THE HIGH COURT

[Record No. 2005/151CA]
[Circuit Court Record No. 1997/4483]

IN THE MATTER OF AN INTENDED APPEAL
THE CIRCUIT COURT
DUBLIN CIRCUIT COUNTY OF THE CITY OF DUBLIN

BETWEEN

THOMAS GANNON

PLAINTIFF

AND
SUSAN EVANS

DEFENDANT

Judgment of Mr. Justice Declan Budd delivered on the 28th day of July, 2005

1. On 4th July, 2005, this motion came before the High Court with the defendant/appellant seeking:-

> An order pursuant to Order 63 Rule 9 of the Rules of the Superior Courts discharging the order of the Master of the High Court made on 1st June, 2005, refusing the defendant's application for an extension of time within which to lodge a notice of appeal in respect of the judgment granted in the above entitled proceedings in the Dublin Circuit Court on 19th May, 2004;
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> An order pursuant to Order 63 Rule 9 of the Rules of the Superior Courts discharging the order of the Master of the High Court made on 1st June, 2005, granting the plaintiff the costs of the said application for extension of time;
>
> An order pursuant to Order 122 Rule 7 of the Rules of the Superior Courts granting an enlargement of the time within which to lodge a Notice of Appeal in respect of the entire of the judgment and orders, including costs, made by the Circuit Court on 19th May, 2004;
>
> Such further or other order as to this Honourable Court shall meet and fit;
>
> Costs.

Background

2. In the background to this motion for an enlargement of time to lodge and serve a notice of appeal in respect of a judgment given in the Dublin Circuit Court on 19th May, 2004, is the tale of the problems which can arise where two people have agreed to live together in a relationship. Both had previously been married and had had children but were separated from their respective spouses.

3. Apparently in or about November, 1988 the plaintiff and the defendant entered into a close personal relationship and began residing together at rented accommodation in Killester, Dublin 5 together with their respective children from each of their earlier marital unions. They subsequently lived at No. 152 Kincora Road, Clontarf, Dublin 3 which was purchased by the parties in the name of the defendant, Susan Evans in July, 1989. Subsequently, in August, 1991, the parties purchased premises at No. 156 Clonliffe Road, Drumcondra, Dublin 3 again in the sole name of the defendant and they lived together in that house. In or about September, 1996, unhappy differences arose between the plaintiff and the defendant such that the plaintiff left the premises at No. 156 Clonliffe Road. The defendant continued to live on in these premises and strongly refuted subsequent suggestions by the plaintiff that he had made direct or indirect contributions towards the acquisition of any beneficial ownership in the premises or that there was any agreement to this effect. Indeed, she maintained that if the plaintiff made any direct or indirect contributions to the household budget, these were not intended to acquire for the plaintiff any beneficial interest in the property but rather were intended to compensate the defendant partially for the considerable monies expended by her on the plaintiff and his children. In further compensation for this expenditure by the defendant, she said that the plaintiff had promised her that she would share in the proceeds of an inheritance which the plaintiff expected to receive on the death of his father.

4. The defendant contends that while the parties did live together for a period between November, 1988, and September, 1996, they had first lived in rented premises and then in a house which was purchased in the sole name of the defendant at No. 152 Kincora Road, Clontarf, Co. Dublin in or about July, 1989. This premises was sold in about August, 1991, and a further premises was purchased at No. 156 Clonliffe Road, Drumcondra in Co. Dublin in the sole name of the defendant.

5. There is a further significant aspect to what lies in the background to this application for an enlargement of time to serve a notice of appeal against the order made in the Circuit Court. The defendant, at all material times since unhappy differences arose between the parties, has maintained that their differences were aggravated by assault and battery perpetrated upon her by the plaintiff. She also contends that at all times the financial responsibility for the discharge of the mortgage repayments on each of the premises fell to her and further that she maintained and improved the premises at Clonliffe Road which became the subject matter of proceedings in the Circuit Court. Indeed, I note that in May, 1997, the plaintiff initiated proceedings against her by way of an equity civil bill in which the plaintiff was seeking a declaration that he is entitled to one half beneficial interest in the premises known as 156 Clonliffe Road and orders consequential on such a declaration. A notice for particulars was served on the plaintiff's solicitor and a reply to this was furnished, including a schedule of repairs and works allegedly carried out by the plaintiff to the premises at Clonliffe Road with an approximate cost thereof, and it was stated at para. 2 of the reply that "the plaintiff and the defendant mutually agreed to purchase the premises at 152 Kincora Road, Clontarf, Dublin 3 in the name of the defendant so as to financially secure and protect the parties' home in the context of the advancement of a stable relationship".

6. When asked at para. 3 as to why the premises at Clonliffe Road was bought in the sole name of the defendant, the reply at para. 3 was "see para. 2 above. Further as the defendant is aware, at the time of purchase of the premises at Clonliffe Road, the plaintiff was involved in litigation against the First National Building Society, and was also involved in litigation brought against him by Equity Bank". In answer to a question as to how the plaintiff calculated that he is entitled to one half beneficial interest in the Clonliffe premises, he replied:-

> "(a) By reason of the direct and indirect financial contributions of the plaintiff;

(b) By reason of the mutual representations and agreements of the parties concerning their respective beneficial interests in the properties;

(c) The legitimate expectation of the plaintiff on foot of the matters pleaded herein;

(d) That the entitlement of the plaintiff to one half beneficial interests in the Clonliffe premises is just and equitable in all of the circumstances."

7. A defence was delivered on 27th March, 1998, by which the defendant denied that the plaintiff made direct or indirect contributions which were intended, expressly or impliedly, to acquire a beneficial ownership to be held equally or jointly between the parties. Indeed, she suggested that any such contributions were intended to compensate her for the considerable monies expended by her on the plaintiff and his children and that he had promised her that she would share in the proceeds of an inheritance which he expected to receive from his father. She maintains that each of the premises were purchased in her name consecutively and that she financed the purchases. She does accept that the plaintiff may have made some small joint expenditure. However, she will say that there was not at any time any agreement, expressed or implied, for the plaintiff to acquire a beneficial ownership of any kind in the premises. Furthermore she says that she looked after and cared for the children of the plaintiff and this should be taken into account in relation to any claim to be considered by the Court.

