D.D

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1980 No. 994 Sp.

A.D.

.v.

D. D. & IRISH NATIONWIDE BUILDING SOCIETY

Judgment of Mr. Justice McWilliam delivered on the 8th day of June 1983.

The Plaintiff and D.D., the Husband, were married on 29th May, 1974. There were three children of the marriage. Until 1979, the family lived in premises owned by a company of which the Husband was one of the directors. At the beginning of 1979 the Husband and members of his family purchased for the sum of £98,000 a holding of 32 acres approximately which included a house which became the family home of the parties to this proceeding. This family home and eight acres were conveyed to the Husband who was registered in the Land Registry as full owner on 20th February, 1980, but it appears that the family had moved into the family home in or about January, 1979. The details of the transaction are not clear to me, but it appears that the Husband was to contribute a sum of £45,000 for the

purchase of the family home, of which £30,000 was to be borrowed from the Defendant Building Society and £15,000 was borrowed from his mother. The sum of £30,000 was borrowed from the Building Society and a mortgage dated 6th February, 1980, was executed by the Husband and the Plaintiff endorsed her consent on it. This mortgage provided for monthly repayments of £481-00. No repayments were made at ar time.

The Plaintiff and the Husband separated in March, 1980, when the Plaintiff left the family home and has since been living in Dublin in a house owned by her brother. These proceedings were commenced by special summons issued against the Husband alone on 12th November, 1980. By this summons claims were made for custody of the children, for maintenance, for a barring order against the Husband, for a declaration that the Plaintiff was entitled to the beneficial ownership of the entire of the family home or of such percentage as the Court might determine, and for an order for the sale of the family home.

On 4th May, 1981, the parties entered into a consent which was received and filed in Court and the action was adjourned generally with liberty to re-enter. One of the terms of the consent was that the Husband would expedite the sale of the family home and pay the balance of the purchase price remaining, after the discharge of the amount due to the Building Society, to the solicitor for the Plaintiff to be invested in a house for the use of the Plaintiff and her children during her lifetime with remainder to the children absolutely.

As no repayments were made at any time on foot of the mortgage and the premises were not sold by the Husband, the Building Society issued proceedings against him by summons dated 5th July, 1982, an Order for possession was made in those proceedings on 26th July, 1982, and the premises were subsequently sold for £48,000, which was less than the sum then due to the Building Society, so that there was no surplus to be applied to the purchase of a house for the Plaintiff. It appears that there was some confusion at the hearing of the application for the order for possession in that the Plaintiff was represented before the Master of the High Court and an

objection to an order was made on her behalf although the Husband consented to the order being made. The matter then came into the Judge's list and was heard at the end of a very long list in the absence of the solicitor for the Plaintiff and the order was made on the consent of the Husband.

On 3rd September, 1982, on an application on behalf of the Plaintiff, the Building Society was joined as a Defendant in these proceedings and an interim injunction was granted restraining the Building Society from selling the family home. This was followed by an application on notice to the Defendants for Orders giving the Plaintiff liberty to amend the special summons by including a claim under section 5 of the Family Home Protection Act, 1976, for the protection of the family home, requiring the Husband to discharge all arrears due on foot of the mortgage, joining the Building Society as a Defendant and preventing the Building Society from taking any steps on foot of the Order for Possession obtained on 26th July, 1982. On 29th September, 1982, the application for an order restraining the Building Society from selling the family home was refused and the other matters were adjourned. Further applications

were made on behalf of the Plaintiff and the summons, as it now appears before me, was amended to include a claim against the Husband under the provisions of the Act of 1976, for compensation for the loss of the family home, a claim against both Defendants for damages for the sale of the family home, and a declaration that the Order of 26th July, 1982, was obtained conclusively by the Defendants in breach of the Plaintiff's rights and is null and void and of no effect.

As I understand the arguments advanced on behalf of the Plaintiff, they are as follows:-

1. The Plaintiff's consent to the mortgage was invalid. This appears to be based on the fact that the Husband was then an agent for the Building Society and on an allegation that the Plaintiff gave her consent to the mortgage in his office and signed it a year before it was dated and after it had been signed by him. Presumably reliance is placed on the provisions of section 3(1) of the Act of 1976, although this section was not opened to me.

2. The Order for possession was obtained by collusion.

3. The Agreement of 4th May, 1981, to the compromise of

the proceedings was entered into by the Plaintiff because of a misrepresentation by the Husband as to the value of the property

4. The Husband's failure to pay the instalments when they became due and his failure to sell the property promptly deprived the Plaintiff of the difference between the amount of the loan and the value of the family home.

Counsel on behalf of the Building Society objected that the amended indorsement of claim did not make any allegation with regard to the invalidity of the mortgage. I consider that there was some justification for this objection, but he also met this ground of claim by submitting that, under section 3 of the 1976 Act, a purported conveyance by a spouse is expressed to be void only if the prior consent of the other spouse was not obtained, that there could be no conveyance unti delivery of the deed and that delivery of the mortgage in this case was not effected until after the consent of the Plaintiff had been obtained. Counsel for the Plaintiff did not contest this submission. I am of opinion that the submission is correct but, even if it were not, I would be very slow to hold that a spouse could contest the validity of a mortgage after entering

into a settlement, with the advantage of legal advice, in which she clearly acknowledges its validity.

