THE COURT OF APPEAL

Neutral Citation Number [2021] IECA 148
High Court Record Number: 2018/515SP
Court of Appeal Record Number: 2019/533

Costello J.
Haughton J.
Murray J.

BETWEEN

GERARD O'MALLEY

PLAINTIFF/FIRST NAMED RESPONDENT

AND

KAY BREEN

FIRST NAMED DEFENDANT/APPELLANT

AND

MARY BREEN

SECOND NAMED DEFENDANT/
SECOND NAMED RESPONDENT

JUDGMENT of Mr. Justice Robert Haughton delivered on the 18th day of May 2021

1. This is an appeal from the judgment of O'Connor J. delivered on 13 September 2019, and his supplemental judgment delivered *ex tempore* on 7 November 2019, arising from which orders were perfected on 3 December 2019.

2. The proceedings were commenced by Special Summons issued on 25 October 2018. The plaintiff/first named respondent brings this action as the executor of Conor Breen who died on 22 February 2017 ("the deceased"), probate of whose estate was granted to the first named respondent ("the Executor") on 21 June 2018. The first named defendant/appellant, ("Kay Breen"), is the divorced former wife of the deceased. The second named defendant/second named respondent, Mary Breen (née O'Malley) ("Mary Breen") is the widow of the deceased and joins with the Executor in seeking to uphold the decision of the High Court.

3. The Special Endorsement of Claim raises questions arising in the course of administration of the deceased's estate as to the legal and beneficial ownership of 6 Distillery Mews, Distillery Lane, Dundalk, County Louth ("the First Property"), which the Executor is desirous of selling in order to reduce the liabilities of the deceased. The first property was acquired in the joint names of the deceased and Kay Breen in December 2000. The appeal is from the finding that Kay Breen holds 58% of the First Property in trust for the deceased's estate, and involves consideration of the competing equitable presumptions of advancement and of a resulting trust, and whether, if there was a joint tenancy, it was severed by events in 2008.

The Affidavit Evidence

(i) The Executor' first affidavit

4. The background is set out in the grounding affidavit sworn by the Executor on 26 October 2018. The deceased died on 22 February 2017 aged 56 as a result of oesophageal cancer. At the date of his death he was resident at 12a Carn Road, Killeavy, County Down, Northern Ireland. He was sole partner at McDonough and Breen Solicitors in Dundalk. The deceased and Kay Breen married on 10 July 1986 and they had two children, Niall Breen, now a practicing solicitor, and Cliodhna Breen, now a practicing barrister, who were no longer dependant when the deceased died. The deceased and Kay Breen became estranged, and separated and lived apart in or about 1994, but their relationship remained cordial even after separation. They divorced by order of the High Court of Northern Ireland dated 6 January 2017.

5. The deceased and Mary Breen had been in a long term relationship, cohabiting since 1995, and they had four dependent children aged 16, 15, 13 and 8 when the deceased died. The deceased and Mary Breen married on 24 January 2017, shortly before the death of the deceased.

6. By his last Will dated 27 January 2017 the deceased appointed the respondent, and another as the executors of his estate. The Executor, who is a brother of Mary Breen, initially renounced his entitlement to administer the Estate but later with leave of the court revoked that renunciation and thereafter with the leave of the Court obtained the Grant of Probate, the other named executor having renounced.

7. Having examined the affairs of the estate the Executor came to the view that "the estate is in all likelihood insolvent", and he is seeking to realise the assets to meet liabilities. He states that issues have arisen in relation to the First Property, which he avers was bought as a "residential investment property". The First Property is devised by the deceased's Will to Kay Breen; the relevant clause reads:

> "I give devise and bequeath my dwellings at The Wood, Ravensdale, Dundalk, County Louth and 6 Distillery Mews, Dundalk to Kay Breen".

8. In December 2000, the deceased negotiated and arranged the purchase of The First Property/Property for IR£190,000 (€205,000). The property was placed in the joint names of the deceased and Kay Breen. The deceased arranged a loan in the joint names of himself

and Kay Breen with AIB Bank Plc in the sum of IR£160,000, the balance was paid from his own funds. The deceased also fitted out and furnished the property from his own funds, and rented it out to third parties as a residential investment property from 2000 up until his death in 2017. From his consideration of the McDonough & Breen conveyancing file the Executor avers that the appellant did not contribute financially or at all to the purchase of the First Property. He avers:

> "9. It is my understanding that the purpose of the Deceased in acquiring the property was to provide an income from the property to fund the education of the two children from the marriage with the First Defendant. He duly did fund the education of the two children from the first marriage both of whom became legally qualified and paid for their private college education at Griffith College, Dublin."

9. In passing certain details of the exhibited Contract for the purchase of the First Property should be noted. First, it confirms that it was purchased for IR£190,000, which means that the deceased's financial contribution from his own funds was IR£30,000 plus whatever he expended on fitting out/furnishing. Secondly there is a handwritten Special Condition 16 that makes the purchase conditional on "the purchaser having an unconditional contract for the sale of No.4 Sutton Court within 12 weeks of the date hereof". This suggests that the deceased was dependent on the sale of No. 4 Sutton Court to put him in funds to proceed with the purchase of the First Property. Thirdly the documents include a Building Agreement, so the First Property was clearly a new build.

