An Chúirt Achomhairc

The Court of Appeal

High Court record number: 2014 No. 44 SP

Appeal numbers: 2014 5 COA and 2015 340

Charleton J
Peart J
Irvine J

Between

Allied Irish Banks PLC

Plaintiff/Respondent

and

Thomas Darcy and Antoinette Darcy

Defendants/Appellants

Judgment of the Court delivered by Mr Justice Charleton on Thursday July 14th 2016

1. Thomas Darcy and Antoinette Darcy appeal two judgments of the High Court in favour of the respondent, Allied Irish Banks PLC, the cumulative effect of which has been to order that their debt to the bank in the sum of €21,154,079.30, together with interest accruing from 21st November 2013 onwards, stands well charged on four properties owned by them. These are specified in the order of Keane J of 3rd June 2015 as being a property called Woodview with grounds in Howth, a plot of ground in Malahide, a house in the same general area and another property in Howth. That well charging order was enabled by the earlier order of Gilligan J of 17th October 2014 which permitted the special summons grounding these proceedings to continue and reversed the order of 9th May 2014 of the Master of the High Court striking same out. While the order made by Gilligan J perfected on 21st October 2014 makes a series of ordinary consequential orders that are typical of those made by a judge managing a special summons, it is his refusal to stay those proceedings as an abuse of the process of these courts that is the effective core of this appeal. This is argued by Thomas and Antoinette Darcy to be a breach of an order of the Supreme Court of 13th November 2013 in prior proceedings, record number 539SP of 2010, remitting the issue of possession orders to plenary hearing and is claimed to be sharp practice, opening the floodgates to the misuse of court proceedings and undermining the integrity of legal proceedings under Article 34 of the Constitution. This argument needs to be seen in the context of the background facts.

Background facts

2. The bank describes Thomas and Antoinette Darcy as property developers. The special summons, on which the Supreme Court made the order remitting the issue of possession orders to plenary hearing, asserted that by four letters of loan sanction, dated between 19th January 2006 and 4th June 2008, they borrowed the sum of €15,808,303 and that this indebtedness was secured by legal charges on the four properties specified in the order of Keane J of 3rd June 2015. On this appeal, it has not been contested that such sums were borrowed and it has not been disputed that legal mortgages were properly entered into on all four properties. One of these properties, now destroyed by fire, was the family home of Thomas and Antoinette Darcy: called Woodview in Howth. All of the mortgages contain a section which states, in standard form, that the signor is the spouse of the mortgagor, that it is advisable for parties to obtain independent legal advice, that consent of the spouse is required, that the mortgage is a continuing security and finally, a section requiring a signature confirming that consent is given pursuant to section 3 of the Family Home Protection Act 1976. This last section is not filled in because the mortgagors of all of the properties were both Thomas and Antoinette Darcy. Hence, the bank asserts that no spousal consent was required.

3. The borrowings were not repaid. Summary proceedings were brought by the bank, with the same title as this appeal, record number 2010/2292S and judgment was obtained in default of appearance on 16th February 2011 in the sum of €17,422,790.53. An application was then brought by Thomas and Antoinette Darcy to the High Court to set aside that default judgment. Ryan J refused to overturn that default order by judgment of 20th July 2012. The next step was for the bank to enforce the judgment, which was growing in amount because of court interest. Included among the methods of enforcement that might have been available to the bank was an application following a demand leading to bankruptcy or the enforcement of the existing mortgages up to sale and recovery of the debt. The vehicle chosen was to obtain an order for possession with a view to sale, by special summons and affidavit, and this was done in proceedings with the same title as this appeal, which is record number 539SP of 2010. These proceedings referenced a letter of demand which, because of its form, gave rise to an issue as to whether an order well charging the sums on the various properties could be made in consequence of the repeal by the Land and Conveyancing Law Reform Act 2009 of particular provisions of the Registration of Title Act 1964. This particular omission in the law has since been rectified by the commencement of the Land and Conveyancing Law Reform Act 2013. By order of the High Court, McGovern J, of 16th April 2012, an order for possession of the properties was made. It was this order that was appealed to the Supreme Court by Thomas and Antoinette Darcy. Following from the failure of the bank to uphold the order of McGovern J in the Supreme Court, the bank did not continue with those proceedings, 539SP of 2010, but instead instituted new proceedings: these current proceedings 2014 No. 44SP. The summons thereof recites that the bank:

> …accepts that the present proceedings have been necessitated by the decision of the Supreme Court of 13 November 2013 to set aside an Order of the High Court (McGovern J of 16 April 2012) which High Court decision had previously given [The Bank] the relief that it seeks in these proceedings. However, the appeal before the Supreme Court proceeded on the basis that by reason of the provisions of the Land and Conveyancing Law Reform Act 2013, which statutorily overruled the decision in Start Mortgages Limited v Gunn [2011] IEHC 275, [Thomas and

> Antoinette Darcy] would have no defence to any new proceedings brought seeking the same relief by reason of the 2013 Act.

These proceedings commenced on 28th January 2014, while the notice of discontinuance of the proceedings which were remitted to plenary hearing by the Supreme Court was only served on the 9th April 2014.

Supreme Court order

4. On the appeal in 539SP of 2010, Thomas and Antoinette Darcy relied on the decision of Dunne J in *Start Mortgages v Gunn* [2011] IEHC 275 (High Court, Dunne J, 25 July 2011) to assert that an issue arose as to the entitlement of the bank to possession of their properties. It is common case that the Supreme Court in giving judgment on the appeal was not ruling on that issue but rather on the question of whether a hearing with oral evidence was necessary in order to properly decide that question. There was a further factual issue regarding the posting by the bank of a letter of demand, the particular form of the letter and whether or not it was received by Thomas and Antoinette Darcy. In the event, the Supreme Court held on 13th November 2013 with Thomas and Antoinette Darcy that there should be a plenary hearing of the case, thus overturning the order of McGovern J of 16th April 2012. The specific order of the Supreme Court should be referenced. The order, paraphrased as necessary, was:

> (i) that these proceedings be adjourned to Plenary hearing as if these proceedings had been commenced by Plenary Summons
>
> (ii) that these proceedings be remitted to the Chancery List in the High Court to be further prosecuted there
>
> (iii) that the said Defendants recover against the Plaintiff the costs of the High Court proceedings and of this appeal when taxed and ascertained
>
> (iv) on application of Counsel for the bank for a stay of execution pending determination of the proceedings in the High Court on the costs order, it is ordered that the said application for a stay be refused.

5. On this appeal, the argument made by Thomas and Antoinette Darcy has been that the Supreme Court expressly, or by necessary implication, required that 539SP of 2010 should be prosecuted by the bank to a conclusion. Effectively, while the outcome is not part of the grounds of appeal in this case, they contended that this would have meant that the bank would have lost their application for possession and sale of the properties. While the consequence of this was briefly argued on both sides such issue is, again, not for decision now. On behalf of the bank it was contended that the debt of €21 million would still remain in favour of the bank, notwithstanding any point as to the validity of a letter of demand or the receipt thereof or on the *Start Mortgages* point. None of these, the bank asserts, could either undermine the debt or the ability of the bank to enforce it through other forms of execution or by the reissue of proceedings freshly seeking the same relief. For Thomas and Antoinette Darcy it was urged that it was unnecessary to engage in speculation as to the eventual outcome since the act of the Bank, in abandoning those proceedings, was a breach of the order of the Supreme Court and thus a contravention of Article 34.4.6º of the Constitution which provides that decisions "of the Supreme Court shall in all cases be final and conclusive."