8. From the point of view of this motion she then significantly goes on to say that the unhappy differences which arose between the parties were aggravated by assaults and battery perpetrated upon her by the plaintiff. Indeed, she not only sought an order declaring her to be the sole beneficial owner of the premises situate at No. 156 Clonliffe Road, Drumcondra, but also damages for assault and battery. Furthermore she maintained that at all times the financial responsibility for the discharge of the mortgage repayments on each of the premises had fallen to her and also that she maintained and improved the premises at Clonliffe Road. When a notice for particulars was served on the defendant, a reply giving details of the information sought was delivered. This included at para. 4 particulars of assaults allegedly made by the plaintiff on the defendant in October, 1994, October, 1995, and in October, 1996. On this last occasion the plaintiff was no longer residing at the house but arrived there in the early hours of the morning in an extremely agitated state. He allegedly attempted to force entry into the house and damaged the defendant's vehicle parked outside and made threats. It was further suggested that the plaintiff on this occasion was removed from the property by members of An Garda Síochána.

9. There would seem to have been no rush for judgment on the part of the plaintiff because on 8th March, 2002, there was an order made before the County Registrar that the plaintiff's claim be dismissed for want of prosecution but that the execution of the order should be stayed for a period of six weeks and thereafter indefinitely, provided that the plaintiff makes discovery in general terms within the six week period. In July, 2002, an order was made by consent for discovery by the plaintiff of specified documents. After this on 11th February, 2003, the County Registrar made an order for further discovery of documents by the plaintiff. It is noteworthy that the notice of trial was served on behalf of the defendant in April, 2003, in order to bring the matter before the Circuit Court. This history of the proceedings suggests that not only was the defendant resisting the plaintiff's claim but she was pushing on for as early a trial as practical.

10. The equity case was first listed before the Circuit Court for hearing on 2nd December, 2003. An application for an adjournment of the case was made to the President of the Circuit Court, Mr. Justice Smyth, on 18th November, 2003. This adjournment was sought because the defendant's daughter was due to have a baby on or about 2nd December and the point was made that she was an important witness both in respect of payments made in respect of the house and also in respect of the plaintiff's conduct. The case was adjourned and listed for hearing on 14th May, 2004. Apparently no lis pendens had been registered in respect of the premises and the defendant had already taken steps to sell the premises before 18th November, 2003. Neither the defendant's solicitor or counsel were aware when making the application for an adjournment that the defendant had sold the premises. She had used another firm of solicitors in relation to the sale.

11. The case came before the Circuit Court on 14th May, 2004, and was this time adjourned at the request of the plaintiff to 19th May, 2004. In the meantime the defendant's solicitor had written a number of letters to the defendant's address in Dublin, but she had in fact left Ireland in February and had gone to Western Australia, thus the letters which her solicitor had diligently sent to her on 7th and 16th April, 2004, and his telephone calls, failed to make contact with her. The defendant's solicitor then made contact with Bob Evans, the brother of the defendant, who confirmed to him that the defendant had sold the premises and had emigrated. Bob Evans advised the defendant's solicitor that he had no forwarding address or contact details for his sister, but he advised him that he would relate to his sister, the defendant, the solicitor's communications in the event that she contacted him. Again the defendant's solicitor had diligently written to Bob Evans by letters dated 14th and 19th May, 2004, warning of the impending hearing. On 19th May, 2004, the case came before Her Honour Judge Elizabeth Dunne in the Circuit Court, and on the basis of the plaintiff's uncontested evidence in the absence of the defendant, the plaintiff was adjudged to have had a beneficial interest in the premises to the extent of 40% of the net proceeds of the sale thereof by the defendant. It was ordered that the plaintiff do recover from the defendant a sum of €172,000 and that the defendant should hold the said sum in trust for the plaintiff in respect of the proceeds of the sale of the premises. The defendant's solicitor related to Bob Evans the outcome of the hearing on 19th May, 2004, and told him the time limit applicable in the event that the defendant might wish to appeal against the order. He requested and understood that Mr. Evans would relate this information to the defendant when and if she contacted him.

12. On 19th April, 2005, the defendant's solicitor received telephone calls from the defendant and from Bob Evans. The defendant instructed him that:-

§ She was now residing in Perth in Australia;

§ The reason she had sold the premises and emigrated was that she had continued to feel traumatised and intimidated by the plaintiff in that he would regularly drive past the premises while the defendant was there and that she regularly received silent telephone calls to the premises during the night;

§ She had thought that the action could not proceed to a hearing in her absence;

§ She had been unaware of the listing of the action for hearing or of the judgment being given against her on 19th May, 2004, prior to her being served in Australia with notice of a *mareva* injunction freezing her assets in Australia which had been obtained by the plaintiff on or about 18th April, 2005;

§ Mr. Bob Evans had not related to her either the fact of or the content of her solicitor's communications to him;

§ She wished to appeal the order made in the action on 19th May, 2004;

§ If required, as a condition of an extension of time to appeal against the said order, and subject to the constraints of any order made against her in the proceedings in Australia, she was prepared to provide appropriate security against any judgment that the plaintiff might obtain on the hearing of an appeal in this action;

§ The defendant intends to dispute the plaintiff's claim in full if she is permitted to appeal the order made in this action on 19th May, 2004.

13. Her solicitor went on to say that Bob Evans confirmed to him that he had chosen not to relate to the defendant either the fact or the content of the communications to him and this was for the reason that he was conscious of how traumatised and intimidated the defendant felt because of the actions of the plaintiff. The defendant's solicitor at para. 8 of his affidavit continued:-

> "I say and believe that, in the event that the defendant is permitted to appeal the Order made in this action on 19th May, 2004, the defendant has a full defence to the plaintiff's claim to a beneficial interest in the premises. In addition to the fact that the defendant disputes that the plaintiff made direct or indirect financial contributions to the acquisition of the premises such as to entitle him to any beneficial interest therein, I say that the plaintiff has averred at para. 5 of a supplemental affidavit of discovery, sworn on 21st March, 2003, that he had failed to disclose to the Revenue authorities the income from which it is alleged that he made the direct or indirect financial contributions to the acquisition of the premises on which he relies. I say that the relief sought by the plaintiff in this action is an equitable one but that the said averment by the plaintiff establishes that he does not come seeking equity with clean hands."