10. It is also of note that the AIB 'Particulars of Offer of Mortgage Loan' exhibited was typed up as an offer to customer "Mr. Conor Breen", and Kay Breen's name was added in handwriting; unchanged is the sentence "The title to the above property must be registered in the name(s) of Mr. Conor Breen to whom this offer is made and by whom the mortgage must be executed." The loan is for IR£160,000 repayable over 20 years, with mortgage protection insurance for the duration on the life of "Mr. Conor Breen" a requirement of AIB. The Loan Offer was signed by both the deceased and Kay Breen in the presence of solicitor John McDonough of McDonough Matthew & Breen, the solicitor undertaking to provide a Certificate of Title - the short circuited means of showing good title to mortgagees that was common at the time.

11. The loan was drawn down on 11 December, 2000. On the same day the First Property was conveyed to the deceased and Kay Breen as "the Purchasers" "**TO HOLD** the same unto and to the use of the Purchaser in fee simple".

12. The consideration stated in the Conveyance is IR£15,000, and presumably this was allocated for the site for stamp duty purposes, with the balance of the contract price of IR£190,000, being IR£175,000, attributable to the building cost. The Executor refers to a purchase cost of €205,000 – which would seem to be the euro equivalent. By the time the trial judge came to assess the proportions in which the property is held it was an agreed fact that the First Property was purchased for IR£190,000 (punts).

13. Returning to the Executor's affidavit, in October 2008, the deceased and Mary Breen purchased a holiday home in Donegal known as Belcruit, Kincassalagh, Co. Donegal ("The Second Property") for the sum of €480,000 in the joint names of the deceased and Mary Breen. This purchase was funded by drawdown of a loan from Bank of Ireland Mortgage Bank ("the Bank") pursuant to a loan offer dated 18 September 2008, together with a contribution from the deceased's own funds. The Executor avers:

> "14. The terms of the loan indicate the amount of credit advanced was €750,000 and included a sum of approximately €145,000 to refinance the AIB Loan on the First Property and a further sum to refinance the existing loan on an investment property in Warrenpoint in the deceased's sole name which is now charged to The Governor & Company of the Bank of Ireland. As a result the loan offer required, as cross security, a charge over both the First Property and the Second Property. The legal work for this purchase was also carried out through the deceased's firm".

14. The Executor in a later affidavit exhibits certain, but not all, of the conveyancing documents, noting that this includes the "solicitors undertaking of the Deceased's firm of solicitors, McDonough & Breen", by which was meant an undertaking to the Bank as to good title to the property in purchase and the property being mortgaged. The Bank's loan offer in Special Condition (i) refers to the security to be provided being first legal mortgages/charges over the Second Property and the First Property. A letter from McDonough & Breen of 1 October 2008 encloses the Solicitors Undertaking, and confirms that approximately €100,000 of the loan cheque will be used to redeem the Bank of Ireland loan secured on property at 25 The Orchard, Warrenpoint, Co. Down. The Solicitor's undertaking is given by John McDonough, partner in McDonough & Breen. Also in this exhibit, is a letter of 8 October 2008 from McDonough & Breen to the Bank confirming that "Conor Breen is not liable for any maintenance payments". The Bank wrote on 8 October 2008 to confirm that "all the Conditions Precedent in the Offer Letter for this Loan have been fully complied with."

15. The Executor then deposes:

<u>Redemption of First Property – Distillery Loans</u>

> "15. I say that the loan from Bank of Ireland Mortgage Bank in the sum of €750,000 was duly drawn down (and the purchase of The Second Property completed in October 2008) and that part of such loan proceeds was used to discharge the previous mortgage on the First Property with AIB Bank Plc. The amount paid to redeem the AIB Bank mortgage was the sum of €143,741.32 as per the statement exhibited. I say the existing AIB mortgage and loan, so redeemed, was in the joint names of the deceased and the First Defendant.
>
> 16. Notwithstanding the fact that the conveyancing was conducted by the Deceased's Solicitor's practice, an examination of the conveyancing file indicates that there was in all probability an error. It seems that it was the intention of the Deceased and the Bank that the First Property would be conveyed to himself and the Second Defendant

subject to the Bank Mortgage. Documentation shows that McDonough & Breen certified to Bank of Ireland Mortgages that the property had been conveyed to the Deceased and the Second Defendant. No trace can be found for any such conveyance. However, in circumstances where the Deceased's responsibilities for the education of his two children from his marriage were complete or nearing completion that provision would be made for the children of his second relationship [sic], that seems a prudent thing to have agreed. Separately, I am informed that the First Defendant retained the benefit of a life insurance policy related to the discharge of the AIB mortgage in the approximately [sic] sum of €197,000 which the deceased continued to pay the premium for.

New Charge to Bank of Ireland Mortgage Bank over First Property and Second Property

17. I say that in order to finance the discharge of the AIB charge a new mortgage over the First Property and second Property in favour of the Bank was created and duly registered at the Registry of Deeds. This mortgage was dated 10th October 2008 made between Conor Breen and Mary O'Malley and Bank of Ireland Mortgage Bank. I say that Mary O'Malley is one and the same as the Second defendant, Mary Breen.