6. The order of the Supreme Court cannot be viewed as being equivalent to a mandatory requirement addressed to the bank that a particular set of proceedings should be pursued to finality. This is especially the case if the pursuit of those proceedings is seen by the party to whom the order was addressed as being unwise or even futile. Proceedings commenced by summary summons and special summons are, together with judicial review applications, forms of court procedure in which affidavit evidence is substituted for sworn oral testimony. Judicial review proceedings are concerned with administrative and quasi-judicial decisions and focus on reviewing the form of decision-making, the procedural correctness of any steps leading to the making of that decision, as well as the question of whether a decision maker possesses jurisdiction to make the relevant order. Remedies within this category are designed to be focused on the application of administrative law and facts are rarely in contention and which are, in any event, almost invariably evidenced by or accompanied by extensive documentation. Hence, cross-examination is rarely necessary and is only permissible in any event, under the Rules of the Superior Courts, with leave of the court. Cross-examination is allowed as of right, however, in summary summons and special summons proceedings. There, the foundational document is the issue of the summons which asserts the nature of the relief to which the plaintiff claims to be entitled. In plenary proceedings, the exchange of pleadings is premised on the assertion of fact and counter-fact through the statement of claim and defence, with evidence being required through oral testimony on such issues as remain live when that exchange concludes. In contrast, a summary summons and a special summons are both forms of initiating proceedings which require to be supported by affidavit evidence. A defendant will know from reading the summons what order is sought from the High Court and will also be served with sworn evidence in narrative written form, exhibiting any relevant contracts or other documents. The onus will then be on the defendant to contend on affidavit as to which parts of the sworn written testimony are incorrect and to support that contradiction by any relevant documentation. While cross-examination is enabled as of right, it is an entitlement rarely taken up. Instead, on an application for summary judgment or on a special summons entering the judge's list for consideration, it will either be agreed that oral evidence is necessary on some particular point or, usually in summary summons cases, a defendant will contend that a sufficient case has been made out whereby there should be a full oral hearing preceded - if necessary and on the order of court - by the exchange of a statement of claim answered by a defence. Summary judgment can be made on the basis of a special summons because if a defendant shows no basis upon which it can be said that the law should withhold that which the plaintiff seeks, or if a defendant's affidavit testimony shows no factual basis contrary to the plaintiff's averments whereby an order should be made, there is no reason to have an oral hearing.

7. It was on the basis of a failure before McGovern J on 16th April 2012 of Thomas and Antoinette Darcy to demonstrate that the bank's contentions were unfounded that judgment was given against them by the High Court. This summary procedure, bypassing an oral hearing, was deemed inappropriate by the Supreme Court on 13th November 2013 because of the existence of a potential legal defence based upon disputed facts. This order was founded upon the principles enunciated by by Clarke J in the High Court at paras. 3.3 to 3.5 of his judgment in *McGrath v O'Driscoll*] [2007] 1 ILRM 203 .and by the Supreme Court in such cases as *Aer Rianta v. Ryanair* [2001] 4 IR 607 and *First National Commercial Bank v Anglin* [1996] 1 IR 75. The threshold of an arguable defence is not high. What is required is that the plaintiff plainly shows that there is no defence open to a defendant. Building an ostensible defence on mere assertion may be futile for a defendant, as may the contention that a defence exists although it is contradicted by all the known documentation. Nonetheless, the principle remains that a defence that is reasonably available on the basis of testimony should be adjudicated through hearing oral testimony from both sides. The order of the Supreme Court of 13th November 2013 cannot be construed more widely than that.

Discontinuing proceedings

8. That being so, was it an abuse of the process of these courts for the bank to issue a fresh set of proceedings? Gilligan J answered that question in the negative in the High Court. He held that there had been no departure from the appropriate procedure set out in Order 26 Rule 1 of the Rules the Superior Courts, which provides:

> The plaintiff may, at any time before receipt of the defendant's defence, or after the receipt thereof before taking any other proceeding in the action (save any interlocutory application), by notice in writing in the Form No. 20 in Appendix C, wholly discontinue his action against all or any of the defendants or withdraw any part or parts of his alleged cause of complaint, and thereupon he shall pay such defendant's costs of the action, or, if the action shall not be wholly discontinued, the costs occasioned by the matter so withdrawn. Such costs shall be taxed. The plaintiff may, however, at any time prior to the setting down of any cause for trial wholly discontinue his action, with or without costs to be paid by any party, upon producing to the proper officer a consent in writing signed by all parties or by their solicitors and such costs (if any) shall be taxed. Such discontinuance or withdrawal, as the case may be, shall not be a defence to any subsequent action. Save as in this rule otherwise provided, it shall not be competent for the plaintiff to discontinue the action without leave of the Court, but the Court may before, or at, or after, the hearing or trial, upon such terms as to costs, and as to any other action, and otherwise, as may be just, order that the action be discontinued, or any part of the alleged cause of complaint to be struck out. The Court may, in like manner, and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counterclaim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave.

9. Gilligan J held that the correct form had been used but that Thomas and Antoinette Darcy "would be entitled to the costs of the proceedings up to that point in time." He held that he did not consider that there had "been any departure from normal procedure" and that he was satisfied that "the notice of discontinuance served in respect of the earlier proceedings on 9th of April 2014 is a valid notice of discontinuance and that these proceedings stand discontinued." On the issue of abuse of process, Gilligan J held:

> I am satisfied that in these special summons and in the special endorsement of claim as set out at paragraph 11, it was … made quite clear that for the avoidance of doubt, the plaintiff accepts that the present proceedings have been necessitated by the decision of the Supreme Court of the 13th November 2013 to set aside an order of the High Court of McGovern J of 16th of April 2012, which High Court decision had previously given the plaintiff reliefs that it seeks in these proceedings. However, the appeal before the Supreme Court provided on the basis that by reason of the provisions of the Land and Conveyancing Law Reform Act 2013 which statutorily overruled the decision in Start Mortgages Ltd. v Gunn [2011] IEHC 275, the defendants would have no defence to any new proceedings brought seeking the same relief by reason of the 2013 Act. I'm satisfied that the plaintiff was in error in issuing the present set of proceedings without having served a notice of discontinuance in respect of the earlier set of proceedings. I'm satisfied that anyone reading paragraph 11 of the special summons would readily see the situation and realise that effectively now a fresh set of proceedings had been issued. I take the view that the error that occurred was simply an error of form and is not an error of any substance. I also take the view that there's been no indication of any prejudice by either of the defendants in [respect] of the situation that has occurred. I take the view that to accede to the arguments as made on the defendants' behalf would not be in the interests of justice and that effectively, what would be occurring would be an obligation on the plaintiff to issue a third set of proceedings. I bear in mind the judgment for €17.42 million was entered against both defendants on the 16th February 2011. I take the view that the Court has a discretion in the matter, and accepting, as I do, but there was an error in that regard and having regard to the Rules, I exercise my discretion in favour of the plaintiff. In my view, the proceedings as instituted on the 21st of February 2014, being these proceedings, are valid proceedings validly issued and I propose to continue and deal with the application as made out therein.

10. The text of the relevant rule clearly provides for discontinuance of proceedings without leave of the court. It also makes plain that, in the ordinary way, any such action will not amount to the setting up of an event against the party discontinuing whereby it may be said that any principle of *res judicata* applies. Among the arguments advanced as to why the judgment of Gilligan J was incorrect in permitting another set of proceedings to continue is that there had been the equivalent by Thomas and Antoinette Darcy of the delivery of a defence. This point cannot succeed. It is true that after a defence is delivered, discontinuance is not enabled simply by filing a notice. Here, however, it cannot be said that a defence had been filed. While the bulk of the potential defence argued for was certainly put on affidavit, a defence in this context is the document dealt with in Order 21 of the Rules of the Superior Courts and is the document in a plenary action which is required to be filed in order to ensure that judgment is not sought on a statement of claim by way of motion before a judge of the High Court. It does not mean a sworn statement of facts potentially establishing grounds for opposing relief sought on a special summons or on a summary summons. Hence, leave of the High Court was not required for this notice of discontinuance. Another point raised was in relation to costs. It was claimed on behalf of Thomas and Antoinette Darcy that no costs were paid by the bank on the service of the notice of discontinuance and that hence it was invalid. Insofar as facts in relation to this can be accessed, it is clear that on discontinuance the solicitor for Thomas and Antoinette Darcy applied to the bank's solicitor to pay each of their costs, as each had entered separate appearances to the special summons that was discontinued by the bank. Thereafter, and it appears on behalf of both Thomas and Antoinette Darcy, a bill of taxation was drawn up in appropriate form. This was last listed before the Taxing Master on 30th May 2016 but has been adjourned. Since no party to litigation can immediately be aware what precise costs have been occasioned by the other side by service of any form of summons, the procedure to be followed is precisely as occurred here.