The plaintiff's replying affidavit

14. The plaintiff said that the defendant's solicitor and counsel did not know at the date of making the application for an adjournment on 18th November, 2003, that the defendant had sold the premises. He believes that the defendant never informed her solicitor that she was selling the premises and that she used another firm of solicitors, Messrs Marcus Lynch and Company, in relation to the sale. He suggested that the defendant had misrepresented to her solicitor and counsel and to the Court the reason why she wished to have the proceedings adjourned when she applied for adjournment on 18th November, 2003. Paul Lappin, Auctioneer of Lappin Estates, acted for the defendant in the sale of the premises and the plaintiff said that he gave evidence to the Circuit Court on the hearing of the proceedings on 19th May, 2004, to the following effect, namely:

§ That the defendant requested him to value the premises on 8th August, 2003;

§ That the defendant instructed him to put up the premises for sale on the open market on 1st September, 2003, and that he took photographs of the premises for his website;

§ That a sale of the premises was originally agreed on 11th September, 2003, but that it subsequently fell through;

§ That the premises was again sold on 31st October, 2003, for €490,000;

§ That the defendant had told him that she was going to Australia.

15. The plaintiff believed that no auctioneer's sign advertising the premises for sale went up outside the premises and the property was advertised for sale on an obscure website. He believed that this was in order to keep the sale as quiet and secret as possible. Furthermore he believed that the defendant did plan at the time of the making of the application for an adjournment to have left the jurisdiction by the time the matter came on for hearing again, in the event that the adjournment was granted. He said that the defendant arrived in Australia on or about 4th February, 2004, the sale of the premises having been completed at the end of January, 2004. The plaintiff said that it was clear from a letter dated 19th May, 2004, from the defendant's solicitor to her brother Bob Evans that her brother had told her solicitor on the telephone that morning that his sister had sold No. 156 Clonliffe Road and had emigrated to South America. The solicitor later that day had telephoned Bob Evans and told him that Thomas Gannon succeeded in his claim and obtained a declaration that Susan Evans was a trustee for him of €172,000, which sum the Judge regarded as 40% of the net sale proceeds. Her solicitor pointed out in the letter that "it was quite a frustrating experience as, without our own witnesses to offer contradictory evidence, we were not in a position to cross-examine Mr. Gannon where we knew his evidence to be extremely suspect. The Judge was satisfied from Mr. Gannon's evidence that Susan Evans and Mr. Gannon had bought No. 152 Kincora Road and then No. 156 Clonliffe Road as "joint ventures" and that Mr. Gannon had indirectly contributed to the acquisition of the properties through paying the mortgage and paying for refurbishment. Mr. Gannon estimated that his input into No. 156 Clonliffe Road had reached IR£65,000 when he left in September, 1996."

16. Judge Dunne said that she regarded Susan Evans and Mr. Gannon as equal joint owners of the property as of September, 1996. Susan Evans subsequently had to deal with the mortgage repayments on her own for some seven years and Judge Dunne held that this justified an adjustment of ownership to 60% for Susan Evans and 40% for Mr. Gannon. A Mr. Lappin gave evidence that he was the defendant's estate agent on the recent disposal of the property and that it had been sold for €490,000 with the estate agency's costs amounting to €6,231.50. Mr. Gannon's legal team produced a 2001 mortgage statement from EBS (disclosed by the defendant at the discovery stage). Judge Dunne noted that the mortgage balance stood then at €56,000 and she adjudged that the likely balance when Susan sold the house was €50,000.

17. In determining the likely net proceeds of the sale of No. 156 Clonliffe Road, Judge Dunne deducted €50,000 for the mortgage redemption and €10,000 to cover estate agency and legal costs of the sale. This gave net sale proceeds of €430,000 and Judge Dunne awarded the plaintiff 40% of this figure at €172,000. As the Judge was aware that the house had been sold, she made a declaration that the defendant holds the sum of €172,000 on trust for the plaintiff and she made an order directing the defendant to pay that sum to the plaintiff. She also awarded the plaintiff the costs of the case to be assessed by the County Registrar, if the plaintiff's costs cannot be agreed between the parties.

18. The letter from the defendant's solicitor to her brother, Bob Evans, continued:-

> "As I explained by phone, if Susan wishes to appeal against the judgment or any part of the judgment, a notice of appeal must be served and filed within ten days of 19th May – effectively the papers would have to be served and filed by first thing on Monday 31st May next. There is no point in Susan appealing the judgment if she is not prepared to return to Ireland and fully participate in the preparation of the case and to appear at the hearing to give evidence.

19. Mr. O'Riordan and myself have consistently advised Susan that we believed that she had a good defence, both on the facts and on the relevant law, and that she could hope to successfully defeat Mr. Gannon's claim. This general view would still hold good for an appeal hearing, although Susan's credibility as a witness on issues in dispute will be weakened by her recent actions. Even if she were to win the appeal hearing in the High Court, she would probably still be ordered to pay some or all of the costs of the case for failing to deal with the matter when she had the opportunity to do so on 19th May."

