Neutral Citation: [2017] IEHC 181

THE HIGH COURT

[2013 No. 13066P]

BETWEEN

DAVID WALSH

PLAINTIFF

AND

MARY WALSH

DEFENDANT

(No.1)

EX TEMPORE JUDGMENT of Mr. Justice Richard Humphreys delivered on the 2nd day of February, 2017

1. I would like to thank senior and junior counsel and solicitors on both sides for their assistance. All the lawyers performed their task with considerable skill and gave me great assistance in what was a difficult case.

General comments regarding *ex tempore* judgments

2. I want to begin by making some brief comments about *ex tempore* judgments. A first point to be stressed is that there a number of decisions of appellate courts in other jurisdictions favouring the giving of *ex tempore* decisions. The New South Wales Court of Appeal in *Hadid v. Redpath* [2001] N.S.W.C.A. 416, at para. 45, per Heydon J.A., urged judges to adopt a "*routine practice*" of delivering unreserved judgments: "*It is a technique with which famous names can be associated*."

3. Likewise, in *Shirt v. Shirt* [2012] EWCA Civ. 1029, at para. 35, Lord Phillips M.R. stated; "*As far as practicality is concerned, if the law is too constraining on judges improving their ex tempore judgments, then they will be loath to give ex tempore judgments. The delay caused by reserved judgments, and the extra time required from judges to prepare reserved judgments, are such that we should not discourage judges from giving ex tempore judgments. Once one accepts that it is open to a judge to amplify his judgment in this way, if he gives the judgment ex tempore, it seems to me very difficult to avoid the conclusion that, if a judge chooses to give oral judgment some time after the hearing, he should have the similar opportunity to amplify and improve the judgment when he receives it back in transcript form*."

4. This leads on to the second, related, point that there is considerable recognition of the proposition that an approved note of an *ex tempore* judgment is not to be equated with a note of a charge to a jury commanding stenographic exactitude. Such an approved note may develop and revise the verbatim transcript, and may "*amplify and improve the judgment*" in Lord Phillips M.R.'s phrase, including by way of giving fuller or clearer reasons for the result arrived at.

5. Kirby J. stated, in "*Ex tempore* judgments – reasons on the run" (1995) 25 *Western Australian Law Review* 213 at p 229, that "*it is always possible, and entirely proper, for a judicial officer to revise ex tempore reasons, even extensively, without altering their substance or the orders which they sustain*."

6. Lord Neuberger, in a speech to annual conference of Supreme Court of New South Wales, "Sausages and the judicial process, the limits of transparency" 1st August 2014, at para. 23, said that "*[o]f course, one of the secrets of the* ex tempore *judgment, at least in England, is that the judge gets the opportunity to "approve" the transcript of the judgment before it goes to the parties. I use inverted commas because, while some judges just improve the punctuation and the syntax, many judges use the opportunity to effect a fairly comprehensive rewriting. I have rewritten sentences even paragraphs. I have transposed paragraphs or even whole sections. I have even deleted sentences or paragraphs – sometimes because I simply could not understand what I had been trying to say. Once I added a paragraph because a brilliant new reason had occurred to me justifying my decision. In due course my decision was overturned and the Court of Appeal said that the new point was a particularly bad one – showing that cheats do not prosper. If I was going to add a point, I should have made it clear that it was a piece of* esprit de l'escalier."

7. Similarly, it was stated by McMurdo P., that "*[e]x-temps are not like summing-ups or final directions to juries where every word said to the jury must be accurately recorded. You can revise ex-temps as long as the changes do not do too much violence to the meaning of what was said in court*: "From Ex-Temps To Treatises; How Leading Judges Write", Judicial Conference Of Australia Colloquium, 8th October 2016, at p. 2.

8. A third point to be emphasised in relation to *ex tempore* decisions is that while there are some advantages in terms of speed and immediacy, there are some ways in which the judgment so produced will differ from a reserved decision. For example, the immediate context of the *ex tempore* removes the necessity to recite a great deal of detail, particularly regarding matters that are not fundamental, and the need to recite facts not in dispute, because the parties present in court are immediately aware of those matters. Reasons may also be more summary than in a reserved judgment, sometimes severely more so. Kitto J. has stated that "*The most common case of an insufficiently disciplined judgment is one which recites the facts in a degree of pedestrian detail that scorns to discriminate between those that really bear on the problem, those that may interest a story-lover but not one possessing the lawyer's love of relevance, and those that are not even interesting but just happen to be there*." ("Why Write Judgments" (1992) 66 Australian Law Journal 787, p 792).

9. Munby L.J. in In re A. and L. (Children) [2011] EWCA Civ. 1611, at para. 35, stated "*I should add that there is no obligation for a judge to go on and give, as it were, reasons for his reasons*" As Kirby J. has said, "*the findings of fact need not be lengthy. They can be confined to the barest outline*" ((1995) 25 Western Australian Law Review 213 at p 226). Indeed there has been some comment in Australia to the effect that appellate courts make allowances for the inherent limitations of *ex tempore* decisions at first instance.

10. A fourth point in relation to *ex tempore* decisions is there are a number of authorities, particularly *Eagle Trust Company Ltd v Pigott-Brown* [1985] 3 All E.R. 119 and *English v. Emery* [2002] EWCA Civ 605, to the effect that it is the issues that are of importance to the judge that need to be specified rather than all of the issues identified by the parties. In Eagle Trust Co Ltd, at p. 122, Griffiths L.J. stated that reasons "*need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted*."

11. It was stated at para. 19 of English v Emery that "*this does not mean that every factor which weighed with the judge in his*

appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision."

12. Munby L.J. in A. and L. said at para. 43, "*The fact that [the judge] did not deal in his judgment with every matter to which [counsel] draws attention does not of itself invalidate either his reasoning or his conclusions*." That is in the context of authority to the effect that there is a "*huge virtue in brevity of judgment*", as Thorpe L.J. put it in *Re B (Appeal: Lack of reasons)* [2003] ECA Civ 881.

13. There is no obligation to deal with every point made, but having said that it is often good practice to identify what the parties say the issues are; and hence I requested the parties in this case to prepare an issue paper, and I am grateful to them for their assistance in that process (albeit that they could not agree on an issue paper and produced competing versions) and in their written and oral submissions in identifying the elements of the case on which they place reliance.

14. While in some cases reasons should be expressly stated (see *O'Mahony v Ballagh* [2002] 2 I.R. 410), in other cases they may be implicit. The decision of Charleton J. *in Lyndon v. Collins* [2007] IEHC 487 (Unreported, High Court, 21st January, 2007) (cited in *Foley v. Murphy* [2007] IEHC 232 [2008] 1 I.R. 619) is illustrative of this point. Here, a District Court Judge ruled that he was "*satisfied that the State has proved its case*", without providing further reasons for this decision. Charleton J. was satisfied that such a reason was lawful because it was "*clearly implied in what the learned district judge said that she was convicting the accused because of the fact that she completely rejected his testimony and accepted instead the testimony of the prosecution*" (at para. 11).