Bank of Ireland Mortgage Bank

18. I say the Second Property has a charge thereon duly registered with the PRA in favour of the bank and this is correctly registered in the name of the Deceased and Mary Breen.

Loan Balance and Redemption Re Both Properties

19. I say the existing balance owing on the loan to Bank of Ireland Mortgage Bank stands at approximately €567,834 as at September 2018 with interest continuing to accrue thereon. I say that the Second Property is now valued at in or around €300,000 and is of insufficient value to discharge the existing charge thereon in favour of the Bank. I say that the First Property is valued at in or around €220,000. Thus, both properties will require to be sold, and the income there from rental and other, to discharge the indebtedness and/or substantial part thereof to the Bank. I say however that while the Second defendant has agreed to the sale of the Second Property to enable me to discharge part of the debt to Bank of Ireland Mortgages, the First Defendant is asserting ownership to the entire interest in the First Property by reason of the benefit of survivorship and denies the entitlement of the Bank defendant."

This last reference to the Bank as a defendant must be a simple error as the Bank is not a party to the proceedings.

16. The Executor then raises the issues/questions for the court raised in the Special Endorsement of Claim:

(a) Does [Kay Breen] have a beneficial interest in the First Property.

(b) Does [Kay Breen] hold a legal interest in trust for the Estate?

(c) Does [Kay Breen] hold her legal interest in the First Property subject to the mortgage with Bank of Ireland?

(d) Did the creation of a Mortgage by the deceased over the First Property sever the joint tenancy?

(e) Is the bequest of the First Property to [Kay Breen] under the terms of his will subject to the mortgage to the Bank?

(ii) Kay Breen's first affidavit

17. Kay Breen swore an affidavit dated 26 November 2018. In much of this she does not take issue with the Executor, but she does add some detail and she takes issue on key points. In paragraph 8 she avers the decree *nisi* was made by the Northern Ireland High Court on 8 November 2016 and was made absolute on 6 January 2017, and that her application for financial relief by way of maintenance, property adjustment and in respect of a pension was listed before the Master of that court, Family Division, on 24 January 2017 but was adjourned for one month as "…the Deceased had not furnished information sought and did not appear in Court…". She was not aware that the deceased had remarried until she saw the marriage certificate exhibited by the Executor. She avers that she is advised that since the deceased's last Will was made on 27 January 2017, *after* the decree of divorce was made absolute, the bequests in her favour of the Wood, Ravensdale and the First Property, take effect in law.

18. In paragraph 12 Kay Breen avers that the family home of the deceased and her had been 'The Wood, Ravensdale', and that in the summer of 1995 she became aware that he was having another relationship, and he moved out initially in August 1995, then moved back at Christmas 1995, but moved out again in 1996 – although he would call daily to the 'the Wood' as "we were all involved together in the children's activities".

    In paragraph 13 Kay Breen returns to her application for ancillary reliefs post-divorce, and avers that a further application was made for discovery but the deceased refused to comply with same, and due to his death the matter did not proceed. Later, in paragraph 29, she confirms that "…there was never a financial settlement on foot of such divorce."

19. Importantly in paragraph 15 she avers "I was not aware until after the death of the Deceased that the property at 6 Distillery Mews had been purportedly re-mortgaged in 2008."

20. In response to the averments of the Executor as to the circumstances in which the First Property was acquired, she avers that -

    "16. …even though living apart I was in regular communication with the Deceased. He was still my lawful husband. As of 2000 we had two children aged 14 and 11. When the children were at Secondary School in Dundalk he collected them every morning and brought them to School. We had no Separation Agreement or any formal

provisions in relation to maintenance. From about 1998/1999 I had a small income as a substitute teacher (having years earlier given up my own teaching career to raise the children). I was given financial assistance by my own parents. In those circumstances I *assume* the suggestion by the Deceased that we would purchase the property jointly was an effort to take account of his responsibilities to me, and his two children." [Emphasis added]

In paragraph 18 Kay Breen accepts that she did not make any direct financial contribution to the purchase price, but she avers –

> "…However, I clearly did act in a manner that reduced any financial burden on the Deceased in that I had given up my own teaching career to raise and look after our children, thereby giving more time to the Deceased to pursue his profession without the cost of childcare. I was not in receipt of and did not pursue a claim for maintenance from the Deceased. The property purchase was a recognition of that."

She then avers that in 1998/1999, she re-started as a substitute teacher and relied upon her parents for financial assistance, and between 2001 and 2005, she was employed as a teacher and "[h]aving a source of income, I used same entirely in maintaining the home. I never went on holidays as I could not afford to".

She then avers that –

"20. Further the Deceased saw to it that he and I were at all stages jointly assessed for income tax, whereby he was taxed as a married man, and entitled to any unused allowances which I may have had. I have only recently ascertained that for tax purposes the Deceased had furnished my address to the Irish Revenue Commissioners as 12a Carn Road, Killeavy, County Down (the address of the Deceased and the second Defendant) which by telephone to the Revenue Commissioner I have had to have corrected."