20. The defendant herself swore an affidavit on 25th May, 2005, at Perth in Western Australia. She said that as soon as she became aware of the judgment having been obtained against her in Dublin she immediately contacted her solicitor and instructed him that she wished to appeal. He advised her that such an appeal could only be taken if she obtained an order extending the time within which to begin such an appeal and this should be done without further delay. As any affidavit that she might swear would have to be forwarded from Australia to Ireland she said that it was decided that the affidavit in support of the application would be sworn by her solicitor on her behalf to avoid delay and that the averments contained in the affidavit of her solicitor were approved by her prior to the swearing of that affidavit and made with her full authority. As for the allegation by the plaintiff that she had misrepresented to her solicitor and counsel and to the Judge of the Circuit Court, the reason why she sought an adjournment of the hearing of the action scheduled for 2nd December, 2003, and the suggestion that the real reason for her seeking such adjournment was to ensure that she could dispose of No. 156 Clonliffe Road before there was a final adjudication of the plaintiff's claim to a beneficial interest therein, she utterly rejected this and said that the sole reason for her seeking the adjournment was the unavailability on medical grounds of her daughter Olivia Williams. She referred to a letter from Dr. Peter Kelly in respect of her daughter Olivia Williams which explains that Ms. Williams was pregnant with her first child and was experiencing a very difficult time due to a threatened miscarriage; she was attending Dr. Boylan's clinic on a weekly basis and not every five or six weeks as is normal. Her due date was 12th December, 2003, but he expected her to deliver prematurely. Accordingly he certified that she would not be fit to attend Court on 2nd December. She believed that it was on the basis of the information contained in Dr. Peter Kelly's letter that the President of the Circuit Court adjourned the case. She refuted any suggestion that there was any intention on her part to prevent the proper determination of the issues in dispute between the parties. At all times she was the party who endeavoured to advance the proceedings to a conclusion. In this regard she referred to:-

> (a) The order made on 8th March, 2002, striking out the plaintiff's claim for want of prosecution with a stay condition obliging the plaintiff to make discovery on oath in general terms; and
>
> (b) The order made on 11th February, 2003, ordering the plaintiff to make further and better discovery; and
>
> (c) The failure of the plaintiff at any time after the pleadings closed in early 1998 to apply for a notice of trial, ultimately obliging her solicitor to make application in 2003 for the notice of trial.

21. She pointed out that, if her intention had been to frustrate the plaintiff's claim and to avoid a legal determination of the claim, she would have had ample opportunity from 1997 onwards to dispose of No. 156 Clonliffe Road, Dublin 3 without incurring the substantial legal costs liability of defending the plaintiff's claim. At para. 8 of her affidavit she said that her decision to dispose of No. 156 Clonliffe Road and to emigrate was due to the behaviour of the plaintiff towards her. I refer to the references to this in the Circuit Court pleadings and particulars, particularly the number of occasions on which she said she was subjected to physical assault by the plaintiff. Subsequently she received numerous silent telephone calls at home during the night which she believed were made by the plaintiff. She said she regularly observed the plaintiff driving past her home in circumstances which she believed were intended to intimidate her. She alluded to para. 8 of the affidavit of the plaintiff in which he averred that no auctioneer's sign advertising the premises for sale went up outside the premises. In his affidavit the plaintiff did not attribute this state of knowledge to any evidence given by the auctioneer Paul Lappin and she was advised by her solicitor that no such evidence was given by Mr. Lappin to the Court on 19th May, 2004. Accordingly she said that this averment reflected the interest taken by the plaintiff in her home which she found intimidating. She had been advised by her solicitor that had the plaintiff's policy of passing the premises arisen out of concern on his part that she might dispose of No. 156 Clonliffe Road, then he could have addressed such concern by registering the proceedings as a lis pendens against the premises but this had not been done at any stage.

22. At para. 10 of her affidavit she specifically noted that at para. 12 of the plaintiff's affidavit he had said that he believed that her brother Bob Evans had advised her, in or around May 2004, about what had happened in respect of the hearing on 19th May, 2004. She stated that her brother did not tell her of his communications with her solicitor until she contacted her brother on 18th or 19th April, 2005 when she received notice in Australia of the making of a mareva injunction freezing her assets in Australia on the basis of the Irish judgment. She did not become aware of the hearing listed for May, 2004 or of the Irish judgment before she was served in Australia with documents relating to the plaintiff's injunction and enforcement proceedings commenced on 18th April, 2005, in Australia. She confirmed that she had emigrated from Ireland on or before 4th February, 2004 and that she did not receive any of the letters subsequently sent by her solicitor to her former home advising of the hearing listed for May, 2004. Although she had subsequently been advised by her solicitor, Harry Mooney, that her view was not correct, she said that at the time that she emigrated to Australia she did not believe that a hearing on the dispute between the plaintiff and herself would proceed in her absence. She disputed the plaintiff's bald averment that she did not have a defence to the proceedings. She referred to the detailed grounds of her defence and counterclaim which had been delivered on her behalf on 27th March, 1998. She also noted that the plaintiff had averred on oath in the course of making discovery that he had failed to disclose to the Revenue authorities the income from which it is alleged he made the direct or indirect financial contributions to the purchase of No. 156 Clonliffe Road and on foot of which he seeks equitable relief in the Equity Civil Bill dated 8th May, 1997. She said that her advice was that such an acknowledgement of tax evasion by the plaintiff should be such as to preclude the plaintiff from obtaining equitable relief and should afford to her a further ground of defence to the plaintiff's claim. However she noted that the plaintiff had not seen fit in his affidavit to address the issue of this ground of defence based on his tax evasion.

23. The defendant made it clear that if her application to extend time for service of notice of her appeal is successful then she realised that the Court may impose conditions requiring her to provide security for the payment of the plaintiff's claim in the event of his succeeding with his claim on the appeal. She said that she would be prepared to offer such security and that she would then instruct her Australian lawyer to apply, if necessary, to vary the mareva injunction obtained by the plaintiff in the Australian proceedings in order to facilitate her giving security in respect of the plaintiff's claim in the Irish proceedings. She said that she intended to travel from Australia to Ireland for the hearing of the appeal in respect of the Irish judgment and that she did not believe that this intention was in any way inconsistent with her averred intention to continue to reside permanently in Australia. She also questioned the bill of costs seeking costs in the sum of €26,562.97 and said that she had instructed her solicitor to retain the service of a legal cost accountant on her behalf to contest such costs. She was advised by her solicitor that there was no reason why the plaintiff's costs of an appeal to the High Court would amount to €35,000 should the plaintiff succeed on the appeal and be awarded the costs of the appeal. She also noted that her solicitor in para. 8 of his affidavit had said that she had a full defence to the plaintiff's claim to a beneficial interest in the premises. In addition she disputed that the plaintiff made financial contributions to the acquisition of the premises such as to entitle him to any beneficial interest therein. There was also a reference to the plaintiff having

confirmed that he had failed to disclose the income from which he alleged that he had made the direct or indirect financial contributions to the acquisition of the premises, on which contributions he relies. In response to this the plaintiff in para. 17 of his replying affidavit said:-

> "There was a full undefended hearing of the case before Judge Dunne in the Circuit Court on 19th May, 2004, and I say and believe that the defendant will not succeed in an appeal in this case."