15. A fifth and final point for present purposes is that stressed in *A and L* by Munby L.J. at para 47 "*[the judge] found himself faced with the dilemma, familiar to any family judge, of adjourning to prepare a written judgment, with all the further delays that might cause, or delivering an immediate extempore judgment so that plans for the children could be moved forward with minimal delay. [Counsel] submits, and I agree, that such extempore judgments should not be discouraged. On the contrary. The safeguard is the ability – indeed the duty – of the parties to seek further elaboration or explanation from the judge if they feel that something is missing*."

16. That safeguard, the ability and indeed the duty of the parties to seek further elaboration or explanation from the judge if they feel that something is missing, whether an aspect of the case not being dealt with or reasons (or adequate reasons) not being given in relation to any conclusion, or some other error or omission, is one that should not be confined to any particular category of *ex tempore* decision and obviously for my part I want to be taken as applying that safeguard to any *ex tempore* judgement I might give, whether the present or any future one.

Overview

17. With those preliminary remarks out of the way, I now turn to an outline of the present case. This action concerns a dispute regarding a lottery jackpot on the 22nd January, 2011. The prize money was €3,389,794. The plaintiff, represented by Ms. Dervla Browne S.C. (with Mr. Kenneth Bredin B.L.), is the son of the late Peter Walsh who died testate on 26th of December 2011. The defendant, represented by Mr. Michael Delaney S.C. (with Mr. Darren Lehane B.L.) is the widow of the deceased. Between the 23rd and the 27th of January 2011 six persons signed the back of the winning ticket: the deceased, the defendant, the plaintiff, Kevin Black, Anthony Daly and Jason Daly; Kevin Black being a relative of the deceased and Anthony Daly and Jason Daly being sons of the defendant. The same six persons signed the National Lottery prize winner claim form. The National Lottery refers to a group of people who win the lottery collectively as a syndicate, possibly a somewhat exotic term with overtones of the sort of organisation that might have been encountered by an intrepid reporter in Chicago in 1931. The lottery instructions for syndicates state that all members of the syndicate must sign the back of the ticket and, as only one cheque is issued, that the syndicate must nominate one person to receive the prize-winning cheque. The nominated person completes the claim form giving full details, and the declaration form is proof that all members of the syndicate are deemed to be part-owners of the winning ticket and that their share of the prize is tax-free in accordance with the National Lottery Act 1986.

18. In the wake of the win, the defendant was nominated as the person to collect the prize. She contends that she was the sole winner and that the other signatories were added to the ticket on the advice of the lottery to ensure that any gifts she might see fit to make to them were exempt from tax. She made various distributions to the other signatories. Subsequently, the house belonging to Peter Walsh (which had been earlier transferred into joint ownership with the defendant) was conveyed to the plaintiff. The defendant contends that the plaintiff had been put to his election of a choice of either €200,000 out of the winnings, or getting the house.

Key issues

19. In terms of disputed questions of fact there were a large number of disputes on matters of fact big and small, perhaps so many that even a reserved judgment couldn't address them all, but I will attempt to identify the key issues:

> (i) Firstly, was Mrs. Walsh the sole purchaser and sole owner, or was the ticket bought as a joint exercise with the late Peter Walsh.
>
> (ii) Secondly, did Peter Walsh have discussions with the plaintiff to the effect that they would share lottery winnings.
>
> (iii) Thirdly, was the defendant advised by Mr. Eamon Hughes of the National Lottery that if she wished to give any gifts to persons she should have them sign the ticket and claim form so that such gifts would be exempt from tax.
>
> (iv) Fourthly, was the plaintiff given the option of €200,000 or the house.
>
> (v) Fifthly, did the deceased create a syndicate or did the six signatories otherwise constitute themselves a syndicate conferring on the plaintiff an entitlement to a one-sixth share.
>
> (vi) Sixthly, by signing the claim form did the defendant and the deceased acknowledge the plaintiff's co-ownership of the winning ticket.
>
> (vii) Seventhly, did the deceased create an express trust by his words and actions.

20. In terms of disputed questions of law that require resolution the key issues seem to be as follows:

(i) Firstly, did the signature on the ticket confer joint ownership on the plaintiff.

(ii) Secondly, do the facts give rise to a constructive trust.

(iii) Thirdly, is the defendant precluded, as a matter of public policy, from relying on an intention to avoid tax as a basis for having been party to the arrangement whereby the plaintiff signed the ticket.

(iv) Fourthly, is the defendant precluded by her conduct from denying the plaintiff's part ownership.

(v) Fifthly, would the plaintiff be unjustly enriched if successful such that he should hold the house on trust for the defendant.

Reliefs sought

21. The reliefs sought by the plaintiff are as follows:

(i) An Order declaring that the plaintiff is entitled to the sum of €564,965.66 from the €3,389,794.00 Lotto Prize Money and that the defendant received same as trustee for the plaintiff.

(ii) An Order that the defendant is liable to account to the plaintiff for the sum of €564,965.66.

(iii) An Order directing that the defendant to pay the plaintiff the sum of €564,965.66.

(iv) Further or in the alternative a Declaration that the plaintiff is entitled to trace the sum of €564,965.66.

(v) A Declaration that the defendant and/or the estate of the deceased holds the sum of €564,965.66 in trust for the plaintiff.

(vi) Further and in the alternative a Declaration that by his words and actions there was a valid Declaration of Trust by the deceased of one-sixth of the Lotto Prize Money being €564,965.66.

(vii) An Order for the taking of all accounts and enquiries.

(viii) An Order for all necessary and consequential orders and reliefs.

(ix) Damages.

(x) Such preliminary Orders for injunctive relief as may be required to preserve and/or protect the amount of €564,965.66 in the hands of the Defendant pending the determination of these proceedings.

(xi) An Order for the costs of these proceedings.

Factual issues

Was Mrs. Walsh the sole purchaser of the ticket?

22. I now turn to my findings of fact in relation to the seven key issues of fact I have identified. The first issue was whether Mrs. Walsh was the sole purchaser and sole owner, or was the ticket bought as a joint exercise with the late Peter Walsh. Mrs. Walsh's evidence was that initially she was the sole purchaser and owner: as she puts it, she won the lotto. Having had the benefit of seeing and hearing her in the witness box I reject that evidence. I am satisfied she was an evasive and unreliable witness and that her evidence was characterised by ducking and weaving, self-contradiction and contradiction of more reliable evidence.

23. Independently of that, she has established what she thinks of the duty to give accurate sworn evidence by her approach to the Inland Revenue affidavit. I am satisfied that having been advised of the requirement to include full details of assets she made a conscious and deliberate decision to swear an affidavit that she knew was false. Not only did she intentionally tell untruths on oath, but I'm satisfied from the evidence that she did so for the purpose of concealing her assets from persons including the plaintiff who had a legal right to access that information. It is beyond credible that she could assert at the hearing that her omission of her assets was a mistake or that she would deny that it was for the explicit purpose of hiding assets from the plaintiff, given that the whole process was meticulously documented by her solicitors in contemporaneous notes.