21. Since the date of death of the Deceased I confirm that I have been in receipt of rent from 6 Distillery Mews. I have received the rent in circumstances where I am entitled to the entire legal and beneficial interest in that property, it having passed by survivorship, and, in so far as it needed to, having been bequeathed to me in the last will of the Deceased.

22. Paragraphs 13 to 15 sets forth details of the re-mortgage of 6 Distillery Mews. I was a stranger to these transactions. I was not aware that the Deceased was purporting to re-mortgage the property. The Deceased never consulted me about this, and the first time I became aware that the Bank of Ireland were alleging to have security in place over 6 Distillery Mews was after the date of death of the Deceased."

It became an agreed fact before the trial judge that Kay Breen was not informed of the transaction in 2008 or the re-mortgage of the First Property, and that her consent was neither sought nor ever obtained.

21. Kay Breen then avers that, while she has not seen the conveyancing files, she cannot understand how the Executor could conclude that 'an error' occurred or that he could contend that the deceased intended that the First Property would be conveyed to himself and Mary Breen. She avers that:

> "24. I was not at any stage consulted about, informed or received any correspondence about any intention to take any steps to do any act with 6 Distillery Mews. The Deceased had always collected the rent, and discharged the mortgage, and I was not aware of any change in the situation before or after 2008."

22. Both her children qualified as legal practitioners in 2014 so Kay Breen does not accept that in October 2008 their education was "nearing completion". In paragraph 26 Kay Breen accepts that she did receive the benefit of the life policy connected to the AIB mortgage on the First Property, although she fails to state how much she received. In paragraph 28 she states that she has requested the title deeds for the First Property but has not received same. In paragraph 30 she states that she never consented to the creation of the 2008 mortgage, adding –

> "…, and in a situation where I was unaware that a loan was being sought and taken, I cannot now be bound to security which I had no knowledge of."

She avers in paragraph 32 that without her consent "as a joint tenant and spouse" she does not believe the deceased had any entitlement to create a mortgage of the First Property, and suggests it is void.

(iii) The Executor's second and third affidavits

23. In a replying affidavit sworn by the Executor on 14 December 2018, he confirms that he has no personal knowledge of the circumstances of the purchase of the First Property. At paragraph 5 he notes Kay Breen's acceptance that the First Property was never a "family home in which she resided" and that "the repayments were met out of the rent that was received." and as Kay Breen did not contribute "in any way towards the purchase" he disputes that she had any beneficial interest in the property and asserts that she held as Trustee for the deceased.

24. In paragraph 8 he avers -

> "I note the claim of [Kay Breen] that she did not know of and did not execute the deed of mortgage with Bank of Ireland. That is the reason I expressed my belief that there had been an error in the Conveyancing Transaction. Nevertheless, I have been advised that even if the legal Mortgage is void, Bank of Ireland would in all probability have an equitable claim over the property. It is of significance to point out that the Bank of Ireland loan was utilised, in part at least; to discharge the AIB mortgage on that property"

25. In a third affidavit sworn by the Executor on 31 January 2019 he exhibits two schedules listing "all of the documents and correspondence… which are available to me from the firm

of McDonough and Breen" in respect of the purchase and title of both the First Property and the Second Property and states that these have been furnished to parties.

26. Before passing from this affidavit I note from exhibit "GOM 6" that by letter dated February 2011 the Bank's solicitor Ms. Marie Carey lodged a complaint with the Law Society alleging that John McDonough had failed to comply with his undertaking in relation to certifying title and had not answered repeated correspondence. Unfortunately, a full set of correspondence is not exhibited, but the next letter is from John McDonough of McDonough & Breen to the Law Society on 4 January, 2012, stating that the dealing in respect of the Second Property had been lodged in the Land Registry, and –

> "With regard to Distillery Mews, we have today forwarded all documents to the Bank of Ireland".

There is then a letter dated 29 February 2012 from McDonough & Breen to the Bank:

> "We refer to your letter of the 31st ult. in above. We return herewith Mortgage duly registered together with Family Home Certificate for [6 Distillery Mews]".

27. What is clear is that no conveyance of the First Property by the deceased and/or Kay Breen to the deceased and Mary Breen, nor any draft of such a conveyance, is listed or appears amongst the exhibits, and it must be inferred that no such conveyance took place in 2008 or at any time.

(iv) Mary Breen's affidavits

28. In her first affidavit sworn on 29 January 2019 Mary Breen confirms her family details and at then avers:

> "3. I say my late Husband, Conor, always intended that both the property at 6 Distillery Mews, hereinafter, 'the First Property' and the property at Donegal, hereinafter 'the Second Property' would be used as security for the loan from the Bank of Ireland and that the First Property and the Second Property would be held for our joint benefit. It was solely on this basis that he drew down a loan from Bank of Ireland in the sum of €750,000 and used part thereof to discharge €144,000, thereof to AIB Bank PLC to pay off the existing loan of the First Property. I say that it was on this basis that I was asked to sign and agreed to sign the mortgage of both properties with Bank of Ireland. I was not aware that the First Property was registered in the names of my husband and Kay Breen.
>
> 4. I say and believe the sale of both the First Property and the Second Property is required to redeem the loan to the Bank of Ireland and I say there is likely also to be a small element of negative balance owing by my late husband's Estate, even with the sale of both properties. I say on this basis I have consented in principle to the sale by the Plaintiff as Executor of both the First Property and the Second Property.
>
> 5. I say my late husband Conor Breen and I have always jointly maintained and managed both the First Property and the Second Property to the complete exclusion

of the First Defendant whom I say has never to the best of my knowledge had any involvement whatsoever with the First Property. I say my late husband Conor Breen and I were in a committed co-habitating relationship at the time of purchase of the First Property and also at the time of refinance of the First Property to Bank of Ireland. We jointly refurbished, renewed and upgraded the First Property in or about 2001 – 2002 years and rented it out. The rent was used to discharge the AIB mortgage until it was redeemed and after that to discharge an element of the Bank of Ireland mortgage.

