstatement of the appeal and he made an order accordingly.

27. As I have said, much of the submission read into the record by the defendant at the hearing of the appeal sets out the plaintiff's perspective on the events that I have just outlined. Apart from that, however, there is little of substantive relevance to the issues that I have to decide in this case. The defendant submitted that the Partition Acts were solely designed for married couples and could not be used for the determination of proprietary disputes between an unmarried couple. He is quite simply wrong about this and I so rule. He directed the court's attention to para. 19.61 in Shatter's Family Law, Fourth Edition, under the heading 'Property Rights'. However, this passage deals with s.36 of the Family Law Act 1995. The plaintiff is, in this case, relying on the Partition Acts 1868-1876 and is not relying upon the Family Law Act 1995. The defendant also referred to the unsuitability and unconstitutionality of the Partition Acts 1868-1876, pointing out that they pre-date the foundation of the State. However, as I have pointed out to the defendant several times, I have no jurisdiction to hear a challenge to the constitutionality of the Partition Acts, in the context of a circuit appeal. The court was also referred to a judicial statement of former Chief Justice Ronan Keane wherein he is said to have stated in a particular case that "equal division of assets is emphatically not mandated by Irish legislation". Further, Mrs. Justice Susan Denham was cited as having stated "the need is for proper provision not division". This court acknowledges that these statements (or statements approximating to those quoted) were made. However, it is also aware of the context in which those statements were made. Neither statement was made in the context of relief claimed under the Partition Acts, 1868 to 1876 in respect of a property owned by an unmarried couple. Rather, they were made in the context of family law proceedings between married persons, under specific family law legislation providing, inter alia, for the making of property adjustment orders in respect of matrimonial property.

The defendant further submitted that under inequality (sic) legislation, discrimination is outlawed on the grounds of marital status. Accordingly, the defendant argues that co-habiting couples are to be regarded as equal before the law regardless of whether they are married or unmarried. I am satisfied that no question of discrimination on the grounds of marital status arises in the present case. The defendant further asserted that "to ensure the existence of amiable partitioning" he pays all bills in respect of the house and has done so since the 1st March, 2007. By way of example he points out that he paid a heating bill recently in the sum of €457 and another one subsequently in the sum of €280. He claims to be paying all bills including food bills (except for treats that the plaintiff decides to bring in for her). The defendant asserts that the plaintiff has far more resources than he has but that nevertheless he has made every effort to accommodate her demands. He asserts that she is just too demanding.

When the defendant had concluded his submission the Court enquired whether he had any problem with the 50/50 apportionment that had been given in the Circuit Court and, if so, what alternative apportionment he contended for. He replied that he did have a problem with the 50/50 apportionment and felt he was entitled to a 70/30 apportionment in his favour. He reiterated that he wanted the status quo maintained. He stated that he was in favour of amiable partitioning on the basis that has already existed for some time, in other words that the parties would continue to live separate lives under the same roof but that there would no physical partitioning of the property or no sale and division of the proceeds in lieu of physical partition. It was put to the defendant that from the plaintiff's perspective the present situation is intolerable. He was asked what outcome he was contending for in the event of the court accepting the plaintiff's evidence in that regard. He was asked if he was asking for a physical partitioning or a sale in lieu of partitioning and division of the proceeds. He agreed that physical partitioning was not a practical solution - that it was not on at all.

28. In cross-examination by counsel for the plaintiff he was asked to clarify his financial means. He confirmed that his pension has now gone up from €208 to €230 per week. He was asked about other assets and told the court that he has four life policies, one for each child, and that they are single payment fixed term policies. They will not mature until 2018 when he is eighty-two years of age and his youngest daughter Nicola is fifty. He was asked if the policies could be cashed in at this stage and he stated that they could not. He was then asked about his pension entitlements arising by virtue of his former employment. He acknowledged that his pension

entitlements have been apportioned as between himself and his estranged wife in the ratio 60/40. That leaves him personally with a current gross pension entitlement of €9,600 p.a. However, he points out that he is not drawing his pension because he is in dispute with his former employers and is engaged in litigation with them. He expressed confidence that he would win that litigation. In the meantime the pension which has not drawn is accumulating. He accepted that the current value of pension entitlements not drawn down is in the order of €63,000 or thereabouts. He further acknowledged that he was entitled to a gratuity upon retirement but stated once again that he has not yet availed of this because of his dispute with his former employer. As the court understands it, the gratuity is not in addition to his pension entitlements. Rather, he can take some of his pension entitlement as a cash lump sum instead of as an annuity. If he opted for this it would obviously reduce the amount of the annuity payable to him. In any event he has not availed of any lump sum entitlement. He confirmed that with respect to the legal proceedings that he has in being against his former employer he is not legally represented. He claims that the reason he is not legally represented is that it is impossible to get any solicitor or barrister to act against an insurance company. He was then asked about other litigation that he is involved in including a professional negligence claim against a firm of solicitors and a claim against a golf club and the Golfing Union of Ireland. He acknowledged his involvement in those other cases. He was asked about his weekly outgoings and he confirmed that his full pension of €230 is spent on household bills and on his car. He was asked about the Mercedes Motor Home referred to in the plaintiff's evidence, and how much he got for it when he sold it. He stated that he received something in the order of €20,000 to €24,000. He has €8,000 to €10,000 left at this stage and it is in a Post Office account. He draws on it from to time to supplement his old age pension. He has no other assets.