24. I am satisfied the defendant is a person capable of very considerable calculation and design. I note her solicitor's view that she was very careful to put all the deceased's assets in joint names. Putting that design in place must have involved quite some effort on her part, including the establishment of a large number of bank accounts and having the house, previously in her husband's sole name, transferred to joint names. She previously had had the Walsh family business transferred to her sole name. The really novelistic feature of the story was that having made all of those efforts she was tripped up by one single account in NIB, in an amount which was modest in the context of the overall €3.3m. She tried to get NIB to pay out without probate, and if they had agreed to do so, then the deceased would have left no estate. But the plot twist in this case was that NIB refused to pay out, so once the defendant was informed of that refusal, the only way to access the money was that she had to apply for probate and swear an Inland Revenue Affidavit. In that process she made a conscious decision to swear to something that she was fully aware was false.

25. Further insight into the mind-set and the calculating nature of the defendant is given by the destination of the money. The defendant had done fairly well out of the Walsh family before the lotto win, having had the business transferred to her sole name and half of the house transferred to her; legitimately so, I don't criticise her in any way for that. But in that context her idea of a fair, proper and appropriate distribution of the €3.3million was to give less than €300,000 to her husband's blood relatives while €3 million ended up with her and her blood relatives or at her disposal, bearing in mind the caveat that the full distribution of the money has not been explained or accounted for.

26. It was also striking that the defendant had a history of playing the lotto with the deceased as a joint exercise and she claimed she would buy tickets for both the deceased and herself. Yet when it came to the winning ticket this was converted in her mind and

in her evidence into her sole win. The plaintiff had given evidence of the significance of the winning numbers to the deceased. That wasn't contradicted in evidence by the defendant and I accept the plaintiff's evidence in that regard.

27. A further insight into the defendant's mind-set is that she made a special point of instructing her solicitors so the cheque was in her sole name and that she had a photocopy of it, as if this was a proof of title or a proof of some point in her favour. However, she was actually fully aware when she so instructed her solicitors that the Lottery only issue one cheque to a representative person nominated by the syndicate. Thus, a totally bogus point was being made and she fully knew of the facts which made it bogus. That was one of a number of attempts by the defendant to retrospectively create alternative facts or shift the goalposts.

28. The story of a sole win was also contradicted by the fact that, contrary to her instructions to her present solicitors on which the defence was drafted, the cheque was lodged to a joint account in full prior to the making of any payments from it. She attempted to make a virtue of that in evidence saying she was happy to share with her husband but I'm of the view that a more probable situation was that this purchase of the ticket was a joint exercise, and her husband's involvement was more than just an act of unilateral generosity on her part.

29. Mr. Shane Feeney of Ulster Bank gave evidence in relation to the mandate whereby Mary Walsh was to be the sole signatory for the account into which the lottery money was lodged, an account in the name of Mary Walsh and Peter Walsh. Mr. Delaney in the course of his able submission contends that it is a matter of significance that Mary Walsh was the only signatory on that account. However, the defendant said in evidence that she handled the family finances. The fact that she was the sole signatory in that account does not establish that she was the sole owner. In any event, it seems to me it is not open to the defendant to make that case given that in her evidence under cross-examination she accepted the money was owned 50/50 with the deceased. In cross-examination she also accepted that the tickets were bought from money deriving from joint funds of herself and the deceased which reinforces the view I would have arrived at independently. Mr. Delaney says it is not pleaded that she drew money from joint funds, but I'm of the view it doesn't have to be pleaded. That aspect (which reinforces, but is far from the only, or a necessary, basis for my conclusion on this issue) is a matter of evidence going to a question on which issue is joined in the pleadings. The arrangement in this case was the sort of family arrangement that was discussed by the Family Court of Australia in *Zyk v. Zyk* [1995] Fam CA 135 or the informal family situation discussed in *Paul v. Constance* [1977] 1 W.L.R. 527.

30. An issue arose as to the plaintiff's evidence that the deceased told him that he had won the lotto; saying words to the effect of "*you should bring champagne, we're after winning the lotto*". I am satisfied that the plaintiff's evidence of what the deceased said is admissible as part of the *res gestae* in the sense that it is proximate to the discovery of the win and to the statement of the deceased to the plaintiff that he would get his share, and explains subsequent dealings discussions and celebrations in the aftermath of that statement. *The People (D.P.P.) v. Lonergan* [2009] 4 I.R. 175 indicates that even in the criminal context the question of proximity in time for the purposes of admitting *res gestae* is not rigid, but is one of a number of matters to be considered. I have considered the possibility of concoction (i.e., that the statement by the deceased could have been concocted because it was too remote in time from the fact to which it related, namely the lotto win) as well but I'm satisfied that evidence is admissible. Mr. Delaney submits the phone call could have been twelve hours after the lotto win and therefore there is a possibility of concoction, but that assumes that knowledge of the win was arrived at the time of the live lotto draw, which certainly has not been established. It is not the law that, as Mr. Delaney put it, the possibility of concoction cannot be excluded, and therefore the *res gestae* exception does not apply. The issue is what weight should be given by the court to any lapse of time. There is not much lapse of time anyway and I am satisfied that the statement by the deceased is sufficiently proximate to the event which it explains.

31. Even if I am wrong about all of that, the challenge doesn't get the defendant anywhere because she accepted in evidence that she was sharing ownership of the money 50/50. It is not necessary therefore in this case to seek to expand exceptions to the hearsay rule; although it is notable historically that equity began with a concern as to injustice not only as to the substance of common law but also as to the rules of evidence (for example, Lord Campbell in *Lives of the Lord Chancellors* (2nd ed.) (London. John Murray, 1846) vol. I, p. 10, cites "*suppression of documents*" by virtue of common law rules as one impetus for the development of the chancery jurisdiction), which is perhaps a good argument for the proposition that the hearsay rule should be relaxed where its equitable to do so. However, that issue will have to be left to another case for further exploration.

32. As I say, even if I'm wrong about the admissibility of this statement it is not essential to my conclusions but simply reinforces a conclusion arrived at independently. Having heard and seen the plaintiff in the witness box I accept his evidence generally and in particular on the issue we are dealing with at present namely that the deceased saw himself as having won the lotto. The plaintiff's evidence overall was broadly consistent internally, unlike the evidence of the defendant. Furthermore the content of the plaintiff's evidence was broadly such that it could be relied on, having regard to the other evidence, unlike the evidence of the defendant.

33. I am satisfied on the balance of probabilities that the evidence of the plaintiff is honest and generally reliable. The point is made that he delayed in raising the issue of the lotto win or raised the issue of the will first rather than raising it as a claim to a share in the lotto. However it seems to me that the approach of the plaintiff makes sense in the sense that he thought that his entitlement to the winnings might have been dealt with in the will. On the balance of probabilities I am satisfied that the ticket was purchased as a joint exercise between the defendant and the deceased. Even if I am wrong about that, it does not in fact affect the result of the case having regard to other conclusions I reach in the light of events subsequent to the purchase.