6. I further say my late husband Conor Breen paid for the education of his two children, Niall Breen and Cliodhna Breen, B.L., from his own resources and the idea of the original purchase of the First Property was to secure these education costs which role was completely fulfilled by him in that both are now a Practising Solicitor and Barrister, respectively.

7. I say that it is my complete understanding that the First Property was acquired by my husband entirely at his own expense and with the assistance of a mortgage from AIB, when that was paid off with the loan from Bank of Ireland the property became subject to that loan. The rent recovered from the property amounted to approximately €15,000 per annum which was paid to Bank of Ireland until the death of my husband when the First Defendant immediately collected rents and retained same."

29. The following also became agreed facts in the High Court: (1) that by agreement between the deceased and Kay Breen the rental income from the First Property was used to pay the AIB mortgage, (2) that in 2008 some €143,00 of the Bank loan was used to discharge the AIB loan, (3) post 2008 the deceased continued to collect the full rent from the First Property, and (4) that post 2008 the deceased continued to discharge the Ark Life policy taken out in 2000 as required by AIB.

30. In a short second affidavit sworn on 29 May 2019 (the first day of hearing in the High Court) Mary Breen gives details of a pay out to her as sole beneficiary of €533,408 on 21 August, 2017 on foot of a Zurich life insurance taken out on the life of the deceased when the Bank loan of €750,000 was taken out in September 2008. She deposes that this policy was not required to be assigned to the Bank – which is borne out by the terms of the loan offer - and was not so assigned. She avers:

"4. I say that I had other debts post the death of my husband not covered by any life policy and to include a charge in favour of Bank of Ireland UK on my private principal residence at 12A Carn Road, Newry, County Down, which at the date of my husband's death was approximately £67,000 Sterling or approximately €82,000 Euros.

5. I also say I was a dependant housewife at the date of my husband's death and I am not in receipt of any widows state pension or any income save for a small state carers allowance in Northern Ireland in respect of my elderly mother."

(v) Kay Breen's further affidavits

31. Kay Breen swore a second affidavit on 11 March 2019. She exhibits a copy letter sent by the deceased to BLM Solicitors, the Belfast solicitors acting for her in the divorce proceedings. In this letter dated 19 September 2016 the deceased is responding to a letter received from the Courts and Tribunal Service Matrimonial Office of 13 September 2016 which clearly required him to complete a form related to his assets/liabilities because he encloses "certified Form M6 and you might kindly arrange to complete and return to the said Matrimonial Office." He then states –

> "In relation to the division of matrimonial assets all said assets are encumbered or in negative equity save the former matrimonial home which I have no difficulty transferring to Kay. Furthermore the Distillery Mews Property is likewise encumbered however I would have no difficulty agreeing transferring to Kay on death. Likewise Niall and Cliodhna are well provided for in my Will should that situation arise.
>
> I am not in a position to put any further proposals however should Kay have alternative suggestions I await same.
>
> I note Kay wishes that matters are dealt with on an amicable basis and I do likewise but the current financial situation does not lend itself to any better proposals at this juncture."

Kay Breen suggests in paragraph 4 of her affidavit that –

> "Even though the 1st Property would pass to me by the law of survivorship, as if to copper fasten the position, the Deceased devised any interest he held in the 1st Property to me by his Will. This devise was not legally necessary, but confirms that the 1st Property was always intended to come to me."

32. In paragraph 5 Kay Breen asserts her entitlement to the First Property because "it was acquired as joint tenants by a lawful husband and wife" giving rise to "…a presumption of advancement". In addition, she asserts that she was a party to the mortgage which funded its purchase and fully liable thereon, "and (subject to seeing the tax records) I believe that my unused personal allowances were used in respect of income tax returns on the rent received".

33. At paragraph 7 Kay Breen comments on the documents furnished in the Executor's third affidavit, noting from the Bank of Ireland Loan Offer Letter dated 18 September 2008 that both the First Property and the Second Property "were inextricably linked since the primary objective appeared to be the purchase of the 2nd Property." She doubts however that the entire file has been produced.

34. In response to paragraph 3 of Mary Breen's affidavit in relation to the deceased's intentions of using the First Property as partial security for the Bank in the purchase of the Second Property she says "I can only repeat that the Deceased never at any stage discussed this with me". She "doubt[s]" that Mary Breen jointly refurbished renewed and upgraded the First Property with the deceased. She also observes that if all or some of the rental income

from the First Property was used to pay the Bank of Ireland then "…it would seem that the 1st Property was at least partially funding the purchase of the 2nd Property".

