Neutral Citation: [2013] IEHC 441

THE HIGH COURT

CORK CIRCUIT COUNTY OF CORK

[2013 No. 74 CAF]

BETWEEN

D.L.

APPELLANT

AND

M.L.

RESPONDENT

JUDGMENT of Mr. Justice McDermott delivered on the 27th day of September, 2013

1. This is an appeal against the order of the Circuit Court (His Honour Judge Fulham) made 26th July, 2013, whereby the court ordered that a sum of €81,500.00, the proceeds of a redundancy payment to the appellant be paid to Allied Irish Banks Plc in respect of the partial discharge of the joint liability of the applicant and the respondent to the Bank in respect of 19 Lancaster Quay, Cork.

Background

2. On 14th July, 2009, an order was made by the Cork Circuit Court (His Honour Judge J. O'Donohoe) who granted a decree of divorce to the applicant and made the following order:-

> "And the Court Doth make Ancillary Orders as set out in the Consent terms filed, a copy of which is attached hereto and is set out as a schedule to this order.
>
> And the Court Doth make them a Rule of Court.
>
> Liberty to Apply
>
> No Order as to Costs."

3. The consent set out the schedule to the order contained agreed terms of settlement. The relevant terms for the purposes of these proceedings are clauses 3 and 4 of the consent which state as follows:-

> "3. Henceforth the respondent (wife) shall be solely entitled to:-
>
> (a) 41 Lakelawn, Douglas, Cork, subject to existing mortgages…however, with the benefit of the endowment policy with Scottish Provident…
>
> (b) Bella vista, College Road, Cork (joint with a third party) subject to liabilities thereon.
>
> (c) 33⅓% of the applicant's First Active pension (retirement) together with 50% of the spousal element attached thereto.
>
> 4. Henceforth the applicant shall be solely entitled to:-
>
> (a) Lancaster Quay (subject to the indemnity hereinafter contained).
>
> (b) Millard Hall.
>
> (c) Property at Blackpool.
>
> (d) Lands at Lisavaird.
>
> All of the above being subject to interest of third parties and liabilities thereon. Each party to execute/secure a release of the other as appropriate in respect of all mortgages re (3) and (4) herein."

4. The property at Lancaster Quay was an investment property in the joint names of the parties and comprised a downstairs commercial premises rented out on a short term lease as a café, yielding a rent of €18,000.00 per annum as of 24th July, 2009. The residential part of Lancaster Quay consisted of four bedrooms, rented out during the college year at an average rent of €800.00 per month, giving a total rental income of €7,200.00 per annum. Shortly after the resolution of the matrimonial proceedings, the appellant/husband who had management and control of the rents received in respect of the Lancaster Quay property allowed the mortgage account with Allied Irish Banks Plc in respect of the property to fall into arrears from 21st October, 2009, as evidenced by a notification to that effect issued to the parties on 3rd March, 2010, indicating an arrears of €7,517.47. The appellant/husband allowed these arrears to grow to €47,378.43 as evidenced by a letter from the Bank to the respondent (wife)'s solicitors of 16th April, 2013, during the period up to 19th July, 2012.

5. In the meantime the respondent/wife in order to fulfil her obligations under clause 3 of the consent obtained a release of the

husband from all mortgages secured on the family home, and a discharge of a mortgage in respect of Lancaster Quay in respect of which she reduced the liabilities attaching to the property by €90,083.18 by re-mortgaging the family home. As a result the mortgage which she is obliged to discharge on the family home amounts to approximately €160,000.00 as opposed to the €33,000.00 that remained outstanding at the time of the divorce.

6. It is clear that the respondent/wife complied with all of her obligations in respect of clause 3 of the consent. However, the appellant/husband has failed to execute or secure a release of the respondent in respect of the mortgage account on 19 Lancaster Quay and, of course, it is acknowledged in clause 4 that it is subject to the interest of third parties, in this case Allied Irish Banks Plc, and the outstanding mortgage liability on the premises which was €391,441.73 as of 15th July, 2013.

7. The respondent, in accordance with a clause permitting liberty to apply, re-entered the matter before the Cork Circuit Court by way of notice of motion dated 6th July, 2011, grounded on her affidavit sworn 1st July. This followed requests by the respondent's solicitors to the appellant during 2010 to take the necessary steps to have the property at Lancaster Quay transferred into his sole name and to procure her release from the liabilities secured on the property. The appellant's solicitors replied by letter dated 12th March, 2010, indicating that they found it impossible to get instructions from the appellant in the recent past and that he had not responded to their letters.