Did Peter Walsh have discussions with the plaintiff to the effect that they would share a lottery winning?

34. The second factual issue is: did Peter Walsh have discussions with the plaintiff to the effect that they would share a lottery win? For the reasons I have referred to I accept the evidence of the plaintiff generally and in particular regarding discussions he had with the deceased that they would share lottery winnings and I reject the evidence of the defendant in that regard. On the balance of probabilities on the evidence I am satisfied such discussions did take place.

35. Ms. Browne argues that such discussions were in effect a pre-existing contractual arrangement and she says such contractual arrangement arises from the case pleaded at para. 4 of the statement of claim, which alleged that the deceased had regularly spoken to the plaintiff about sharing his money. This was dealt with on behalf of the plaintiff in replies to particulars by saying this was a matter of evidence for the hearing of the action. The evidence of the plaintiff at the hearing of the action was that he and his father played the lottery and gambled on other sports including GAA and horse racing over many years and in that context had spoken to him about sharing money won in the lottery. The plaintiff's evidence was their mutual agreement and intention was that winnings were to be shared. Ms. Browne, as I say, calls this a pre-existing contractual arrangement which came to fruition with the signature of a ticket. Mr. Delaney says a pre-existing contract is not pleaded, and that the pleadings refer only to previous discussions. I think that calling it a pre-existing contractual arrangement is possibly over-formalising it. The issue is: what was the intention of the parties at the time of the transactions at issue in this case? Intention can be inferred from all of the circumstances, including previous discussions with the father, so it is relevant to that extent. I don't think that relying on the previous discussions in that way takes Ms. Browne beyond para. 4 of the statement of claim. I am of the view that, from the deceased's point of view, a win was not going

to be something to benefit him as such but rather his wider family, including his own blood relatives and the plaintiff in particular.

36. This is not a case therefore where it would be accurate to say that a syndicate was retrospectively formed after the win. It is a case where it was in the contemplation of the deceased, as a player, that playing was for the benefit of himself and other family members. Thus, in my view it would not be correct to consider that the deceased was giving the plaintiff a gift by asking to sign the ticket. Rather, he was giving tangible expression to his intention and contemplation prior to having won, that any win would be for the benefit of family members, including the plaintiff.

37. Again, *Zyk v. Zyk* [1995] Fam CA 135 is of assistance in that regard. Here, it was stated that "*In the ordinary run of marriages a ticket is purchased by one or other of the parties from money which he or she happens to have at that particular time. That fact should not determine the issue. Where both parties are in receipt of income and where their marriage is predicated upon the basis of each contributing their income towards the joint partnership constituted by their marriage, the purchase of the ticket would be regarded as a purchase from joint funds in the same way as any other purchase within that context and would be treated accordingly: see Anastasio [(1981) FLC 91-0193]. Where one party is working and the other is not the same conclusion would ordinarily apply because that is the mode of partnership selected by the parties. The income of the working member is treated as joint in the same way as the domestic activities of the non-working partner are regarded as being for their joint benefit. ... In the sort of case to which we have referred above the conclusion would be that the ticket was purchased by joint funds and the contribution of the prize would be seen as a contribution by the parties equally. There may be cases where the parties have so conducted their affairs and/or so expressed their intentions that this would not be the appropriate conclusion, but in the generality of cases with which this Court would normally deal this appears to us to be the correct approach and the correct outcome*" (paras. 50-51).

38. While that decision related to the informality of purchase from joint or individual funds, the more general point is that family arrangements may have a certain informality of execution but are underpinned by a prior intention of joint benefit (a similar point arises from *Paul v. Constance*, to which I will return). That principle extends beyond husbands and wives to include family arrangements intended to benefit other family members. The win in this case was an exemplification of that broader concept to the extent that the deceased intended in advance that any potential win would be for the benefit of his family members including the plaintiff. The arraignment for subsequent signature of the ticket was simply a formalisation of that prior arrangement and intention.

Was the defendant advised that anyone she wished to benefit by gift should sign the ticket in order to avoid capital acquisitions tax?

39. The third factual issue is whether the defendant was advised by Mr. Eamon Hughes of the National Lottery that if she wished to give any gifts to persons she should have them sign the ticket and claim forms so that such gifts would be exempt from tax. Mr. Hughes was emphatic that he had absolutely no recollection whatsoever of the defendant or of any dealings with her, yet at the same time, very unwisely, he seemed prepared to assume that he had given that advice to the defendant. He was totally unable to back up that assumption or give any reason for it and he resiled from it in cross-examination. Given that he has no recollections at all, his testimony on this matter is totally speculative and is devoid of real evidential value. Maybe he was influenced by the fact that he had been called by the defendant and in that process had had prior exposure to her story, or maybe not – the reason why he foolishly chose to give that evidence without any basis for doing so does not fundamentally matter for present purposes. The most one can say is that sometimes he drew winners' attention to tax implications because he repeatedly said that Capital Acquisitions Tax thresholds were in the public domain. His evidence was however somewhat contradictory in the sense that he also said that the lottery didn't give people advice, and that what they did with their money was their own business.

40. The most one can take from his evidence is that he might have referred to the tax position in conversation with the defendant but then again he might not. He was keen to stress the tax thresholds, and their being in the public domain, yet at the same time the defendant claimed to be unaware of them. She would hardly have been unaware of them if Mr. Hughes had drawn attention to them.

41. A further issue was as to the time when the phone call took place with Mr. Hughes. Mr. Delaney asked in re-examination a question to the effect that *if a syndicate of say ten people won* would Mr. Hughes send an email to his colleagues straight away. The particular hypothetical in the question – "*if a syndicate of say ten people won*" – was heavily relied on by Mr. Delaney in argument. However, the reply was that Mr. Hughes would contact colleagues forthwith because it takes time for money to be transferred from the Central Bank to the Bank of Ireland. Mr. Hughes' emails to colleagues are on the Tuesday rather than on the Monday when the defendant says she called the lotto. Mr. Delaney seemed to be of the view that this answer supported the idea that the defendant could not have represented herself as part of a syndicate on the premise that she called on the Monday. However the answer seems just as open to the opposite conclusion, namely that she did not call on the Monday but rather first called on the Tuesday afternoon and that that call prompted a number of emails from Mr. Hughes all concentrated around that time. The content of those emails supports the proposition that she informed the lottery of the syndicate win. Mr. Hughes' answer that it would take time for money to be transferred from the Central Bank to the Bank of Ireland, is just as valid when he received a call from a sole winner, as it is from a syndicate winner. The money has to be transferred either way. The answer contains nothing specific to a syndicate, still less to a syndicate of "*say ten people*", and certainly isn't at all supportive of the proposition that some more immediate action is required for a syndicate win than for a sole win.