I do not accept that the allegation of collusion in obtaining the Order for possession is sustainable. The Husband had no defence to the proceeding and the only right given to the Plaintiff is under section 7 of the 1976 Act whereby the Court may decide that, if the Plaintiff were capable of paying the arrears due and the future payments, it would be just and equitable to adjourn the proceedings, presumably to enable the Plaintiff to discharge the payments due and to become due. It has not been suggested that the Plaintiff was in a position to pay the arrears so that, if her legal advisers had been in Court when the order was sought, no ground could have been advanced for opposing it.

Although I am not clear what importance is attached to the allegation that the mortgage was executed by the Husband and her consent indorsed by the Plaintiff in January, 1979, I am satisfied from the evidence of the solicitor for the Husband that the deed could not have been executed until the following January

On application being made on behalf of the Building Society,

I dismissed the Plaintiff's claim against it at the close of the Plaintiff's case, the other two submissions relating solely to the claim against the Husband.

With regard to the compromise of 4th May, 1981, I am satisfied that the Husband over-estimated the value of the family home. His solicitor stated in evidence that, in 1979, the land would have been valued at somewhere between £1,500 and £2,000 per acre. At £2,000 per acre, the 26 acres taken by the Husband's family would have been valued at £52,000. At £1,500 per acre, the value would have been £39,000. In the one case the family home would then have been worth approximately £46,000 and, in the other, it would have been worth approximately £59,000 assuming that the total price of £98,000 was a proper one. These figures suggest that the price the Husband paid was probably the full value of the family home. It is clear, however, that, at the time of the compromise, the parties considered that, after discharge of the mortgage debt out of the proceeds of the sale of the family home, there would be a considerable balance to enable the Plaintiff to purchase a house for herself and her children. Although it has not been

contested that the Husband represented the value of the family home to be £70,000 I do not accept that the Plaintiff has a good ground for her claim for £40,000, the amount which she estimates she should have had available for the new house had the Husband's valuation been correct and he had sold the property expeditiously. The Plaintiff was represented at the hearing and on the settlement and the consent makes it clear that it was appreciated that money was due on the mortgage. It must be assumed that the figures were investigated on behalf the Plaintiff and it is not suggested that there was any misrepresentation as to the amount due on foot of the mortgage. As the matter comes before me, there is no claim for breach of the agreement contained in the consent and there is no claim to have this agreement set aside on the ground of fraud or misrepresentation. The claims being made are made under the provisions of the Act of 1976, and, in particular, the provisions contained in subsection (2) of section 5 of that Act. Subsectic (2) is as follows:- "Where it appears to the court, on the application of a spouse, that the other spouse has deprived the applicant spouse or a dependent child of the family of his

residence in the family home by conduct that resulted in the loss of any interest therein or rendered it unsuitable for habitation as a family home, the court may order the other spouse or any other person to pay to the applicant spouse such amount as the court considers proper to compensate the applicant spouse and any such child for their loss or make such other order directed to the other spouse or to any other person as may appear to the court to be just and equitable."

On behalf of the Husband it was argued that no claim can lie under this subsection where the spouse has left the family home. I do not accept that this argument, in this form, is valid because one spouse might, by his or her conduct, compel the other spouse to leave, but this is not an issue which I have to decide on the present application.

As I understand the argument on behalf of the Plaintiff in respect of the misrepresentation by the Husband as to the value of the family home, it is that it deprived the Plaintiff and the children of a home which would have been purchased with the surplus of the sale price remaining after the discharge of the mortgage and, therefore, that the representation constituted

conduct depriving the Plaintiff of her residence in the family home within the meaning of the subsection. There appear to me to be several answers to this argument. In the first place, it seems to me that there is only one family home in this case, that is, the one sold on foot of the mortgage. Secondly, once it has been established that the mortgage was validly created with the consent of the Plaintiff, as I am of opinion that it was, the conduct of the Husband relied upon must consist in his failure to pay the instalments. Although there is no reference in subsection (2) of section 5 to "an intention" to deprive a spouse of her residence in the family home as there is in subsection (1), I am of opinion that a failure to pay instalments due on a mortgage would not be conduct resulting in the loss of an interest in the family home sufficient to entitle a spouse to compensation under the subsection unless it were established that the other spouse was financially able to pay the instalments. The only figures before me indicate that the Husband did not have an income sufficient to meet the instalments, which amounted to £5,372 per annum. Finally, as the amount due on foot of the mortgage at the time of the

compromise was dealt with under the terms of the consent, it cannot, in my opinion, now be made the basis of a claim under subsection (2).

Undoubtedly, the Husband did not carry out the terms of the agreement with regard to expediting the sale and, therefore, as no instalments were paid, the debt to the Building Society was substantially increased. This might support a claim under the agreement for the difference between the amount due to the Building Society at the time when the sale should have been effected and the time when it was effected, but no such argument was advanced before me and does not appear to be open on the form in which the matter comes before me. For the reasons I have stated above, I am of opinion that these defaults on the part of the Husband subsequent to the date of the compromise are not such as can support a claim under subsection (2).

Although the Plaintiff has been left in a most unfortunate situation, particularly as the Husband sustained a serious head injury in an accident in February, 1982, and is not yet able to engage fully in business, with a consequent loss of income, I must dismiss her claim on this application.

Herbert R. McWilliam