24. She said that it was disingenuous for the plaintiff to describe the hearing as "a full undefended hearing of the case" as her solicitor, having been unable to obtain instructions from her in relation to the hearing, had attended with counsel at the hearing out of courtesy to the Court and because Mr. Mooney was on record as her solicitor. In the absence of herself and of instructions from her, there was no cross-examination of the plaintiff or his witnesses and no evidence was offered in rebuttal of the testimony of the plaintiff or his witnesses. She said that the issues in dispute as detailed in the pleadings have not been tested in any real sense before a Court and she reiterated that she had a good defence to the plaintiff's claim. In para. 18 of her affidavit she concluded that she accepted that her actions in disposing of the property and emigrating to Australia were imprudent and unjustified and that, regardless of the eventual outcome of the proceedings, should she now be permitted to appeal the judgment obtained on 19th May, 2004, she may have to bear responsibility for some or all of the costs occasioned to the parties by her actions. She indicated that it was her intention to pursue her appeal against the order made on 19th May, 2004, and to attend the hearing of the appeal in Ireland, if the time for such appeal is now extended and that she was prepared to offer such security for the prosecution of that appeal as to the Court should seem appropriate or necessary, subject only to any necessary releases, relaxation or amendment of the *mareva* injunction obtained by the plaintiff in the Australian proceedings.

25. An affidavit of Robert Evans, the brother of the defendant, was sworn on 31st May, 2005, and filed on behalf of the defendant. His evidence was that he was reasonably familiar with the nature of the dispute between the plaintiff and the defendant, in that as well as being her brother he had had financial dealings with the plaintiff and the defendant during the course of their relationship in that he had had occasion to lend money on several occasions to his sister. Also he had business and employment dealings with the plaintiff during some of the period in respect of which the plaintiff claims to have been making direct or indirect financial contributions towards the purchase of 156 Clonliffe Road, Dublin 3 on foot of which the plaintiff claimed a beneficial interest in that property. Had the hearing scheduled for 14th May, 2004, which was adjourned to and proceeded on 19th May, 2004, been a contested hearing, it was his intention to attend as a witness to give evidence and it would be his intention to give evidence at the hearing of an appeal if this application for extension of time proves successful. He had had contact with the solicitor acting for his sister in the course of the preparation of the case and it was these contacts which led the solicitor to contact him when he was unable to contact his sister prior to the scheduled hearing. His sister had discussed her intention to emigrate and to sell No. 156 Clonliffe Road with him, Mr. Evans, and his understanding of the situation was that her decision was because of the effect on her of certain actions of the plaintiff when their relationship was ending and in the course of these proceedings. His belief was that his sister found extremely distressing all matters concerning the plaintiff and he had decided not to contact his sister, despite being requested to do so by her solicitor, both in the period immediately preceding the hearing in May, 2004, and subsequently when the solicitor advised him of the outcome of the hearing. He averred:- "Although I told Mr. Mooney that I would relay to my sister his communications to me when and if she contacted me, I say that I did not in fact tell my sister that I had received letters from Mr. Mooney or that I had spoken to him about the case until the 18th – 19th day of April, 2005 when my sister advised me that she had been served with further Court papers in Australia in relation to this matter. I say that my decision not to advise my sister of these matters at an earlier stage was not motivated out of any lack of respect for the Court process, but was entirely based on my belief that I would cause unnecessary stress and worry for my sister if I raised these matters with her." In paragraph 12 of his affidavit the plaintiff expressed his belief that Mr. Evans did contact and inform the defendant about what happened in respect of the case hearing on 19th May, 2004. He drew this inference from the last paragraph of the letter sent to Mr. Evans by Mr. Mooney, the defendant's solicitor, on 19th May, 2004, to the effect that Mr. Evans had indeed indicated to Mr. Mooney that he would relate the details of Mr. Mooney's costs to the defendant. In this letter Mr. Mooney writes to Mr. Evans:- "I note that you indicated that you would forward my cost details to Susan for her consideration…" The plaintiff drew the inference from this that if the matter of costs was going to be communicated by Mr. Evans to his sister, the defendant, it was only reasonable to believe that the defendant would want to know the outcome of the case if she was considering paying costs. He expressed his belief that it was implicit from this paragraph that the defendant clearly knew that the case was on for hearing on 19th May, 2004, as again why else would one be discussing the issue of costs with her. He suggested that the defendant was aware at all material times that the case was on for hearing on 19th May, 2004, and furthermore that she was aware of the decision of the Court in the matter immediately thereafter. In response to this, Robert Evans at paragraph 4 of his affidavit said that he did inform Mr. Mooney that he would relay to his sister his advice and costs proposals in relation to these proceedings when and if his sister should contact him, but he then went on to say that he did not in fact communicate these matters to his sister and he did not make her aware that a Court hearing was due to be held on either the 14th or 19th days of May, 2004, nor did he communicate Mr. Mooney's advice in relation to the judgment granted against her on 19th May, 2004, or that Mr. Mooney was seeking payment of his costs in the matter. He then goes on to swear positively that:-

> "I say that I first discussed these issues with my sister when she contacted me on 18th or 19th day of April, 2005, having been served with further proceedings in Australia."

26. This corroborates the defendant's statement in paragraph 10 of her affidavit that her brother did not tell her of his communications with her solicitor until she contacted her brother on 18th or 19th day of April, 2005, when she received notice in Australia of the making of a *mareva* injunction freezing her assets in Australia on the basis of the Irish judgment.