8. Meanwhile on 11th March, 2010, the respondent's solicitors wrote to the Bank expressing concern that correspondence still indicated her liability in respect of the mortgage account. By letter of 17th May, the Bank sought an update of the net worth profile of the respondent outlining her assets and liabilities certified by an accountant in order to make a final decision on her request to be relieved of liability. These details were sought by the Bank again on 15th July, 2010, and 14th January, 2011. The respondent states that she was reluctant at that time to furnish information to the Bank. This documentation was ultimately furnished but in February, 2012, the Bank indicated that it was refusing to release the respondent from the loan.

9. The respondent's motion was adjourned on a number of occasions to allow the Bank to come to a decision in respect of the matter. Ultimately, the Cork Circuit Court (His Honour Judge O'Donnobhain) adjourned the proceedings generally with liberty to re-enter on 6th February, 2012, because the parties had no notice of any decision by the Bank at that stage.

10. For his part, the appellant claims that he instructed his financial advisers to write to the Bank to take the necessary steps in order to fulfil his obligations under clause 4. By letter of 24th July, 2009, his accountants put a proposal to the Bank whereby the appellant would take over in full the borrowings on Lancaster Quay, but an issue arose as to the failure on the part of the respondent to supply the financial details requested by the Bank and which was resolved by October, 2011. The Bank advised that a decision was under consideration by letter of 19th October, 2011, and in February, 2012, indicated that it was not in a position to release either borrower from the debt and was not agreeable to the ownership of the property at Lancaster Quay being amended.

11. The respondent applied to re-enter the proceedings by notice of re-entry dated 1st May, 2012, by which time the Bank had confirmed that they were unwilling to release the respondent from the mortgage. The intention of re-entering the matter was clearly to procure a court order compelling compliance by the respondent with clause 4 of the consent which had already been made a rule of court.

12. On 19th July, 2012, this second motion to re-enter the proceedings was adjourned on terms to 11th October. It was agreed between the parties that 19 Lancaster Quay would be placed on the market for sale forthwith, and the usual ancillary terms in respect of auctioneers and conveyancing fees were included. The appellant agreed to apply to the Bank to place the mortgage on an interest only basis forthwith. It was also agreed that the rents from the property would be applied to the mortgage account subject to the discharge of justifiable necessary expenses arising from the letting of the premises. It was also agreed that, in order to ensure that the rental income would be applied appropriately, the property would be managed by the parties' son, pending sale.

13. The motion to re-enter was thereafter adjourned to 4th March, 13th March, 29th May and 17th July, 2013. The appellant claims that this was done to facilitate his discussions with the Bank in relation to final settlement of liability and the respondent claims that these adjournments occurred while awaiting a decision of the Bank. In any event, it was agreed by the parties that the matter could not be progressed before the Circuit Court until the Bank's view was made known. That view was dependent upon the negotiations.

14. It is clear that the respondent in consideration of the agreement of these terms did not pursue the remedy that was undoubtedly available to her in respect of clause 4. It had already been made a rule of court. The motion provided the vehicle whereby the respondent could seek an order embodying the terms of clause 4 and any necessary ancillary orders for its enforcement and the protection of her entitlements thereunder. Though that relief was not specifically claimed, it is clear from the evidence and submissions made to this Court that the respondent was reverting to the court to procure orders to enable her to enforce the provisions of clause 4 against the appellant. By reason of her forbearance in agreeing the adjournment of the motion, the court is satisfied that both parties were advantaged but no further order merging clause 4 in the order of the court was made.

15. In compliance with the terms agreed, auctioneers were appointed and the property was placed on the market in or about October, 2012. An offer has been received to purchase the property for €222,000.00 and heads of terms of agreement dated 24th July, 2013, concluded. The appellant has indicated at all times that he is willing to complete the sale of the property. The proceeds of the sale, of course, will be applied in their entirety in part discharge of the mortgage, subject to any deduction that is appropriate for legal fees and costs of sale. They are estimated to be €10,000.00. As of 15th July, the redemption figure was €391,441.73. Following the successful completion of the sale, a sum of €212,000.00 will be available which will reduce the redemption figure to a sum of €179,441.73.