35. In a third affidavit sworn by Kay Breen on 30 May 2019, the second day of the hearing, she provides details of the life insurance taken out at the time the First Property was purchased.

36. She avers that this was a joint Ark Life Temporary Protection Plan "…taken out by the deceased and me Kay Breen as joint proposers on the lives of the late Conor Breen and me this Deponent" for IR£160,000 for 20 years. This was a requirement of AIB as a term of the loan for the purchase of the First Property. Kay Breen avers:

> "4. When the AIB Mortgage, as I now know, was paid off or redeemed in 2008, it continued to operate independently of the AIB Mortgage with the monthly premia payment of €54.38 continuing to be made by Conor Breen on our joint behalf from the rental income from 6 Distillery Mews.
>
> 5. Conor Breen died on 22nd February, 2017. On or about 12 July 2017 a sum of €203,213.92 was paid out to me on foot of the said Policy."

37. The following factual matters were expressly <u>not</u> agreed by the parties before the trial judge:-

> (1) What was the state of knowledge of the deceased and Mary Breen, as to the title to the First Property, at the time of the 2008 transaction?
>
> (2) Was the purported re-mortgage of the First Property in 2008 an inadvertent error, or a wilful act?
>
> (3) What was the intention of both the deceased and Kay Breen at the time of the acquisition of the First Property in 2000?

High Court Judgment

38. The hearing in the High Court proceeded on affidavit, and without any cross examination. The written judgment in the High Court was delivered on 13 September 2019. The trial judge notes in paragraph 2 that at hearing the Executor accepted that "the discharge in 2008, which was effected without notice to Kay Breen until recently, could not affect whatever interest Kay Breen had in the [First Property]." In paragraph 3 he notes –

> "3. In order to avoid calling witnesses about events in 2008 and so that this Court could make a final determination in these proceedings, counsel for the [Executor] informed the Court that the [Executor] was willing to accept the worst possible interpretation from the discharge in 2008, which may affect the interest of the estate.
>
> Having set out the facts the trial judge addressed the "Disputed Intentions" of the deceased and Kay Breen at the time of purchase of the First Property. He found that the Executor had not adduced evidence to support his "understanding" that the purpose was to provide income to fund the education of the two children. He notes Mary Breen's averment that "the idea" of the purchase "was to secure" the education

costs of the children, and Kay Breen's averment that as to her assumption that the joint purchase "was an effort to take account of his responsibilities to [Kay Breen] and his two children".

the trial judge concludes –

"18. In short, this Court cannot determine a common intention of the deceased and Kay Breen when the [First Property] was purchased in joint names. Further the Court cannot determine the intention of the deceased when he redeemed the mortgage in 2008. He consciously did not inform Kay Breen of the redemption, who believed that the joint mortgage continued to be served by the rental income. Both the deceased and Kay Breen had been jointly liable to AIB in respect of the joint mortgage".

39. The trial judge then notes the competing inferences from the bequest of the First Property to Kay Breen in the deceased's will – the Executor arguing that it demonstrated that the deceased did not identify her as having a right of survivorship, and Kay Breen's counsel arguing that it showed the deceased always intended her to own it. The trial judge then expresses "concern about inferring intentions without having oral evidence and cross-examination when a contest arose."

40. The judgement then summarises the submissions of the parties (the references in these passages to "the Dundalk property" are to the First Property):

"22. The [Executor] submits, with the agreement of Mary Breen who was separately represented by counsel, that there are four alternative possibilities arising from the situation:-

(i) Kay Breen holds her interest in the Dundalk property under a resulting trust for the deceased, and hence in trust for the estate. To the extent that the Dundalk property was bequeathed to Kay Breen, that is an issue to be addressed by the plaintiff executor after the debts of the deceased have been satisfied.

(ii) The payment of €143,741.32 by the deceased to AIB in 2008 re-acquired the Dundalk property from AIB by the release of that mortgage and caused a severance of the joint tenancy such that the parties then held in unequal shares. Consequently, Kay Breen holds her interest in the property subject to the deceased's equitable interest created by the repayment of the loan.

(iii) The Bank of Ireland mortgage on the Dundalk property caused a severance of the joint tenancy and thus the estate is entitled to a half share subject to the Bank of Ireland mortgage. Counsel submitted that bad faith is not relevant in that instance because the deceased was entitled to at least a half share in 2008. In the absence of evidence that the deceased acted to disadvantage Kay Breen in 2008, the Court, according to counsel, should not make a finding adverse to the interests of the deceased. In 2008, the deceased could not further encumber the interests of Kay Breen in the Dundalk property and was

therefore not in breach of the maxim requiring clean hands when coming to equity

(iv) Kay Breen is correct and the deceased's interest in the property terminated on his death, meaning that Bank of Ireland has no security in the property.

Submissions for Kay Breen

23. The following submissions were made in response to the said four alternatives:-

(i) The Dundalk property was acquired by the deceased and Kay Breen as joint tenants. No presumption of advancement could arise as the deceased did not gift the property to Kay Breen. The purchase was primarily funded by way of a mortgage for which both Kay Breen and the deceased had equal liability and obligations.