27. I pause at this point to comment that if one accepts what has been sworn to by the defendant and her brother to the effect that, despite his assurances to Mr. Mooney, her solicitor, that he would convey his messages to her both before and after the trial on 19th May, 2004, instead of doing this her brother has sworn that, as it was his understanding and belief that his sister found extremely distressing all matters concerning the plaintiff, he decided, on his own initiative and decision as to what was best for her, not to contact his sister, despite being requested to do so by her solicitor both in the period immediately preceding the hearing in May, 2004, and subsequently when the solicitor advised him of the outcome of the hearing. This was despite the fact that he had told Mr. Mooney that he would relay his communications to her when and if she contacted him. He goes on to say positively that he did not tell his sister that he had received letters from Mr. Mooney or that he had spoken to him about the case until he was contacted by his sister and advised by her on 18th or 19th April, 2005, that she had been served with further Court papers in Australia in relation to the matter.

28. At this stage I am dealing with this motion for an enlargement of time to deliver and file the notice of appeal on the basis of affidavit evidence. On the one hand I have positive averments from the defendant and her brother to the effect that she did not know about the hearing on 19th May, 2004, until she was served with the proceedings in the *mareva* injunction in Australia and then contacted her brother on 18th or 19th April, 2005. She then moved with commendable alacrity to bring a motion for extension of time to lodge the notice of appeal. Secondly, Robert Evans has sworn positively on affidavit that he was aware of the circumstances of

the relationship between his sister and the plaintiff as he had had occasion to lend her money during the period of this relationship and he has also had business and employment dealings with the plaintiff during some of the period in which the plaintiff claims to have been making direct or indirect financial contributions towards the purchase of No. 156 Clonliffe Road on the basis of which the plaintiff is claiming a beneficial interest in the property. Robert Evans takes responsibility for not informing his sister and he explains that his reason was that his sister had discussed with him her intention to emigrate and to sell No. 156 Clonliffe Road and his understanding was that her decision to emigrate was due to the effect on her of actions by the plaintiff when the relationship was ending and during the course of these proceedings. He believed that his sister found all matters concerning the plaintiff to be extremely distressing and so he decided not to contact his sister, despite telling her solicitor that he would do so. I comment on this that this omission can be construed as the considered and considerate decision of a loyal brother concerned about his sister's state of wellbeing when she had reached the point where she was so distressed in Dublin that she had chosen to emigrate to Western Australia. While one may criticise him for his adoption of an "ostrich-like stance" and his failure to comply with the solicitor's requests, nevertheless his concern for his sister's state of health and wellbeing when putting together her new life in Perth is quite reasonable and understandable. On another construction her brother took too much initiative on himself in deciding not to communicate the solicitor's information to her and, accordingly, there was an error on his part.

29. A further consideration is that in the affidavits on the one hand I have the affirmative averments of the defendant and her brother that he did not inform her of the proceedings or the obtaining of the judgment until 18th or 19th April, 2005, and that this was the reason for her delay in giving instructions to her solicitor to lodge the notice of appeal. It is noteworthy that the defendant has been consistent in maintaining that the house is and was always her property, in that both the properties one after the other have been in her name solely and the defence and counterclaim lodged on her behalf bear out this contention on her part. Furthermore, there was an order on 8th March, 2002, when the plaintiff's claim was dismissed for want of prosecution but with a stay provided the plaintiff made discovery in general terms within a six-week period. Similarly, on 11th February, 2003, a further order for discovery on the part of the plaintiff was made. Furthermore, the notice of trial was served by the defendant's solicitor and not by the plaintiff's solicitor. One further point is that both the defendant and her brother have sworn on affidavit that the plaintiff's conduct caused considerable distress to the defendant and the defence and counterclaim includes a claim for damages for assault and battery and the defendant's affidavit discloses her fears in respect of watching and besetting of her premises. Her brother declined to disclose her whereabouts even to her own solicitor and her brother has made it clear that this was because he was concerned about her state of health due to the behaviour of the plaintiff. He did not wish to have her further distressed while she was establishing a new life in Perth, having gone to the Antipodes, the far side of the world from Dublin.

Relevant rules and cases

30. Order 63, rule 9 of the Rules of the Superior Courts, 1986 states:-

> Any party aggrieved by an order, including an order as to costs, made by the Master may, within six days from the perfecting of the same, or if made *ex parte* from notice of the same, or in the case of a refusal from the date of such refusal, apply to the Court to discharge such order or to make the order refused.

31. Order 122, rule 7 states:-

> The Court shall have power to enlarge or abridge the time appointed by these Rules or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the Court may direct, and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed.

32. In *Eire Continental Trading Company Limited v. Clonmel Foods Limited* [1955] I.R. 170, the Supreme Court held that an applicant, in order to be successful, must show that he had formed, bona fide, an intention to appeal within the specified time limit; an element of mistake and the existence of an arguable ground of appeal. Lavery J. on p. 173, having set out these three criteria then continued:-

> "In my opinion these three conditions are proper matters for the consideration of the Court in determining whether time should be extended but they must be considered in relation to all the circumstances of the particular case. In the words of Sir Wilfred Greene M.R. in Gatti v. Shoosmith [1939] 1 Ch. 841, (a case resembling the present in many ways):-
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> > 'The discretion of the Court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised.'"