42. Mr. Delaney suggested in argument that more time would be needed for a syndicate win because of additional formalities, particularly the claim form, but that speculation on his part was not something that the witness actually relied on and was not a proposition that he in fact dared to attempt to draw from the witness. Mr. Delaney also submitted there was no reason to put together a syndicate in the absence of, or prior to, the defendant having receiving advice from Mr. Hughes, but in fact there was every such reason, namely the family arrangement and the wishes of the deceased. In the absence of reliable supportive evidence I do not consider that it has been established on the balance of probabilities that Mr. Hughes actually gave any particular advice to the defendant to the effect that she should put other persons on the back of the ticket to avoid the imposition of tax. As I say, I find her evidence unreliable, both generally and on this issue. But even if I'm wrong about that, it does not follow that that any such advice in any way influenced the intentions of the deceased or the dealings of the plaintiff with other members of the syndicate.

43. Independently of that, the defendant's story that six names were on the ticket for tax purposes does not make sense on a number of levels. If it was, as she claims, her ticket, no tax would be payable by the deceased, by Jason Daly on €300,000, or by the plaintiff, whether he took €200,000 or the house worth €135,000. So on her story, three of the five named added to the ticket were superfluous for tax purposes.

Was the plaintiff given the option of choosing €200,000 or the house?

44. The fourth question of fact is whether the plaintiff was given the option of €200,000 or the house. The defendant's evidence on this issue is not credible. She suggests that she mentioned this alleged choice of €200,000 or the house to her solicitor Jack Duncan once and once only, in 2011, but never again. Jack Duncan was never called to give evidence, and there is absolutely nothing to

suggest that he wasn't available. It is not possible to accept that this issue would not have come up in discussions with his partner Aileen Giblin, particularly when going through the pros and cons of transferring the house to the plaintiff. It would have been a very simple answer to all the pros and cons to say - no, we're doing this because Mr. Walsh agreed to take the house in lieu of a lotto win. It is even more incredible that if this happened, it would not have been mentioned when the plaintiff first made his claim in relation to the lotto. A letter was sent replying that the house was transferred but there was a complete absence of a suggestion that there had been an agreement that this was in lieu of him taking a share in the lotto.

45. In any event the idea that the plaintiff was given a choice of €200,000 or the house is not inherently plausible as it is evident from the evidence, which is unchallenged, that the house was worth €135,000. There is no apparent reason why the plaintiff would do himself out of €65,000. If the offer was to take the house or €135,000 then that might be more plausible, but as presented by the defendant this scenario does not strike me as one that commands acceptance as a matter of probability.

46. Furthermore, it is suggested that the plaintiff was offered a share in the lotto or the house before signing the claim form, but then signed the claim form and had already decided to take the house prior to the win being claimed. The supposed choice wouldn't make sense in that context. If there was such a supposed choice, it would be inconsistent with the plaintiff being asked to sign the ticket, thus making him a co-owner under the lottery rules which I'll come to. The defendant's evidence is fundamentally inconsistent with such a choice having been offered in relation to what happened next.

47. Another feature which I rely on in rejecting the defendant's evidence on this issue is that she accepts in her evidence that she was somewhat unwilling to transfer the house. She went out of her way to say from the witness box that the plaintiff didn't deserve it. One must ask then why would she be so unwilling if she had already agreed to such a transfer in return for the plaintiff waiving his claim to the lotto win. That attitude could only be understood on one of two grounds; either there was no such agreement or there was an agreement and she was reluctant to honour it. Neither conclusion is terribly flattering for the defendant. I think having heard the evidence that the more likely option was that there was no such agreement. It is also notable that the defendant didn't pass on any of this alleged information regarding tax implications that she said she received from the lottery. I also have regard to the reasons already mentioned for rejecting the defendant's evidence generally and accepting the plaintiff's evidence generally. On the balance of probabilities having heard the evidence I am satisfied that there was no agreement whereby the plaintiff was offered or took the house in lieu of €200,000 as his share of the lottery win.

Was a syndicate created by the deceased or otherwise constituted conferring an entitlement on the plaintiff to a one-sixth share?

48. The fifth issue is whether the deceased created a syndicate or whether the six signatories otherwise constituted themselves a syndicate conferring on the plaintiff an entitlement to a one-sixth share. There were a litany of acts by the six signatories individually and collectively which were consistent with them forming, and holding themselves out as, a syndicate. On the balance of probabilities on all the evidence, I conclude that the six persons did constitute themselves a syndicate by signing the ticket and the claim form and in their dealings with the lotto and indeed individually with the Revenue. I am satisfied on the evidence they did constitute a syndicate and the defendant held them out to the lotto as a syndicate and indeed the defendant and Jason Daly accepted as much in evidence.

Did Peter Walsh and Mary Walsh acknowledge the plaintiff's co-ownership of the ticket?

49. The sixth question is whether, by signing the claim form, the defendant and the deceased acknowledged the plaintiff's co-ownership of the winning ticket. I would answer that in the affirmative, having regard to the reasons as set out above, and ultimately the defendant, under cross-examination in the witness box, accepted that the other signatories were co-owners.

Did Peter Walsh create an express trust by his words and actions?

50. The seventh issue is whether the deceased created an express trust by his words and actions. The defendant gave evidence that the deceased knew that she was the winner. I reject her evidence in that respect for the reasons set out already regarding rejection of other related evidence. The evidence that the deceased informed the plaintiff that he would get his share and not have to worry about money was not challenged as to admissibility. Having regard to the matters as I have set out already, I accept the plaintiff's evidence that the deceased said that the plaintiff would be taken care of, will get his share, and he won't have to worry about money for the rest of his life.

51. The evidence as to whether there was a get-together on the Sunday was contradicted by the defendant, but I reject the defendant's evidence to the contrary having regards the matters I have referred to. The plaintiff puts Jason Daly at the meeting although Jason Daly denies this. Jason Daly's evidence was highly unsatisfactory. He changed his position multiple times on the question of gift versus loan, and seemed unnaturally eager to change his sworn evidence to avoid contradicting his mother. If he was unwilling to contradict her on the loan issue, I infer he would be probably unwilling to contradict her on the question of whether he was in attendance at the house or at what time. He bends with the wind. I am not satisfied that his evidence as to his involvement at the time of the win is credible or correct. Even if, contrary to my finding, the plaintiff's recollection as to who was present in the house was incorrect, Jason Daly was only a figure at the periphery and the plaintiff never claimed to have seen him sign the ticket. I am satisfied the plaintiff's recall of the key element namely his conversation with the deceased and the context of that conversation were honestly given and reliable having regard to the matters referred to. I am satisfied the acts of the deceased were such that they create an express trust in favour the plaintiff for one-sixth of the winnings. Reference to his share is properly understood in context as reference to an equal share. The point is made by Mr. Delaney that the one-sixth did not crystallise immediately so certainty was lacking. In that regard I accept Ms. Browne's submission that it is irrelevant as to when the signatories signed the ticket because the defendant stated that it was agreed from an early stage that there would be six signatories; when they actually signed isn't relevant for this purpose. The amount therefore was certain from an early stage, on the Monday or Tuesday even on the defendant's own evidence. One has to look at the words and actions of the deceased overall when the decision was made to have six signatories, which at an early stage fixed and crystallised the terms of the trust that the deceased in my view intended to create. The fact that the deceased did not expressly say "*you are getting one-sixth*" does not defeat the plaintiff's claim in this regard. I am of the view that "*you are getting your share*" means an equal share, and the deceased's actions, including having the ticket signed by six persons, clarifies what this means; namely, one sixth. As there could only be one nominated cheque recipient, that nominee, the defendant, was consequently to hold one-sixth of the money on trust for the plaintiff.