11. The real issue is whether there has been an abuse of the process of the courts by the discontinuance of the first special summons proceedings and the substitution of a new special summons, lacking the ostensible defect of the first, with an overlap of both sets of proceedings for the period from 28th January to 9th April 2014. The answer must be in the negative.

12. A functioning, impartial court system that is bound by the rule of law is central to the discharge of the responsibilities of a democratic nation. People end up in disputes, claiming entitlements from others or from the State to which they may or may not have a legal right. The proper forum to resolve such disputes is the courts system. Hence, under the Constitution of this State there is a right to assert and have vindicated a legal right; *Macauley v Minister for Posts and Telegraphs* [1966] IR 345. Actual experience of the exercise of this right – acting as a litigant either through the commencement of an action or being faced with the defence of one – teaches one that this may be a drawn out, stressful and expensive process. Litigation can be used abusively. The purpose of exercising the constitutional right to litigate is the vindication of legal entitlements which the parties in the cause seek to assert. Of course, any legal right may be claimed on a factually or legally incorrect basis. To sort out such situations is the everyday task of the courts. Where a cause of action is bound to fail, it is not always necessary for those facing a court hearing to await the outcome of all preliminary steps and to patiently sit through an oral hearing and await a judge's decision. In drastic cases, litigation can be cut off from the outset through the use of the 'bound to fail' jurisdiction, subsisting as it also does under the 'vexatious litigation' title: *Kenny v Trinity College Dublin* [2008] 2 IR 40. The rationale for the entitlement of judges to resort to orders of that kind is that the legal system exists for the benefit of those in the country and that its misuse undermines not only the entitlements of the people in general but the functioning of courts. Hence, the courts have inherent powers to protect their own jurisdiction as part of the principle that abuse of the legal system should be stopped.

13. The question of what constitutes an abuse of process can take on many guises. Typically, this will occur where a person disingenuously initiates proceedings which they are aware have no credible basis in law or fact. The entitlement to assert a legal claim must be exercised for the purpose under which that entitlement exists in the first place; whether it be a claim for damages in tort or a claim that an administrative body exceeded its jurisdiction. Hence, since the function of legal proceedings is to assert entitlements in law, proceedings cannot be brought for an improper purpose, such as that of extortion or of wearing down an opponent; *Sean Quinn Group Ltd v An Bord Pleanála* [2001] 1 IR 505. Nor would it be right to frame proceedings or to defend proceedings in a manner designed to embarrass an opponent by calling in aid the apparent involvement of parties who, in reality, have nothing to do with the specific contest of legal rights asserted by both parties. While litigants who have been wronged are entitled to a measure of acknowledgment towards their feelings of bitterness and hurt, it is not part of the proper purpose of litigation for it to be used as an engine driving adverse publicity against one or more parties. Court cases are heard in public under Article 34 of the Constitution; hence public and media presence attend litigation and in consequence any allegation of abuse of process must take that into account. Nor can it be right to use the privileges that money affords to bring unnecessary interlocutory applications prior to the trial or to demand or to produce oppressive quantities of documents as part of the discovery process. Similarly, it is wrong to bring several sets of proceedings in aid of wearing down an opposing party or to relitigate old wrongs that have already been resolved. Normally, the principle of issue estoppel can be pleaded against such conduct but even splitting an action into several sets of proceedings can also be wrong. Litigants cannot try out one aspect of a set of facts that is in its true nature integral to a wrong complained of and keep other facts in reserve in order to launch fresh proceedings if success is not encountered. The rule in *Henderson v Henderson* (1843) 3 Hare 100 promotes a single trial of relevant events, with Lord Bingham in *Johnson v Gore Wood & Co.* [2002] 2 AC 1 at 31 noting that the rule promotes the "current emphasis on efficiency and economy in the conduct of litigation, in the interest of the parties and the public as a whole"; this passage also being cited with approval in *AA v The Medical Council* [2003] 4 IR 302 at 316.