16. The appellant was employed as the manager of a financial institution on a salary in excess of €81,000.00 per annum until 25th February, 2013, when he was made redundant and received a severance package of approximately €200,000.00. Following deductions for legal fees, income tax, universal social charge and a tax efficient contribution to his private pension fund of €38,771.00 he was left with a net sum of €80,256.00.

17. It is clear that for whatever reason, following the divorce and settlement, the appellant who was to be solely entitled to Lancaster Quay and who was in charge of the receipt of its rents, failed to ensure that rents received from the property were applied to the discharge of the mortgage repayments. This resulted in arrears of some €47,378.43 as of 16th April, 2013. Therefore, not only was the respondent's release from liability in respect of the mortgage not secured by the respondent, but she has in the meantime been exposed to further liability in respect of these accumulated arrears. The court is satisfied that the appellant though making some approaches to the Bank in respect of the future of the property and both parties' liability, failed to take any effective steps with a view to complying with clause 4. This is what prompted the re-entry of the proceedings and resulted in the agreement to sell the premises.

18. The respondent, on becoming aware of the redundancy payment to the appellant, caused an *ex parte* application to be made to the Cork Circuit Court on 27th February, 2013, which granted an order (His Honour Judge D. Riordan) directing the appellant to lodge the entire redundancy sum to his solicitors account and restraining him from dissipating that sum without further order of the court. The motion which issued following the making of that application was adjourned from time to time and the original order made on 27th February, 2013, remained in force until 26th July. It was adjourned at the appellant's request to enable him to secure the best deal possible from the Bank in cooperation with the respondent in respect of the discharge of the remaining liability. It has been a constant theme of the various applications made by the appellant, whether for an adjournment of various motions or a stay on the order of the Circuit Court, that he is best placed to obtain a settlement from the Bank given his experience and skills.

19. The relief claimed in the motion dated 27th February, and originally returnable to 4th March, sought orders in the following terms:-

> "(a) Directing the applicant herein to lodge the entire proceeds of his redundancy/severance package (*circa* €190,000) payable by his employers…to such account as This Honourable Court shall seem fit.
>
> (b) An order restraining the applicant herein from dissipating the aforementioned monies without order of the court.
>
> (c) If necessary, an order directed to (the appellant's employer) restraining the payment out of the aforementioned sums of the applicant without further order of the court, or in the alternative directing the said employers to pay the said monies into such account as to This Honourable Court shall seem fit.
>
> (d) In the alternative an order directing the applicant to apply such portion of the said funds to the discharge of the mortgage on property situate at 19 Lancaster Quay, Western Road, Cork as to This Honourable Court shall seem fit.
>
> (e) Such further or other order as to This Honourable Court shall seem fit…"

This relief was sought against the background of the previous re-entry of the proceedings whereby the respondent was seeking further relief from the court to ensure the implementation of clause 4, together with such further ancillary orders that might be appropriate in the circumstances. It is also clear that the developing circumstances raised issues as to how the terms of clause 4 might appropriately and prudently be given effect. It was in that context that the court granted the interim relief sought by the respondent. At this stage the property was on the market, a substantial amount of money had been awarded to the appellant, substantial arrears had been built up in respect of the property thereby exposing the respondent to further liability, the respondent had obtained the agreement of the appellant to take steps to realise the value of the property in order to discharge a part of the liability and had completely fulfilled at considerable cost, all of her obligations under clause 3: the appellant, for his part, recognised his obligation under clause 4 to pursue the best possible terms from the Bank to crystallise the liability of the parties and enable the release of the respondent.

20. A further attempt was made to engage with the Bank and following a meeting between the appellant, the respondent and Bank officials on 21st June, 2013, and a subsequent meeting between the appellant, his advisers and the Bank, proposal terms were offered by the Bank which, if accepted by both parties, would result in a significant reduction of their liability to the Bank. The proposal dated 15th July, provided for the sale of the Lancaster Quay premises for a minimum price of €222,000.00 subject to maximum outlay of €10,000.00. On completion of the sale the sum of €212,000.00 was to be paid in permanent reduction of the debt. A further sum of €80,000.00 was required to be lodged in further reduction of debt and the sum of €79,441.73 would be regarded as unsustainable debt. The Bank accepted that the remaining €20,000.00 could be cleared by an immediate once off payment or alternatively, within three years at 0% interest rate. The unsustainable debt would be written off by the Bank by 31st December, 2017, if all of the other conditions were observed. The Bank indicated that the funds constituting the proceeds of sale of the property and the €80,000.00 lump sum would have to be lodged by 30th September, 2013. It was, therefore, clear by the time this matter came before the Circuit Court for hearing on 17th July that a decision had been made by the Bank to forgive a substantial amount of the outstanding liability on the terms offered. This would require the appellant to contribute a sum of €80,000.00 by way of a lump sum to the settlement: clearly this was most of the redundancy sum frozen by the court.