(ii) The 2008 transaction 'was knowingly and fraudulently entered into by the deceased and Mary Breen … and to argue that the same could have adversely impacted on the original 2000 arrangement or the existence of a joint tenancy whether at law or in equity is under the circumstances unsustainable, as it would compensate [the deceased] and indeed [Mary Breen], for significant wrongdoing.' The deceased and Mary Breen unlawfully purported to create a further mortgage over the Dundalk property in 2008. In addition, the Bank of Ireland mortgage cannot affect Kay Breen's interest in the Dundalk property.

(iii) There should be no severance of the joint tenancy in equity. The deceased continued to take all the rental income from the Dundalk property after 2008, with the consent of Kay Breen, on the basis that it was being applied in the same way since 2000. As such, the deceased and his estate are estopped in equity from claiming a severance of the joint tenancy.

(iv) The Dundalk property is held by Kay Breen as surviving joint tenant and Bank of Ireland has no valid mortgage over the Dundalk property"

41. At para. 24 the trial judge quotes Wylie (*Irish Land Law*, 5th Ed. Bloomsbury Professional, 2013, at para.8.15) as authority for the proposition that co-owners may hold the legal estate or interest as joint tenants, so that the right of survivorship applies, but this legal estate may be held by the joint tenants for themselves in equity as tenants in common, and on the death of one co-owner the legal estate may pass by survivorship to the surviving co-owner, but that survivor must hold the legal estate in trust for the deceased co-owner's estate and his beneficial share will pass according to the terms of his will. The judgment then considers the implication of the following equitable doctrines: (1) the presumption of a resulting trust (2) the doctrine of advancement and (3) the severance of a joint tenancy.

42. The presumption of a resulting trust insofar as it arises here can only be rebutted in circumstances where there is evidence to prove that the purchaser intended the property as a gift. The trial judge refers to *Dyer v Dyer* (1788) 2 Cox Eq Cas 92 where at para.93 Eyre CB stated "…the trust of a legal estate…results to the man who advances the purchase money" irrespective of who takes the legal title, and refers to *Equity and the Law of Trust in Ireland* (Biehler, 6th Ed. Roundhall, 2016) where at p.159 Biehler suggests that the

presumption rests on the principle that equity intends bargains, not gifts. In para 26 the trial judge quotes Denham J. in *Stanley v Kieran* [2011] IESC 19 where at para. 28 she stated "[t]here is a presumption that the provider of funds for the purchase of the property is the beneficial owner".

43. Under the heading "Unequal contributions" the trial judge then refers to *Laskar v Laskar* [2008] EWCA Civ 347, and in particular the judgment of Neuberger L.J. whose approach he ultimately finds to be "commendable and practical". In that case a mother exercised her right to purchase a council property at a discount. The mother and daughter borrowed money and contributed different sums but less than 5% each in order to acquire the property in their joint names. The rent from the property was used to discharge the repayments and outgoings. Because it was an investment property Neuberger L.J. distinguished the case from *Stack v Dowden* [2007] UKHL 17 which involved a residential property purchased by a couple with children. He also mentions that the mother had other children, who were dependent, and the appellant daughter had been brought in as co – purchaser primarily because the mother could not afford the purchase on her own. At para 21 of *Laskar* Neuberger J. saw "…no reasons not [to] fall back on the resulting trust analysis, namely that in the absence of any relevant discussion between the parties, their respective beneficial shares should reflect the size of their contributions to the purchase price…". Neuberger L.J. therefore determined that the discount should be attributed to the mother, and ultimately decided that the daughter had a 33% beneficial interest in the property. The trial judge concludes by the commenting:

> "32. Rightly, he [Neuberger L.J.] thought it 'sensible to stand back and see whether that looks a fair result' and determined that 'it seems not unreasonable'."

44. The trial judge then makes key findings:

> "33. The presumption of a resulting trust can be rebutted where there is evidence that the purchaser intended the property as a gift. As made clear by the Court of Appeal in *Standing v Bowring* (1885) 31 Ch D 282, the relevant time for establishing evidence of intention to make a gift is the time of the transfer. The onus is also on the person seeking to rebut the presumption of a resulting trust to produce evidence that the purchaser did intend to benefit the donee.
>
> 34. The Court cannot determine the intentions of the deceased when he paid IR£30,000 in 2000 and purchased the Dundalk property in joint names. The deceased, who was at all relevant times a practising solicitor, unfortunately engaged in a series of untidy transactions relating to the Dundalk property. Kay Breen believed that she was the joint owner with a right to survivorship. There is no evidence of a gift of the Dundalk property in 2000.
>
> 35. The presumption has therefore not been rebutted. Further, both parties remained liable to AIB for the mortgage repayments thereby both contributed to the purchase".

45. In paragraphs 36-38 the trial judge considers the doctrine of advancement, which was relied upon by Kay Breen, but decides that this "…limited, antiquated and dubious presumption" should not apply "where an investment property was purchased between an estranged husband and wife.", and in circumstances where the deceased was living with Mary Breen and had children with her, and the First Property was not a family home.