Decision
29. I am satisfied on the evidence that both parties contributed equally to the acquisition and initial renovation of No. 8 Inbhir Íde. However, with respect to the extension that was added in 2002, it is clear that the plaintiff paid for the vast majority of the costs of it in direct contributions. The total costs came to €53,841 and the defendant paid only €2,890 of that. The plaintiff paid the balance of €50,951. Accordingly to the valuer, the added value accruing to the premises overall by virtue of this extension is actually less than the cost of constructing it. The added value amounts to some €40,000, which in approximate terms amounts to 8% of the total value of the property (ie 8% of €515,000). Mr Talbot's direct contribution to that added value amounts to about 0.6% (ie 0.6% of €515,000). For ease of calculation, I will round that up to 1%. Accordingly of the 8% added value created by the extension a proportion representing 7% is attributable to the plaintiff's direct contributions, and a proportion representing 1% is attributable to the defendant's direct contributions.

Additionally, Mr. Talbot contends he made indirect contributions to both the acquisition and improvement of the overall premises. The evidence is unsatisfactory in that regard because it is greatly lacking in detail. Moreover, the evidence is that the plaintiff's contributions to both the acquisition and improvement of the premises came from savings and not from borrowings. In those circumstances, it is very difficult to say that the parties would not have been able to acquire and improve the property "but for" the indirect contributions of the defendant. As against that, the plaintiff herself has acknowledged that the defendant did make some indirect contributions by providing general maintenance services in respect of the property over the years.

If I was deciding this case solely on the basis of direct contributions I would, on the evidence, have to apportion beneficial ownership in the following way.

In respect of the 92% of the property value represented by the premises excluding the 2002 extension the parties are each entitled to an equal share, ie 46% each. In respect of the 8% added value represented by the 2002 extension this must be apportioned between the parties in the ratio 7:1. Accordingly the overall apportionment will be 53%: 47% in favour of the plaintiff. However, having regard to the evidence that I have with respect to indirect contributions from the defendant I am prepared to increase the defendant's proportion on account of that. It is very difficult to do so on any exact or scientific basis because of the unsatisfactory state of the evidence but having regard to the plaintiff's acceptance that the defendant has made indirect contributions in the nature of general maintenance, having regard to the defendant's own evidence with respect to that, and having regard to the period concerned, I am prepared to raise the defendant's proportion by 3%, and correspondingly reduce the plaintiff's proportion by 3%, so as to the give each of the parties a 50/50 interest in the property. It follows from this that I regard the defendant's claim that he should be entitled to 70% interest in the property as being not sustainable on the evidence and wholly unrealistic.

I accept the evidence of the plaintiff that the relationship between the parties has deteriorated to the point where it is virtually non existent. I accept that the parties are not friends anymore. I further accept the evidence of the plaintiff that she finds the present situation to be a huge strain and that this is having an adverse effect on both her physical and psychological health. She has characterised the situation as intolerable and I accept that it is intolerable for her. In those circumstances I believe that the defendant's suggestion that the status quo should be maintained is simply untenable. As the plaintiff is interested in the property to the extent of one moiety she is entitled to an order for a sale of the property in lieu of partition and a distribution of the proceeds on a 50/50 basis pursuant to s.4 of the Partition Act, 1868. Accordingly, I grant her a declaration to that effect, and I direct that the property be sold and that the net proceeds of the sale after payment of taxes (if any) and the costs and expenses associated with the sale should be divided equally between the parties. I direct that the plaintiff's solicitors Messrs. Tom Collins and Company of 132 Terenure Road, North, Terenure, Dublin 6 and the solicitor nominated by the defendant, namely Mr. Neil Blaney of Portmarnock, County Dublin are to have joint carriage of the sale. The solicitors having joint carriage shall agree between them the most appropriate mode of sale with a view to obtaining the best possible price for the property, including whether or not it is to take place by tender, by private treaty or by public auction, and in that regard they may advertise the property (or cause it to be advertised), they may retain such third party professional assistance as they may require, and they may fix an appropriate reasonable reserve.

I further grant an order directing the defendant to do all such things, perform all such acts and sign all such documents as may be necessary to give effect to the sale that I have ordered. Further, I wish to make it clear to him that if he fails to co-operate in the sale, or if he attempts to frustrate the sale in any way, I will regard it as a contempt of court and the matter can be re entered before me at any time for the purposes of seeking to have him attached and possibly committed to prison for contempt of court.

In case it is necessary for her to do so I grant the plaintiff liberty to apply to this Honourable Court for an order directing the County Registrar/Registrar of Titles to execute all such documents as may be necessary to give effect to the sale that I have directed.

Costs
30. The normal rule is that costs should follow the event. However, I am acutely conscious that if I award the costs of these proceedings against the defendant it may not leave him with sufficient funds to put a roof over his head after the sale. I think that in all the circumstances of the case I am going to exercise my discretion to make no order as to costs. In other words each side should bear their own costs of these proceedings. However, all reasonable conveyancing costs associated with the sale, and all expenses reasonably incurred by the solicitors having joint carriage of the sale, are to come out of the sale proceeds.

Liberty to apply

31. Both sides are to have liberty to apply in the event of unforeseen difficulty in giving effect to any or all of my orders and directions.