21. On 17th July, counsel on behalf of the appellant sought an adjournment to enable a counter proposal to be put to the Bank in respect of these terms. An adjournment of one week was granted in the course of which on 19th July, solicitors on behalf of the appellant made contact with the Bank, but to no avail. On 26th July the court (His Honour Judge Fulham) made an order effectively granting relief pursuant to para (d) of the notice of motion directing that the €81,500.00 held on account be paid out to the Bank. A stay was placed on this order for two weeks in the event of an appeal. The motion was adjourned to 17th October because it was clear that, notwithstanding the payment of the €80,000.00 under the proposal terms and the payment over of any proceeds of sale, an amount of €20,000.00 would remain outstanding. Counsel for the respondent sought an adjournment of the motion to enable application to be made for such orders as might be necessary in relation to that sum. No issue was raised at any stage as to the jurisdiction of the Circuit Court to make the orders requested.

22. It is clear that the notice of motion contemplated a number of possible orders: the continuation of the freezing order until further order, an order preventing the employer from paying out the lump sum and the order actually made. Events had once again moved on and the more substantive relief sought in the notice of motion became the real issue between the parties in respect of the lump sum having regard to the progress made in negotiations, the reluctance of the appellant to accept the terms offered by the Bank and the rapidly approaching deadline contained in the proposed terms of 30th September for payment. The learned Circuit Court Judge dealt with the substantive matter and made the order sought. I am satisfied that both parties fully understood the centrality of this issue to the implementation of clause 4: if the terms of clause 4 were not given effect by order of the court together with any ancillary order necessary to secure payment at that time, the respondent would likely lose the opportunity to ensure the fullest possible compliance by the appellant with his obligations. The urgency of this issue was also demonstrated in the appellant's application for a stay on the Circuit Court order.

23. An application was made to this Court by notice of motion of 1st August, 2013, seeking a stay on the order of 26th July pending the hearing of an appeal. Counsel submitted that the appellant was most anxious to be afforded time to engage with the Bank in order to reach a satisfactory conclusion and, in effect, greater debt forgiveness, thereby protecting to the greatest extent possible the redundancy sum which had been frozen by the court. The court acceded to the application and adjourned the matter to 10th September in order to afford the appellant the opportunity to secure the better terms which he felt would be available. He was unsuccessful in doing so. On the adjourned date the appellant sought to extend the stay by emphasising the fact that failure to do so would deprive him of an effective appeal because the €81,500.00 would by that stage have been paid over to the Bank. The court continued the stay but decided to hear the appeal on 24th September, bearing in mind that 30th September had been set as the date for payment of the lump sum by the Bank. It is clear at this stage that the Bank had not offered any more favourable terms to the parties other than those of 15th July.

24. Counsel on behalf of the applicant now contends that the Circuit Court and this Court on appeal has no jurisdiction to make an order of the kind made on 27th February or 26th July. It is submitted that the terms of the orders were made without jurisdiction for the following reasons:-

> (1) There was no statutory power vested in the Circuit Court to grant an order freezing funds or directing the payment of frozen funds to another;
>
> (2) Clause 4 of the consent of 14th July, 2009, was only made a rule of court and therefore, is not enforceable against the appellant unless the respondent applied to the court and obtained an order giving effect to the terms of clause 4. This has not been done and therefore, the court has no legal basis upon which to make orders arising out of the alleged failure of the applicant to comply with the terms of clause 4;
>
> (3) Clause 4 is so vague that it is not possible to translate it into an order of sufficient precision as to give rise to the specific entitlement now claimed, namely, an entitlement to the freezing of a lump sum and/or that it be paid to the Bank;
>
> (4) It would be inappropriate to make any order on the basis of clause 4 because it seeks to impose obligations on the Bank and the appellant in his dealings with the Bank in a manner calculated to affect the Bank's interests when it is not a party to these proceedings.