33. Counsel for the defendant contends that since the initiation of the plaintiff's claim she had always maintained that she had a good defence to his claim and also had a counterclaim, not only declaring her to be the sole beneficial owner of the premises as disclosed on the documents showing it to have been purchased in the sole name of the defendant, but also that she was seeking damages for assault and battery in respect of the plaintiff's conduct towards her. Furthermore, the defendant and her solicitor had pushed ahead to extract discovery of documents from the plaintiff by bringing motions to dismiss the plaintiff's claim and also by serving notice of trial to bring the case into a Court list. She had then secured an adjournment in November, 2003, of the original trial date of 2nd December, 2003, because her daughter, Olivia, was having a difficult pregnancy and Dr. Peter Kelly wrote a report about her difficulties which, when produced to the President of the Circuit Court, caused him to adjourn the trial to 14th May, 2004, whence it was adjourned by the plaintiff's solicitor to 19th May, 2004. Both the defendant and her brother have sworn on affidavit that the defendant first learnt about the outcome of the case which took place on 19th May, 2004, in the Dublin Circuit Court, on or about 19th April, 2005, when she then promptly moved to give her solicitor instructions to seek an enlargement of time for the purpose of delivering and filing the notice of appeal. She always had the intention of contesting the plaintiff's claim and not only did she put in a defence and counterclaim but also she endeavoured to advance the proceedings to a conclusion. In this regard I note:- (a) the order made on 8th March, 2002, striking out the plaintiff's claim for want of prosecution, with a stay on a condition that the plaintiff make discovery on oath in general terms; and (b) the order made on 11th February, 2003, ordering the plaintiff to make further and better discovery; and (c) the failure of the plaintiff at any time after the pleadings closed in early 1998 to apply for a notice of trial, ultimately causing the defendant's solicitor to make application in 2003 to serve notice of trial. The point has been made on behalf of the plaintiff that, if her intention had been to frustrate the plaintiff's claim and to avoid a legal determination of that claim, then she had ample opportunity from 1997 onwards to dispose of 156 Clonliffe Road, Dublin 3, without incurring the substantial legal costs liability of defending the plaintiff's claim. The defendant noted that the plaintiff was in a position to aver that no auctioneer's sign advertising the premises for sale went up outside the premises and she said that this averment reflected the interest taken by the plaintiff in her home which she found intimidating. If his concern was in respect of a sale of the premises, then this could have been addressed by registering the proceedings as a *lis pendens* against the premises but the plaintiff did not do this at any stage. Secondly, counsel for the plaintiff contended that there was clearly an error on the part of the defendant's brother in regarding the need to protect the defendant from further distress being caused to her by the plaintiff and her apprehension from her belief and

perception of his conduct towards her and her apprehension that the plaintiff was watching and besetting and telephoning her home during the night. She also testified that she regularly observed the plaintiff driving past her home in circumstances which she believed were intended to intimidate her. This makes understandable the reason why her brother did not contact her despite having led the solicitor to believe that he would comply with his request in this respect. Her brother was probably also in error in giving priority to her peace of mind and security in her new life rather than informing her of the impending trial and then the results thereof, which took place in Dublin. There was also the error on her part about her mistaken belief that the case could not proceed without her. Thirdly, it is clear that the defendant has a stateable case if only because each house was put in her sole name which certainly seems odd if there was an intention and agreement, as suggested by the plaintiff, that they each held a half of the beneficial interest. Furthermore, there are express averments saying that the defendant had paid the mortgage premiums from 1996 to 2004 as the plaintiff was not living in the house during that time. Furthermore, counsel for the defendant contends that the plaintiff can suffer no prejudice as the plaintiff has been guaranteed a fund to meet his claim, if and when successful, by the effect of the *mareva* injunction.

34. Counsel for the plaintiff contends that the defendant is not entitled to relief for several reasons. Firstly, he contends that the defendant misled the Court, her own lawyers and the plaintiff at a time when she was selling the house and going to Australia. Secondly, he points out that she left Ireland just before the hearing of the case and took with her the subject matter of the case, namely the value of the house. Thirdly, he contends that the defendant knew about the ongoing trial and the result of the trial or at least deliberately closed her eyes to those matters. Fourthly, he says that the defendant only re-emerged when the plaintiff obtained a *mareva* type injunction in Western Australia, which froze her assets in Perth. Counsel stressed that the Supreme Court had approved of the remarks of Greene M.R. about the question being as to whether upon the facts of the particular case the discretion of the Court should be exercised in the circumstances of the particular case. The cases of *Gerard Hughes v. Patrick O'Rourke & Others* [1986] I.L.R.M. 538 and *Bank of Ireland v. Breen*, (Unreported, Supreme Court, McCarthy J., 17th June, 1987) both make it clear that all three criteria are still important and even if all three criteria are satisfied, the Court's discretion in each case is exercised in the light of the particular facts of the case. In *Bank of Ireland v. Breen*, McCarthy J. said at page 5:-

> "More importantly, however, I would wish to emphasise that the first and overriding consideration in applications of this kind is that the Court has a discretion which must be properly exercised in all the circumstances of the case, including the three recognised criteria to which I have referred. The obvious other circumstance would be the question of prejudice; there may well be cases in which an applicant for the relief sought here would qualify under the three criteria, but fail in his application because of the prejudice it would cause to the prospective respondent."

35. In *Dalton v. The Minister for Finance* [1989] IR 269 in a personal injuries action, the Supreme Court held, in dismissing the motion to enlarge time for service of notice of a cross appeal, that the plaintiff had not formed an intention to appeal during the limited time, neither was her failure to appeal due to a mistake on her own part or that of her lawyers. Neither had she an arguable ground for an appeal on the basis of inadequacy of damages, since the evidence on which this was based, namely, her worsened condition, could not have been before the High Court and cannot therefore be the basis of an appeal. These three cases all indicate the importance of the three criteria.

36. The plaintiffs then sought in the first instance an order under O. 63 r. 9 of the Rules of the Superior Courts, 1986, extending the time for appealing the order of the Master of the High Court made herein on 28th May, 1992, and, subject to the granting of the extension, an order for discovery of the documents in their possession as described above in the substantive motion.

37. In *An Blascaod Mór Teoranta and Others v. The Commissioners of Public Works in Ireland and Others*, [1994] 2 I.R. 372 the plaintiffs' motion for discovery by the defendants of documents in their possession which related to the manner in which the Minister's decision was reached to sponsor the An Blascaod Mór National Historic Park Act, 1989, and related also to the preparations for, and drafting of, the Act, including materials considered at Cabinet meetings. An order for such discovery was refused by the Master of the High Court. The plaintiffs then sought in the first instance an order under O. 63 r. 9 of the Rules of the Superior Courts, 1986, extending the time for appealing the order of the Master of the High Court made herein on 28th May, 1992, and, subject to the granting of the extension, an order for discovery of the documents in their possession as described above in the substantive motion. There was unequivocal evidence that there was an intention to appeal the order of the Master within the time limit provided by the Rules and it was averred by Peter J. Callery, one of the plaintiffs, that he had instructed their solicitor and counsel to appeal. Neither the affidavit of Peter J. Callery nor of the plaintiff's solicitor identified "the existence of something like mistake". There was also evidence that there were difficulties in the case and there was a need to take advice thereon. Murphy J. referred to the Eire Continental case and then quoted the passage cited by Greene MR above to the effect that the Court has a free discretion and the crucial question is whether this should be exercised upon the facts of this particular case. Murphy J. concluded on p. 375:-

> "It would seem to me, having regard to the decision of the plaintiffs, the instructions given to their legal advisers, and the unusual problems which required consideration, that this is an appropriate case in which to grant the extension of time sought."