14. But the jurisdiction to prevent the abuse of court procedures is not so much about economy and efficiency as the courts exercising the right to order their proceedings so as to ensure fairness in procedures and the appropriate use of court time; *Talbot v Hermitage Golf Club* [2014] IESC 57. Rather than any issue as to cost, a court must examine the individual circumstances of a particular case (a process which necessitates an understanding of the case's history and the course of proceedings up to that point) before it can properly exercise its jurisdiction to strike out proceedings as an abuse of the legal system.

15. These particular circumstances demonstrate that one of the litigants is owed a substantial amount of money by the other parties. The circumstances in which that money is owed have been adjudicated upon by the courts utilising a procedure which afforded each party the opportunity to make whatever case in law or in fact that they considered appropriate. Proceedings were issued in the ordinary way and in accordance with the Rules of the Superior Courts. Judgment was obtained by default. This allowed for a review, on demonstrating a reasonably arguable defence. This was not shown. Those Rules, which serve the ultimate aim of justice, provide that a litigant against whom judgment in default has been entered may apply to court to review that administrative decision. An opportunity was thus presented to Thomas and Antoinette Darcy to swear in written form any answer or response they might have to the bank's claim against them. The reality of the case is that loans of money were advanced to them with a view to developing property. The wisdom of making or of seeking those loans is not part of that review as there is nothing in this case to indicate any undue influence or any other aspect of contract law which might provide a defence. Thus any consideration as to whether there has been an abuse of the process of the court by the bank should start with the premise that creditors are entitled to enforce their debts. Within the court system, the summary judgment procedure is designed to enable the identification of potential defences which would divert the litigation into an oral hearing to enable judgment to be granted by a judge in the event that it is very clear that there is no defence to a monetary claim.

16. Given the existence of this debt to the bank, no legal system would be complete unless it offered more than a paper judgment. Methods of proper enforcement are integral to the functioning of courts. The bank chose a form of letter of demand which, it seems, may have resulted in a failure to achieve enforcement through a court order charging the debt upon properties mortgaged by the debtors. This may consequently have resulted in a court not being able to sell those properties with a view to enforcing the judgment. That situation arose, it appears, due to an inadvertent omission in the drafting of the Land and Conveyancing Law Reform Act 2009 which was then corrected through the commencement of the Land and Conveyancing Law Reform Act 2013. It did not occur as a consequence of a desire by the bank to use litigation as an improper weapon of terrifying the debtors into settling judgment but rather as the ordinary use of the court system in recovering a loan. While the case of *Buckley and Others (Sinn Féin) v Attorney General* [1950] IR 67 has been eloquently called in aid by counsel on behalf of Thomas and Antoinette Darcy, there is a great difference between a situation in which the Oireachtas reformed and amended the law for the benefit of citizens (as in the present case) from a situation in which the legislative branch of government makes a deliberate effort to interfere with litigation that is lawfully proceeding through the court system.