25. The appellant relies upon the provisions of s. 37(2) of the Family Law (Divorce) Act 1996, in respect of the first proposition. It provides that:-

> "The court, on the application of a person (the applicant) who has instituted proceedings that have not been determined for the grant of relief, may –
>
> > (I) if it is satisfied that the other spouse concerned or any other person, with the intention of defeating the claim for relief, proposes to make any disposition of or to transfer out of the jurisdiction or otherwise deal with any property, make such order as it thinks fit for the purpose of restraining that other spouse or other person from so doing or otherwise for protecting the claim."

It is submitted that this is the only basis upon which orders of the type made in this case could have been made in matrimonial proceedings. It is clear that an application under s. 37(2)(a) applies only to "proceedings that have not been determined for the grant of relief". The relief referred to is defined as relief under ss. 12, 13, 14, 15(1)(a) or (b), 16, 17, 18 and 22 (with exception of s. 22(1)(e)). Though references to "defeating a claim for relief" include "frustrating or impeding the enforcement of an order granting relief", nevertheless, the provision only facilitates applications made prior to the grant of relief in respect of the various sections. This is clearly a case in which the substantive relief was granted on 14th July, 2009. The respondent accepts that this was not an application under s. 37 in any event, and the redundancy payment made in the case could not have been contemplated at the time of the granting of substantive relief.

26. I am not satisfied that this precludes the court from entertaining an application for a Mareva style injunction in respect of property post judgment in matrimonial proceedings but prior to enforcement. There is ample authority to support the granting of a Mareva style relief as an aid to the execution of an order of the court, and it is sufficient that the applicant for such an injunction has an enforceable substantive right to recover an award from a defendant. I am satisfied that the granting of the original order following the *ex parte* application was within the jurisdiction of the court, and may be granted on the production of the necessary proofs. (See Courtney – *Mareva Injunctions and Related Interlocutory Orders* (1998) paras. 3.02 – 3.07 and 4.28 – 4.34). At no stage was the *ex parte* order appealed by the appellant and, indeed, the appellant submitted to a continuation of the injunction between the 27th February and the 26th July.

27. Clause 4 was contained in the consent schedule to the order but was not made part of the order: it was made a "rule of court". The appellant contends that this distinction is crucial to the issue of enforcement. It was submitted that the only effect of making clause 4 a rule of court was to enable the respondent to apply within the existing court proceedings for relief in respect of that clause, rather than to institute separate proceedings on foot of the settlement. It was also submitted that to enforce clause 4 it was necessary for the respondent to apply to the Circuit Court for an order directing compliance with the clause, and if there were non-compliance, to initiate the appropriate enforcement process. Reliance was placed on Foskett: *The Law and Practice of Compromise* (2005) para. 11.04 – 11.20 and Delaney & McGrath: *Civil Procedure in the Superior Courts* (2012) (3rd Ed.) paras. 19 – 23 to 19 – 26. This contention is summed up in the following extract from the judgment of Warrington L.J. in *Re Shaw* [1918] P. 47 at pp. 53-54:-

> "The parties to the probate action compromised it by an agreement…By the decree following those terms the term were directed to be filed and made a rule of court, but there was no judgment in which those terms were merged. In my opinion, notwithstanding that the terms were made a rule of court, the liability to pay the annuity remains contractual. The effect of making the terms a rule of court enables the terms to be summarily enforced without the necessity of bringing an action."

28. The authorities relied upon indicate a two stage process whereby the enforcement of clause 4, once it has been made a rule of court, should proceed on the basis that an appropriate court order is obtained embodying the clause and secondly, in the event of non-compliance, the respondent may take enforcement proceedings on foot of that order.

29. The court is satisfied that making the clause of an agreement a "rule of court" does not have the same effect as making an order in the terms of the clause. It provides a shortened procedural route to enforcement of the term by way of application within the proceedings whereby an order may be made merging the terms of the clause with the existing order of the court thereby providing a means for the enforcement of the agreement without recourse to separate proceedings. In formulating the precise terms of the order to be made, the court may have regard to the nature and extent of the settlement. It may be inappropriate to make such an order, if it were to affect a third party's rights who is not a party to the proceedings or, if the terms of the clause relied upon are so vague or imprecise as not to be capable of formulation as an order by the court. Normally, it would be prudent to ensure that when seeking to convert such an agreed clause into the form of an order, that this specific relief should be claimed in the notice of motion relied upon. However, given the executory nature of many orders, particularly in family law proceedings, and the exigencies often dictated by changing circumstances, as in this case, strict adherence to this procedure may cause injustice on occasion.