38. In that narrow aspect of the case it would seem that overall the fairness of the situation was an important factor in allowing an extension of time. However Murphy J. in fact went on to refuse the substantive relief sought on the grounds:

> 1. that any question as to the validity of legislation having regard to the provisions of the Constitution of Ireland, 1937, must be determined by reference to the provisions of the Act under consideration and not the purpose of the Minister who sponsored the bill or of any member of the Oireachtas who supported or opposed it, and
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> 2. that accordingly, the documents in respect of which discovery was sought by the plaintiffs were irrelevant to the matter in issue between the parties.

39. The thinking behind this is that any inquiry by the Court into the motives by reason of which legislation was passed for the purposes of determining a question as to the validity of such legislation having regard to the provisions of the Constitution of Ireland, 1937, would be wholly impracticable, and contrary to the doctrine of separation of powers.

40. Counsel for the plaintiff in the present case contended that the defendant had misled the Court and that the defendant was unaware of the limited time period for appeal as she had put herself in that position by leaving no contact number. He also stressed that Mr. Evans had told a lie to the defendant's solicitor and that this was to avoid the legal process. He suggested that in the light of the defendant's conduct in selling the house and taking off with the proceeds of sale, she should now, having ignored the Court proceedings in May, 2005, not be allowed to appeal the judgment. Furthermore, she was the author of her own misfortune in not leaving any contact number or address with her solicitor so that he might be able to contact her as required. While there is undoubtedly an onus on a person who has served notice of trial then to pay heed to when the case is likely to come before the

Court, nevertheless I think there are several other significant factors in this case. The first is that the plaintiff initiated the proceedings on 6th May, 1997 and it can hardly be said that he was rushing to obtain judgment in view of the fact that the defendant's solicitor had to serve the notice of trial. There is also the element that the defendant has alleged that it was the plaintiff's violent and intimidating conduct which caused her to end the relationship and eventually, because of his continual conduct of repeatedly passing her house and also, as she said she also believed, because he would ring her telephone during the night and say nothing. In paragraph 18 the defendant accepted that her actions were imprudent in respect of the sale of the house and her departure for Perth. Furthermore the positive averments by the defendant and her brother are significant, credible and understandable being to the effect that she did not know about the actual proceeding of the Court case and that she only learned of the decision of the Dublin Circuit Court when she contacted her brother, in order to ascertain the position after the service of Supreme Court documents on her in Perth. She then subsequently took steps promptly to instruct her solicitor to bring the application for an extension of time to deliver and file the notice of appeal.

41. This Court is not at present in a position to hear oral evidence with the witness being subjected to cross-examination. At this stage of the proceedings, there are positive averments in the affidavit of the defendant and of her brother that she did not know about the trial date or that the case was going on in May, 2004. This seems to have occurred because of an error on the part of her brother in failing to make contact with her. However, underlying such matters is the crucial factor that both the defendant and her brother felt it would imprudent for her to allow the plaintiff to know where she was residing. Counsel for the plaintiff has invited me to draw inferences from correspondence and then to find the defendant's affidavit untruthful. These are matters which are best decided on testimony given from the witness box in Court. For the present I have positive averments by the defendant and her brother that the defendant did not know that the trial was taking place on 19th May, 2004, and only learned about this in April, 2005. Counsel for the defendant points out that the defendant did nothing illegal in leaving Ireland and taking the money with her. There is a suggestion made by the plaintiff's counsel that there was a failure to tell the Court of the sale of the premises and of her imminent departure. However, there was no order made preventing her from selling the house and there was no order preventing her either from selling the house or taking the proceeds of sale with her. No doubt it would have been prudent, polite and less provocative to have informed the Court and the plaintiff's advisers that she intended to depart to Australia. In respect of the adjournment in November, 2004 both the plaintiff and her daughter, Olivia Williams, swore affidavits to the effect that the adjournment sought in November, 2003 was because of Olivia's difficult pregnancy and that, if it had not been for her medical condition, she would have attended the hearing scheduled for 2nd December, 2003, to give evidence on behalf of the defendant as to her personal knowledge of the plaintiff's assaulting of the defendant and of the plaintiff's financial unreliability and dependence on the defendant during the period of his relationship with the defendant.

Conclusion

42. I have come to the conclusion that the defendant, to all intents and purposes, has satisfied the criteria set out in the Eire Continental case and that if there is any deficiency in that respect then I think that in all the circumstances the justice of this case requires that time should be extended for the delivery and filing of the notice of appeal. This case needs to be heard on verbal testimony in respect of the substantive conflict between the parties. Happily the proceeds of sale are available and are the subject of the *mareva* injunction. I think that there is very little prejudice to the plaintiff in the making of an order that the time for service of the appeal should be extended. He has complained about the defendant not informing the Court of her intention to sell and to emigrate to Perth. However, there was no Court order enjoining the defendant from selling the house nor was a lis pendens registered. Since the conflict in this case in reality centres around a cohabitee type problem in respect of ownership of house property, the issues are of a quasi-marital type. In order to have a just outcome, it is best that the truth should be extracted in its entirety, if the matter is not resolved in the meantime by agreement. It is certainly preferable that a Court should hear the parties and their witnesses and decide the truth of who is entitled in law to the assets in contention. For the present where there is a conflict I have preferred the testimony of the defendant and her brother, which is on affidavit, rather than the more tendentious inferences which the plaintiff has drawn for the purposes of his affidavit. I note also that counsel for the defendant refutes the suggestion that his client has played ducks and drakes with the legal process since she has submitted in Australia to the *mareva* injunction and the money is still available and has not been put on a horse or secreted away.

43. Accordingly, I will make an order in the terms of the notice of motion dated 3rd June, 2005, and I will hear counsel as to the matter of costs and whether any security is required in respect of the continuation of the *mareva* injunction by agreement or by order.