52. The Court of Appeal decision in *Paul v. Constance* [1977] 1 W.L.R. 527 is of assistance, particularly the statement at p. 530 analysing transactions where parties were "*unaware of the subtleties of equity but understanding very well indeed their own domestic situation*". The Court of Appeal concluded that the High Court in that case was correct to hold an express declaration of trust made to the deceased even though it is "*not easy to pin-point a specific moment of declaration*" per Scarman L.J.

53. I also derive assistance from the decision in Re *Golay's Will Trusts* [1965] 1 W.L.R. 969 where Ungoed-Thomas J. concluded that it is open to the court to interpret the phrase "*a reasonable income*" so as to quantify the precise extent of what that meant; and that

the involvement of the court in quantifying the extent of the interest did not create such uncertainty as to prove fatal to the trust. Thus, the trust was not avoided on grounds of uncertainty, and reference is made to the fact that the courts were constantly required to make objective assessments as to what was or was not reasonable.

54. Now if it had been necessary for me to determine what share was to be enjoyed by the plaintiff based only on the words spoken by the deceased in the context of an intention to have the ticket at a future point signed by six people, I would have held that the interest was to be a one-sixth interest, but of course we don't have to speculate about what would have happened because the deceased did invite the plaintiff to sign the ticket and to participate in arrangement for a total of six persons, and that was then completed by the signature of the claim form and the presentation of the ticket and claim form to the lottery. Therefore there is no uncertainty that requires resolution, or that would prevent me from being satisfied as to the existence of a trust.

Questions of law
55. I now turn to the legal issues. The main legal submissions made on behalf of the defendant fall away having regards to my findings of fact. Indeed a number of those submissions do not even get off the ground having regard to the defendant's evidence particularly under cross-examination.

Did the signature on the ticket confer joint ownership?
56. The first legal issue is whether the signature on the ticket conferred joint ownership. My attention has been drawn to an interesting discussion by the Supreme Court of India of the legal nature of lottery tickets in *H. Anraj and Government of Tamil Nadu* [1985/1986] A.I.R. 63, where it was held that a lottery ticket comprised two rights, both of which were capable of being transferred, assigned or sold. But again, I find that the issue of ownership was conceded in evidence by the defendant herself and Jason Daly. The defendant ultimately accepted that the transactions of the lotto were such that the plaintiff was a co-owner. That seems to me to be a resiling from the case as pleaded that the plaintiff was not an owner. It seems to me to have been clearly acknowledged in the evidence that the plaintiff was a co-owner. That conclusion seems totally inconsistent with the argument that what the plaintiff was to get is a matter of gift and concession on the part of the defendant. If I am wrong about that, the rules of the game clearly confer ownership on the plaintiff having signed the ticket and the claim form. That is the distinction between this case and *Horan v. O'Reilly* [2008] IESC 65 where the ticket was not signed.

57. The National Lottery Act 1986, s.1, defines a National Lottery ticket as "*entitling its owner to participate in the National Lottery*" and a winning ticket as "*a ticket the owner of which is entitled to a prize in the National Lottery*". The plaintiff is an owner under the rules of the lottery and therefore is "*entitled to a prize*", according to the definitions in the 1986 Act. Mr. Delaney argues that signature of the ticket doesn't confer equal ownership but that such ownership depends on the intentions of the formers of the arrangement, in this case the defendant. That however is an argument based on a false premise. First of all I hold that, arising from the plaintiff's discussions with the deceased regarding sharing winnings and from the dealings between the deceased and the plaintiff prior to the win being claimed, there was an express, or if I am wrong about that, alternatively an implied, agreement that the plaintiff would receive a share equal to the share of any other player involved. It therefore follows on that the signature of the ticket by the plaintiff in the circumstances of this case conferred a one-sixth ownership. That conclusion is reinforced by the overall circumstances I have held that the purchase was a joint operation between the deceased and the defendant. Therefore, it would make sense and has logical appeal that the winnings would be divided equally between the deceased and his blood relatives, and the defendant and her blood relatives. The choice of six signatories is consistent with this in the sense of their being three signatories on each side of the family. As is the evidence which I have accepted that the deceased was the person who communicated with the plaintiff; it would be logical for the head of each side of the family to communicate with the members on that side. The agreement that there would be, in addition to the deceased and the defendant, two persons on the deceased's side and two persons on the defendant's side is very much in the spirit of equality, and of course equity favours equality.

58. The arrangement of three on each side would not make sense, or certainly wouldn't make as much sense, if the amounts of their shares were to be out of kilter, or at the very least if the overall amount on each side were to be out of kilter. At most, the defendant's submission amounts to the proposition that it may be that the three persons on the defendant's side agreed to divide the money differently amongst themselves but, if so, that is a matter for them. The arrangements on her side don't establish that there wasn't intended to be an equal division between the two sides. I also have regard to the fact that at the end of her cross-examination the defendant accepted she couldn't contradict the plaintiff's view that he was getting a sixth. Mr. Delaney sought to object to that, but I think it was a legitimate question, and the answer only reinforces the conclusion I have arrived at independently.

59. The submission was made that the plaintiff didn't assert a right to a one-sixth share prior to receiving a letter from the lotto saying that he was part of a six person syndicate. But that is a specious point because there is simply no logical connection between receiving such a letter and asserting a claim. The plaintiff knew at all times that he was one of six people who were signatories to the ticket, and to the claim form, and the letter didn't tell him anything that he didn't already know in that regard.

60. The next submission was that the evidence of the plaintiff was not consistent with an argument that everybody who signed the ticket was entitled to one-sixth each because of the fact that other persons received other amounts of money as opposed to exactly one-sixth. However, Jason Daly's evidence was that there was an agreement between himself and the defendant, and for whatever reason, Anthony Daly was not called and again there is absolutely nothing to suggest he wasn't entirely available to give evidence. The case is not about what agreements were made with other people individually on the defendant's side of the family.

61. If I'm wrong about all of that, the alternative situation arises that in my view, in all the circumstances even if there wasn't a positive express or an implied agreement that the plaintiff would be a one-sixth owner, the circumstances are such as to confer equal joint ownership on the plaintiff in the absence of an agreement of the contrary, again having regard to the principal that equity favours equality, and I find there was no such contrary agreement. I am satisfied on the balance of probabilities that the intention was the plaintiff's share was to be on a one-sixth basis.