30. The terms of clause 4 provide that:-

> "Each party to execute, secure a release of the other as appropriate in respect of all mortgages *re* (3) and (4) herein."

The appellant clearly understood his continuing obligations in that regard, in particular since he was a former manager of a financial institution and the beneficiary of the respondent's compliance with her obligations. The court acknowledges that the capacity of the appellant to "execute/secure" the respondent's release from the mortgage with the bank is to an extent dependent on the bank's willingness to offer terms which will enable the respondent to achieve that objective as well as his and her willingness to agree those terms. The court is not concerned with how that release is obtained. It may be done in one transaction or it may be done over the course of several transactions pursuant to arrangements entered into between the appellant and the Bank. However, the terms of clause 4, vis-à-vis the Lancaster Quay property, are not to be viewed in a vacuum. The court is entitled to look at the purpose of the clause, the overall obligations entered into by both parties in respect of the settlement and the attitude and steps, if any, taken by the appellant in seeking to implement the terms of clause 4. If the appellant was unwilling to sell the property four years after the making of the divorce decree and contributed to an accumulation of fresh arrears by not paying rents in discharge of mortgage repayments as a result of which the respondent had incurred a further liability, the respondent was entitled to apply to court to have the clause formulated in the form of an order directing the appellant to secure her release from the mortgage and to direct as part of that process that the property be sold. In essence, that was the relief originally sought by the respondent when she initially applied to re-enter the proceedings. It is clear that the purpose and intention of clause 4 was to ensure that the respondent was freed of liability in respect of Lancaster Quay, in the same way as the appellant had been relieved of liability by the respondent pursuant to clause 3. Of course, if a sale of the property took place and the proceeds thereof were paid to the bank, the respondent would be released from the terms of the mortgage but not from the balance of the loan monies in respect of which she would still be jointly liable with the appellant.

31. It is clear that the appellant did not seek specific relief in the notice of motion that the clause which was hitherto a rule of court should be made an order of the court. However, I am satisfied that it was clear during the course of the proceedings to the appellant that the respondent was seeking such an order on the initial re-entry application directing the appellant to secure her release from the mortgage and, as part of that process, directing the sale of the property. That motion did not proceed because of the agreement reached between the parties. The further application to freeze the redundancy money was another logical step on the road to redemption of the mortgage. Matters moved swiftly when the redundancy sum became available. The respondent had a legitimate fear that the sum would not be applied towards redeeming the mortgage and it was only after the freezing of the monies that the appellant moved to negotiate further with the Bank. This produced the terms of 15th July which offered a significant forgiveness of debt to both parties. They offered, very importantly, the opportunity to be released from the mortgage on the payment of the proceeds of sale and the lump sum, together with the forgiveness of debt which would leave only a joint liability of €20,000 which could be paid over three years with zero interest. This was a considerable advance for the respondent who up to this point had only the prospect of being relieved of liability to the extent of the proceeds of sale. This is the closest the respondent is likely to come to obtaining a release from the mortgage as envisaged by the agreement and to be relieved from her continuing liability to the Bank following the sale of the premises. The appellant is unwilling to accept these terms: that is his right. However, the court is not concerned with his reason for doing so but with the completion of his obligations under clause 4. His unwillingness to accept the terms is because he does not wish to pay over the lump sum frozen because, he says, it is to fund his living expenses between now and his retirement four years hence.

32. The court is only concerned with whether it should grant the relief sought in the notice of motion. I am satisfied as a matter of law that the court has jurisdiction to make an order in respect of the frozen sum. The money was frozen many years after the divorce decree was made on 24th July, 2009, and the initial injunction was clearly granted in aid of the enforcement of clause 4. It is clear, however, that the two stage process envisaged by the case law had not been completed by February, 2013 in that the terms of clause 4 had not been made an order of the court nor had any ancillary orders been made in aid of its enforcement. However, I am satisfied that the essence of the relief which the respondent was seeking in clause (d) was substantively the same. On the initial application to re-enter the proceedings, the appellant was in reality facing an application that the terms of clause 4 be regarded as an order and that the appellant be directed to procure the release of the respondent from the mortgage and further, that the property be sold. The appellant could not have been under any misapprehension as to the nature and extent of the relief sought in that regard and agreed to the sale of the property without the necessity for an order.