17. Certainly, that case is authority for the proposition that interfering with existing litigation for an improper purpose may be nullified, but that is not the case here. The Rules of the Superior Courts contemplate that litigation may have to be brought to an end and, in that regard, Order 26, Rule 1 provides a complete code for the proper and just control of that circumstance; *Smyth v Tunney and Others* [2009] 3 IR 322. The circumstances under which litigation may be terminated are as varied as the death of a plaintiff and the non-survival of a cause of action, that someone thinks the better of continuing to either prosecute or defend litigation, or that the proceedings suffer from a technical defect which necessitates their recommencement. Without judging the ultimate consequence of the discontinuance of these proceedings, it is clear that it was the latter consideration that motivated the bank. This is a very different situation to one where such discontinuance should be condemned. An example of that would be *Castanho v Brown & Root* (UK) Ltd. [1981] AC 577 where interim payments were obtained in consequence of an admission of liability for personal injuries yet proceedings were discontinued because the plaintiff thought he might be more successful in pursuing an action in the United States of America. That is illustrative of an improper purpose. On the other hand, the legal system in all its complexity is not always a model of limpidity. Complexity and uncertainty is bound to give rise to inadvertence and mistakes and it would not constitute the just disposal of a case for parties with a genuine claim to be blocked out simply because they had blundered into an incorrect procedure.

18. That is precisely what happened in this case and the courts would be abjuring their responsibility to grant wronged parties an appropriate legal remedy if they were to force litigants to unnecessarily continue litigation that is flawed only in terms of procedural correctness. Of course, with every step taken in litigation there may be another party who needs to seek advice and take an appropriate procedural step in response; such as entering a defence or delivering an affidavit. The Rules of the Superior Courts provide for a just response regarding the payment of costs where an action is discontinued. Where the case has gone as far as the effective close of pleadings, then the leave of the court is required on this subject to the imposition of conditions which, as a matter of fairness, will take such considerations into account.

19. Thus the decision of Gilligan J was correct and should be upheld.

The mortgage

20. Another point raised on the appeal was that Antoinette Darcy had not given her consent to the mortgage of the property which

was at one stage the family home. The Family Home Protection Act 1976 was designed to protect spouses against the encumbrance - through mortgage or other forms of alienation - of their home against their will. Keane J, in his judgment on this issue, characterised this point as "entirely misconceived in law". He applied the decision of the Supreme Court in *Bank of Nova Scotia v Hogan* [1996] 3 IR 239 in resolving the matter. The conveyance by one spouse of an interest in the family home is invalid unless made with the consent of the other, non-owning, spouse. This can be contrasted with a situation where a spouse alienates an interest in property of which they are the owner or co-owner, as is the situation in the present case. Keane J adhered to the analysis of Walsh J in *Bank of Ireland v Purcell* [1989] IR 327 at 333 in describing the legislation as "a remedial social statute enacted to protect the interest of the non-owning spouse in the family home". Noting that alienation could occur out of vindictiveness, the purpose of the legislation was to ensure that the parties to a marriage could not be victimised in the bitter circumstances which could sometimes arise within the breakdown of a marriage. The trial judge cited all the relevant cases, including *TF v Ireland* [1995] 1 IR 321, *In the matter of Jeffel (In Receivership*) [2012] IEHC 279 and the judgment of Henchy J in *Nestor v. Murphy* [1979] IR 326. This latter case he characterised as giving a right of avoidance to a spouse who was not party to the transaction. Drawing on the judgment of Gilligan J in the *Jeffel* case, he noted "that the reference in the definition of "family home" at s. 2 of the 1976 Act to "the spouse whose protection is in issue" must be presumed to be a reference to the "non-owning spouse" for it would be absurd to find that a spouse vested with full legal and equitable title in a property could have recourse to the 1976 Act." Keane J concluded at para. 43:

> Applying the foregoing analysis to the circumstances of the present case, it seems to me that the second named defendant is confusing the situation that appertained here, i.e. one in which she jointly engaged in transactions concerning the family home that she and her husband jointly owned, with the quite different one whereby a spouse, as sole owner of the family home, purports to deal with that property without the consent of the other non-owning spouse.

21. This reasoning cannot be faulted or improved on. In reality, the Act of 1976 was passed as a protection of property rights. It does not prevent those protected from voluntarily alienating their own property.

Result

22. In consequence the judgements of both Gilligan J and Keane J and the orders made by them cannot be disturbed on appeal.