Do the facts of the case give rise to a constructive trust?
62. The second question of law is whether the facts give rise to a constructive trust. Given that the rules of the game states that the nominated person collects on behalf of all members, it axiomatically follows that the nominated person, in this case the defendant, holds the winnings in trust for all members to the extent of their ownership. In the case of the plaintiff I hold that there is an express trust in favour of the plaintiff to the extent of one-sixth of the winnings, but even I am wrong about an express trust the defendant holds one-sixth of the winnings on a constructive trust for the plaintiff. Mr. Delaney suggested that preconditions for a constructive trust were not established, but I have regard to the view of Barron J. in *N.A.D. v. T.D.* [1985] I.L.R.M. 153, at p. 160, that a "*constructive trust is imposed by operation of law independently of intention in order to satisfy the demands of justice and good conscience*". I accept Ms. Browne's submission that a constructive trust is imposed in any situation or if one person is in possession of property belonging to another and does not account for that. In this situation we have the twin requirements of ownership and failure to account, and a trust is to be, and must be, imposed in that situation.

63. Reliance was placed by Mr. Delaney on the High Court of Australia decision in *Russell v. Scott* [1936] 55 C.L.R. 440, and that in *Lynch v Burke* [1995] 2 I.R. 159 which discussed rebutting the presumption of a result in trust by evidence in particular circumstances, but if anything those authorities seem to me to support the position of the plaintiff rather than the defendant.

64. Mr. Delaney submits that the beneficial ownership of the lottery monies falls to be determined by reference to the intention of the person who was the original owner of the ticket; on his submission the defendant, prior to the formation of the syndicate. He says the evidence establishes that Ms. Walsh's intention was that the other persons would not be entitled to a portion as of right but would receive a payment of such amount as she and her discretion saw fit to make to them, as he put it. He says she has that discretion because the rules are silent on division and there was no pre-existing contractual arrangement. There are a number of fundamental problems with that submission.

65. Firstly, the factual basis for the submission does not exist. The defendant was not the original owner; the purchase was a joint exercise. Secondly, it wasn't a case where the syndicate was born after the event. The syndicate was a crystallisation and a giving expression in concrete form to an intention that existed ab origine and was an intention in the mind of the defendant prior to buying the ticket. Further, there was an agreement between the plaintiff and the deceased that the plaintiff would get one-sixth and furthermore it is fundamentally contradictory to accept that the plaintiff was a co-owner and yet contend that the extent of his interest is totally discretionary and a matter of gift on the part of the defendant. It seems to me under the rules that the plaintiff wasn't just the equitable owner but was the legal owner of the ticket in terms of the rules having signed it.

66. I find that there was an understanding and agreement between the plaintiff and the deceased and I also find that the defendant and the other signatories acquiesced by their conduct in that understanding and agreement that the plaintiff would get an equal share, namely a one-sixth share. If I am wrong about that, again I consider the share should be taken to be an equal share in all the circumstances in the absence of an agreement to the contrary and there has been no such agreement. On the facts, I am satisfied that the signature of the ticket was a concretisation of a family arrangement, not a gift to the plaintiff. Thus the approach in *Dickerson v. Commissioner of Internal Revenue* (2012) T.C. Memo 2012-60 whereby ownership fluctuated as between holding an unsigned and then a signed ticket, which was regarded as having been a transfer assignment or gift, doesn't seem to me to arise.

67. If, contrary to the approach I have taken, asking the plaintiff to sign was a gift or an assignment of a chose in action, it was good in equity (an analogous situation arose in *McEneany v Shevlin* [1912] I.R. 32, relating to the assignment of deposit monies.) I note that *Halsbury* states (Vol. 13 para. 33) that "*an assignment of an equitable chose or thing in action will be enforced, even though voluntary, provided that the donor has done everything required to be done by him in order to transfer the debt or fund*", and a similar rule applies to the equitable assignment of a legal chose in action. In the present case everything has been done to make the assignment complete in equity. The plaintiff and the other members of the syndicate signed the ticket, completed the claim form, and presented the documentation to the National Lottery which, in turn, was satisfied that everything was in order and confirmed that it regards the six persons concerned as the owners of the winning ticket. I draw support by analogy from *Murray v. Murray* [1939] I.R. 317 for the conclusion that (if I am wrong about an express trust) a constructive trust does arise on the facts as to one-sixth of the winnings.

Does public policy preclude the defendant from relying on an intention to avoid tax as a basis for having been party to an arrangement whereby the plaintiff signed the ticket?

68. A third legal issue is whether the defendant is precluded as a matter of public policy from relying on an intention to avoid tax as a basis for having been party to an arrangement whereby the plaintiff signed the ticket. It is better, I think, to speak in terms of preclusion rather than estoppel, in that preclusion is perhaps a broader equitable concept. Historically, estoppel has been an excessively technical doctrine, although, as Mr. McDermott's work on *The Law on Res Judicata and Double Jeopardy* (Bloomsbury, 1999) (Ch. 9) points out, requirements, for example, of mutuality have been severely cut back in recent years. I am rejecting the defendant's evidence that the reason the plaintiff signed the ticket was to avoid tax in the context of proposed discretionary gifts, but if I am wrong about that conclusion, it would be contrary to public policy to give effect to such an agreement having regard to the principles discussed in *Gascoigne v. Gascoigne* [1918] 1 K.B. 223 and *McEvoy v. Belfast Banking Co. Ltd* [1935] A.C. 24, *Parkes v. Parkes* [1980] I.L.R.M. 137.

69. In *Revenue Commissioners v. Droog* [2016] IESC 55, at para. 1.1, Clarke J. refers to a distinction between tax evasion, which involves "*the improper concealment of facts from the tax authorities so as to unlawfully reduce tax, on the one hand, and tax avoidance on the other*". Here, on the defendant's evidence, it seems to me that the facts amount to a situation where there was improper concealment. On her case, the recipients of the win were held out as owners, but were in fact at the mercy of the defendant who would give them such gifts if any as she wished to give in her discretion. *Droog* is dealing with tax avoidance versus evasion in the formal context of the Taxes Acts. Here we are dealing with the broader context of public policy. It seems to me that to permit the defendant to make the case she seeks to make would be to allow the operation of the statutory tax exemption in favour of lotto winners to be carried out in such a way as to undermine statutory policy regarding the taxation of capital acquisitions in the context of, and perhaps this is the important point, an essentially incorrect representation that the donees were actual owners as opposed to persons who are simply intended recipients of gifts. Such situation would in my view be contrary to public policy.

70. Mr. Delaney submits that it is a point in his favour that the defendant was not herself to benefit from the tax evasion. That is not the case because she derived utility from her sons not having to pay gift tax (for example, because the financial benefit thereby conferred lessened any need for them to make further calls on her resources at a future point). But even if she didn't, such an arrangement is still contrary to public policy. Thus, any such agreement should be disregarded and, on that basis, the plaintiff is entitlement to a one-sixth share would stand.