33. The motion in this case involves a second stage of proceedings intended to secure for the respondent compliance with the terms of clause 4. The property has yet to be sold and the applicant's release obtained. A lump sum now the subject of the order of the Circuit Court became available to the appellant in February, 2013. The most obvious way to redeem a mortgage is to pay it off. There is no indication by the respondent that he intends to use that money, if free to do so, to pay down the mortgage. The present motion was preceded by a letter of 26th February, 2013, in which the solicitors for the respondent sought an assurance that the sum would not be dissipated but would "be held for both parties pending the conclusion of the family law proceedings herein". I am satisfied that the present motion could only be understood as a vehicle by the respondent to secure an order embodying the terms of clause 4 and an ancillary order directing that payment of the lump sum to the Bank as part of the process of securing the respondent's release from the mortgage.

34. This application was intended initially to achieve interim relief calculated to preserve the *status quo* until the further directions of the court were obtained: but it was always clear that the respondent would seek to have the lump sum applied in further reduction of the mortgage debt. This would necessarily require the court to give effect to clause 4 as an order and direct the payment of the sum to the Bank if the respondent were to succeed. That is the substantive effect of the order made after a hearing in the matter in the Circuit Court. Once again, the respondent agreed to an adjournment and did not press the matter in order to enable negotiations to continue which ultimately resulted in the offer of 15th July. The respondent behaved in a prudent and reasonable way in thereby assisting the appellant in seeking as large a reduction in the joint liability of the parties as possible prior to the sale of the premises. The appellant in rejecting the terms offered seeks to regain control of the lump sum which he seeks to apply as he sees fit in the future, without regard to his clause 4 obligations. If this happens, I am satisfied that leaving aside the terms offered by the Bank, the appellant will not pay out that sum to the Bank. In these circumstances, the respondent will not be afforded any relief on the liability remaining following the payment over of the proceeds of sale of the premises. For her part, the respondent has accepted the terms and conditions of the divorce settlement and has fulfilled her obligations under clause 3 at considerable financial pain.

35. The point is also made that the making of the order under para. (d) of the notice of motion is, in effect, the second stage of a two stage process, the first stage of which has yet to be completed. I am satisfied that notwithstanding the case law envisaging the two stage process as outlined by counsel, and the objection taken to the very general form of the earlier notice of motion brought to re-enter these proceedings, that this is a case in which the court should not permit technical or pleading points to defeat, what I consider to be the just result. This is a case in which the obligations of both parties were executory with a view to the vesting of various properties in each party. Each party undertook an obligation under clauses 3 and 4 to secure the release of the other from any mortgages attaching to the properties obtained under the settlement. It is now four years since the making of the decree of divorce and the appellant has failed to implement clause 4 in respect of Lancaster Quay. The court proceedings clearly demonstrate that he fully understood his obligations under clause 4 and the nature and substance of the relief sought by the applicant at all stages namely, the adoption and enforcement of clause 4 by the court.

36. The notice of motion at para. (d) seeks an order directing the applicant to apply such portion of the lump sum to the discharge of the mortgage on 19 Lancaster Quay as to the court shall seem fit. Though the other reliefs sought in the notice of motion are interlocutory in form in aid of enforcement of clause 4, the terms of clause (d) go somewhat further and invite the court not merely to preserve the sum pending further determination but to apply the funds preserved to the discharge of the mortgage on the property. This could only occur if the court concludes that the clause may be given the force of an order directing the appellant to secure the release of the respondent from the mortgage and that as an ancillary order, the court should direct payment be made to the Bank.

37. I am satisfied because of the unexpected events that required urgent action by the respondent to preserve her position and the necessity for determination of the core issue in respect of the lump sum by 30th September, that the application should be regarded in substance as one to clothe clause 4 in the form of an order and made such ancillary order as may be appropriate to ensure that the agreement is enforced and, in particular, that a substantial part of its benefit to the respondent is not lost. I recognise that in most cases, the better approach is to adopt the two stage process but it would not be in the interests of justice to apply such a process inflexibly. The issue in this case has been fully canvassed and the appellant has not been disadvantaged or prejudiced by what might be regarded as a telescoping of the two stage process. In the special circumstances of this case, I do not consider that a reliance on legal formalism should be allowed to defeat the respondent's entitlement to relief. I am, therefore, satisfied that the lump sum presently held on account be paid to the Bank in part discharge of the capital sum due on foot of the mortgage account. I will hear counsel as to the precise form of the order that should issue.