

THE HIGH COURT

IN THE MATTER OF THE PARTITION ACTS 1868 AND 1876

BETWEEN:

A.L.

Plaintiff

and

J.L.

Defendant



Judgment delivered on the 27th day of February 1984 by

Finlay P.

This is an appeal brought by the Defendant who is the husband from the order of the learned President of the Circuit Court made on the 17th day of October 1983 directing the sale of the premises, 7 Whitethorn Park, Artane in the City of Dublin and further declaring that the Plaintiff is entitled to a beneficial interest to the extent of 40% of the nett proceeds of such sale and the Defendant is entitled to a beneficial interest to the extent of 60% of the nett proceeds of such sale.

The Plaintiff who is the wife served a notice to vary the order of the Circuit Court seeking a declaration that she is entitled to 50% of the nett proceeds of the sale.

I find the facts as proved before me in evidence relevant to the issues raised to be as follows.

The parties were married in May 1975. Prior to their marriage in the month of April 1975 they had purchased the premises, the subject matter of these proceedings. That purchase had been financed by means of savings which the parties had been making prior to April 1975 as an engaged couple by obtaining a loan on mortgage from the

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Irish Nationwide Building Society of £5,500; by taking out a term loan from a Bank in the sum of £600 and by obtaining £800 from a Credit Union on loan.

It is agreed that it was the intention of the parties that the house should be purchased in their joint names, each to be entitled to a half share in it. Upon taking legal advice for the purpose of completing the sale of the house, the parties discovered that by reason of the fact that the wife was still under 21 years of age, the purchase could not be taken in her name and the Deed of Conveyance of the house was accordingly taken in the name of the husband alone.

The wife reached the age of 21 years in July of 1975 and the parties then visited a solicitor with the intention as had been arranged between them at the time of the original conveyance of having a further Deed executed by the husband granting a half share in the house to the wife. Upon discovering that the cost of this would be in the region of £80 and requiring money at that time for the setting up and furnishing of the house which was not yet completed they decided not to proceed with the matter at that time. Prior to the marriage, the parties had both been in well-paid and steady employment, the wife worked as a cashier in a newspaper office and the husband worked as a plumber and later as a Water Inspector with the Dublin County Council. He, in addition to his earnings in that job was able to do plumbing work out of his working hours and make money at that as well.

Unfortunately, difficulties arose in this marriage at a relatively early stage and the wife finally left her husband and the family home in February of 1980 and has since that time been living with another

man. There were no children born to the marriage though the wife now has two children of whom the person with whom she lives is the father.

Throughout the period when the parties lived together as man and wife, they both contributed to a joint pool out of which there was discharged not only household expenses but also the repayments of the loans raised from the Bank and the Credit Union and the repayments of the mortgage instalments.

There was a conflict of evidence before me as to the proportion of these repayments, the husband claiming that he paid approximately twice as much as the wife into the joint pool, the wife asserting that they each made an equal contribution.

I am satisfied on the evidence that the wife made one final payment to the mortgage account which was then in arrears shortly after leaving the family home for good in February of 1980 but that apart from that all mortgage repayments have been met by the husband since that time.

The husband lives in the family home and has done so on his own since February of 1980 and it is necessary that he lives in the area which the home is situated as that is a condition of his employment as a Water Inspector. The reason the wife gave for now asserting this claim to a beneficial share in the house and seeking a sale was that she had a responsibility towards her two children and if anything happened to her would want to have a capital asset of some description to leave to them.

Counsel for the husband, Mr. Murphy, conceded that there was arising from the circumstances surrounding the purchase of this house a trust in the husband to the benefit of the wife of a half share

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in the house. He contended, however, that that must be construed in equity as a trust conditional upon the maintenance of the relationship of marriage and that on the evidence the wife having broken that relationship by leaving the husband and the family home and going to live with another man that the trust was now avoided. He then contended for an interest in the family home consisting solely of her contributions towards the reduction of the mortgage and towards the discharge of the two loans and urged me on the evidence to hold that - that was no greater than one-third.

Counsel on behalf of the wife, Mrs. O Broin, contended that the circumstances surrounding the purchase created a trust of one-half share in the house unaffected by subsequent events and further in the alternative contended that even if the share of the beneficial interest of the wife in the house fell to be determined in accordance with the contributions that the evidence supported an equal contribution from each party and that therefore the wife was entitled to a 50% interest in the house. She conceded, however, that the husband was entitled to a credit for the extra amounts paid by way of mortgage instalments by him since February 1980.

I have carefully considered the submissions made by Mr. Murphy which he concedes is a novel argument. I have come to the conclusion that it is not a valid proposition of law.

It was the clear intention of these parties that this house should be purchased jointly by them and in my view the events which happened and the circumstances under which it was purchased in the sole name of the husband when viewed through equitable principles must be given the same force and effect as if their intention had been carried out

in the first instance as if they were both grantees under the Deed of Conveyance of an equal share in the house. He submits, however, that such trust was conditional upon each party honouring the obligations of the contract of marriage and that on the evidence the wife having deserted the husband and left the family home the condition has failed and the trust should in equity be terminated or cancelled. There is not, in my opinion, in the general principles of equity room for a voidable or conditional trust depending upon the maintenance of the marriage nor can the Courts investigate the true reasons for the unfortunate break-up of the marriage in order to ascertain the reality of the beneficial ownership of two people who agree jointly to purchase a house and make each of them contributions towards the redemption of mortgages standing upon it. In these circumstances, I am satisfied that the wife is entitled to a 50% or one-half share in the equity of redemption of these premises.

I am equally satisfied that even if the evidence were clearly to establish a greater contribution during the period from 1975 to 1980 by the husband to the repayment of loans and the discharge of the mortgage than that made by the wife that this does not affect the proportion of one-half which the wife had as of February 1980 in the equity of redemption in these premises.

Different considerations, however, in my view apply to the situation since that time and in particular to the discharge of the mortgage on the premises which is still being effected solely by the husband in the last four years.

In my view, the equity of redemption in these premises as of February, 1980 consisted of the then gross market value of the premises less the amount still outstanding to the Irish Nationwide Building Society. The evidence already given before me did not permit me to determine either that gross market value nor was a precise figure for the amount

outstanding at that time on the mortgage available.

It is necessary that these matters should either be agreed between the parties or that further evidence should be adduced before me so as to permit me to determine them in the event of a dispute. Having determined the relationship in terms of percentage between the total amount outstanding on the mortgage as of February 1980 and the gross market value of the premises, it seems to me that the precise form of declaration which I must then make is to declare the wife entitled to one-half of the percentage constituting the equity of redemption at that time. To take as a simple example, if the amount outstanding on the mortgage at that time constituted 10% of the gross value of the premises the wife would be entitled to a 45% share in the ownership of the house.

With regard to the claim for a sale of the premises pursuant to the Partition Acts, the position appears to me to be as follows. Having regard to the provisions of the Family Home Protection Act, 1976 in the absence of an agreement between the parties, an order for sale cannot in my view be made under the Partition Acts unless the Court is also satisfied that it should dispense with the consent of the non-agreeing spouse under Section 4 of the 1976 Act.

Having regard to the evidence which was given before me on this Appeal, I am not satisfied that at present there are grounds on which it would be appropriate for the Court to dispense with the consent of the husband. It may be that circumstances will change which would make it appropriate to dispense with that consent but at present I am not prepared to do so.

I will hear the parties on the question as to the gross value of the house in February of 1980 and the total amount then outstanding to the

Mortgage Society and have heard them will make an order of declaration along the lines which I have indicated in the statement and will make a order for the sale of the house