Does the defendant's conduct preclude her from denying the plaintiff's part-ownership?

71. The fourth question of law then is whether the defendant is precluded by her conduct from denying the plaintiff's part-ownership. I find as a fact the defendant held the plaintiff out as an owner, and in my view she is precluded in equity from denying his part-ownership. She hasn't established any agreement for an unequal share to be held by the plaintiff. In my view, preclusion or estoppel clearly arises. The plaintiff did act to his detriment in signing the claim form in the sense that he could have sought to have the beneficiaries nominate someone else. If he had dug his heels in, it is accepted that the defendant would not have been able to collect the cheque. Therefore, by signing the claim form he conferred a benefit on the defendant and waived the possibility of using the leverage of signature so as to ensure a more neutral nominee would be appointed. Even if I am wrong about estoppel in the formal sense, I consider the defendant is precluded in equity from denying the plaintiff's part-ownership. Again, I come to the point that in evidence the defendant accepted the plaintiff's part-ownership in cross-examination which reinforces the conclusion I have independently arrived at.

If successful in the action, would the plaintiff be unjustly enriched?

72. The fifth, and final, question of law is whether the plaintiff would be unjustly enriched if successful in the action such that he

should hold the house on trust for the defendant (see *Corporation of Dublin v. Building and Allied Trade Union* [1996] 1 I.R. 468, p. 483 *per* Keane J.). Mr. Delaney states that his argument regarding unjust enrichment is based on the evidence that he was offered the choice between €200,000 or the house; evidence I have obviously rejected already. He also submits that even if this evidence is rejected, which it is, there was a close temporal connection between the lotto win and being told he was getting the house and that he would not have got the house without the win. The evidence regarding the house transfer is clear. There was no mention of lotto winnings from beginning to end. It is clear that the plaintiff's father wished to benefit him by transferring the house to him. I am satisfied on the evidence on the balance of probabilities that the intention was clearly to make an unconditional gift of the house to the plaintiff. That conclusion is supported by documentary material at the time including solicitor's attendances, and that it was also the intention of the defendant to do so. Thus, I reject the proposition that the house is held on a constructive trust. No agreement at the time of the house transfer has been established that it was to be done in the context of the lotto, and again it is almost incredible that it can be suggested that that would be the case given that it is not mentioned at any stage in the very detailed contemporaneous documentary materials. That there may have been a close temporal connection, and that he might not have got the house without the lotto win, are not sufficient in equity to establish that there would be unjust enrichment or that there was a constructive trust or that there is any other basis for the counterclaim to succeed as pleaded. The onus to prove the counterclaim rests on the defendant and she has failed to discharge that onus. I have rejected her evidence on this issue for reasons set out earlier.

73. In any event to transfer the house to the defendant now would unjustly enrich the defendant given the manner in which he dealt with the proceeds of a lottery win. Furthermore, the defendant's breach of trust and calculated deception to conceal her assets are such that she fails the clean hands test and would not present as a compelling candidate to be granted equitable relief. On that issue and on the issue of preclusion, the comments of the Supreme Court in *Carrigaline Community Television Broadcasting Co. Ltd. v. Minister for Transport* [1997] 1 I.L.R.M. 241 are apposite. The court may refuse equitable relief to plaintiffs whose legal rights have been infringed where they have themselves been guilty of inequitable conduct. That long-established maxim of equity will apply even though the inequitable conduct of the party concerned has not directly affected the other party, as illustrated in *Parkes v. Parkes* [1980] I.L.R.M. 137.

74. This is illustrative of the legal principle of more general application, *ex turpi causa non oritur actio*. That maxim recognises the reluctance of courts to allow those who have themselves repudiated legal obligations to invoke the law when it seems expedient for them to do so.

75. Accordingly there will be a mandatory order directing the defendant to pay to the plaintiff the sum of €564,065.66 forthwith, and I will dismiss the counterclaim.

Consequential orders

76. Costs follow the event. In relation to the question of terms of a stay and the question of an injunction and the question of a return date for discovery in aid of execution, I have regard to a number of matters. Firstly, the fact that I have found that the defendant intentionally gave false evidence on oath as to her assets to the Revenue Commissioners. Secondly, that she did so for the purpose of concealing her assets from persons who had a legal entitlement to know about them including the plaintiff in particular. Thirdly, that she gave inaccurate, evasive and unreliable evidence from the witness box. Fourthly, in particular, that inaccurate evidence included her denying that she had intentionally made a false statement from the Revenue affidavit and further denying that she had done so with the intention of concealing her assets in the manner described.

77. Further, I have regard to my finding that she is a person of considerable calculation and design. I have regard to the fact that the lottery winnings have not been fully accounted for and finally to the fact that payments out of the winnings in replies to particulars were not fully disclosed on behalf of the defendant and to all the circumstances and the matters set out above.

78. So, having regard to all those factors I am prepared to give the defendant a stay on the order in favour of the plaintiff, but the stay would be on the actual enforcement of the judgment and the actual enforcement of, as opposed to taxation of, the costs. That stay does not stay any interim measures such as injunctive relief, discovery in aid of execution or any other steps to be taken by the plaintiff to protect the order in his favour that I have made. So I would grant that stay for 28 days and if a notice of appeal is lodged within 28 days until the determination of the appeal by the Court of Appeal, but in the circumstances and having regard to the matters that I have referred to, the stay needs to be on terms that are sufficient to ensure that the order I have made in favour of the plaintiff is protected.

79. I am unhappy to put it at a minimum at the suggestion that the defendant might be spending the plaintiff's money in order to prevent the plaintiff from getting access to his money, but independently, the plaintiff is entitled to assurance that he will be able to protect the award and a sum for costs, as otherwise the award would be diminished by having to pay costs out of it. So I am going to act on the basis of the rough estimate of costs I have been given on behalf of the plaintiff. I have not been given a counter-figure on behalf of the defendant. I appreciate time is short but I will deal with that by giving liberty to apply to vary the amount of the lodgement. So the term of the stay will be that the stay will be operative as and when the defendant lodges in the High Court, to the credit of the action, the sum of €929,965.66 which is made up of €564,965.66 by way of judgment, €300,000 by way of an estimate of the costs in this court, and €65,000 by way of an estimate of 50% of the costs of an appeal. There will be liberty to apply to vary that figure if the defendant wants to dispute it or to suggest an alternative figure.

80. In relation to injunctive relief, the suggestion that the plaintiff should proceed, even for the purposes of an application today, on affidavit and by way of notice of motion is unnecessarily formalistic in the context where I have heard oral evidence and made findings on the basis of that. So I will provide for an injunction to prevent the defendant from reducing her assets below the sum of €929,965.66 and I will give everyone liberty to apply and Ms. Browne can have a return date of Monday 6th February, 2017 at 12 o'clock for a motion for discovery in aid of execution or any other relief she wants to apply for, the motion to be served by close of business tomorrow and to be returnable for 11:45 on Monday.