46. The trial judge then states his conclusion on resulting trusts:

> "41. A resulting trust arises because of the unequal contributions to the purchase price of the Dundalk property and because both parties remained equally liable for the mortgage repayments. While Kay Breen holds the legal interest to the property, she holds a portion of the beneficial interest on trust for the estate of the deceased.
>
> 42. The [Executor] is seeking equitable relief and the Court is informed by the maxims that '*he who comes to equity must come with clean hands*' and '*equality is equity*'. The 2008 transactions had the intended effect of allowing the deceased and Mary Breen to purchase a holiday home and to redeem other loans. They purported to encumber the entire interest in the Dundalk property and the Donegal property with this increased loan. It remains to be established what Bank of Ireland will do to enforce its security over the interest of the deceased in the Dundalk property. Kay Breen did not consent to the 2008 transactions and should not be disadvantaged by the untidy if not wrongful conduct of the deceased. The deceased, as a practising solicitor, did not come with clean hands and failed to acknowledge the tenancy in common which he had created. He redeemed the AIB mortgage for his own benefit and it is coincidental that Kay Breen no longer has a liability pursuant to a mortgage of the Dundalk property. Although Kay Breen does not now have this liability, she lost the opportunity to have the mortgage with AIB repaid from the rent. Until 2017, Kay Breen acted on the basis that the rent would service the mortgage repayments and she was unaware that the rent was purportedly secured in fact for other loans advanced by Bank of Ireland.
>
> <u>Severance</u>
>
> 43. The approach adopted in *Laskar* is commendable and practical. The orders to be made in these proceedings are supported by also considering the law relating to severance of a joint tenancy.
>
> 44. The conversion of a joint tenancy into a tenancy in common by severance may occur by law or in equity. The redemption and replacement of the mortgage on the Dundalk property in 2008 resulted at a minimum in an alienation of the deceased's interest in the Dundalk property. It is noted that s.30 of the Land and Conveyancing Law Reform Act 2009, which now requires consent for alienation, did not apply to the re-mortgaging in 2008.
>
> 45. Therefore, the deceased, in alienating his interest in 2008, severed the unity of interest in the ownership of the Dundalk property. The estate of the deceased and

Kay Breen own the beneficial interest in the Dundalk property as tenants in common".

47. Consistent with these findings, at paragraph 47 the trial judge gives his answers to the questions raised in the Special Summons, and these are set out in the final order which is recorded below.

48. The matter was then adjourned for a brief period on foot of the trial judge's invitation for written submissions as to how the equitable division of the property should be decided. A short further hearing took place on 7 November 2019 and the trial judge delivered an *ex tempore* judgment. Counsel's Note of 7 November 2019 records:

> "After a short hearing and on the basis of an agreement of the parties to an amendment of the Special Summons by the addition of the words 'and if so in what proportions' to paragraph 15(b) of the Special Indorsement of Claim, the Judge considered the financial contribution of each of the parties. On the basis that the 1st defendant's liability for 50% of the AIB mortgage in the sum of £160,000 constituted a financial contribution and taking account of the sum of £30,000 actually provided by the deceased, The relevant contributions were £110,000 and £80,000 and he divided the equitable interests 58% to the Estate and 42% to 1st Defendant.
>
> He made orders for the costs of the Plaintiff to be paid out of the Estate and that the 1st and 2nd defendants were entitled to their costs out of the Estate"

49. The order perfected 3 December 2019 records the amendment, and answers the questions posed in the amended Special Summons as follows:

(i) Kay Breen has a legal and beneficial interest in the First property

(ii) The Executor holds 58% of the beneficial and legal interest in the First Property for the estate of the deceased and Kay Breen holds 42% of the beneficial and legal interest in the First Property

(iii) Kay Breen does not hold her interest in the First property subject to the mortgage with Bank of Ireland Mortgage Bank

(iv) The said mortgage with Bank of Ireland Mortgage Bank in 2008 severed any joint tenancy in the First Property

(v) The bequest of the deceased's interest in the First Property to Kay Breen under the will of the deceased is subject to any enforceable mortgage of the interest of the deceased in the First Property

The Trial Judge also ordered that the costs of all parties be paid out of the Estate of the Deceased, such costs to be taxed in default of agreement.

Grounds of Appeal.

50. The Notice of Appeal dated 20 December 2019 sets out 25 grounds of appeal which may be summarised as asserting that the trial judge erred as follows:

- In finding that the First Property was purchased other than by the deceased and Kay Breen as joint tenants on an equal 50/50 legal and beneficial basis.

- In finding that a resulting trust arose from the original purchase and in the alternative erred in failing to hold that the presumption of a resulting trust was rebutted on the facts of the case, in particular, the undisputed evidence before the Court that the deceased had failed to pay maintenance in respect of the children of the marriage to Kay Breen.

- If a gift element arose on the initial purchase, in finding that the doctrine of advancement in 2000 did not apply.

- In finding that there was a gift element in circumstances where Kay Breen and deceased were jointly liable for payments to AIB and required the rental income to meet the mortgage payments and where the deceased was a solicitor and failed to advise the Kay Breen to seek independent advice.

- In holding that Kay Breen should not be disadvantaged by virtue of the 2008 transaction (of which she had no notice), yet holding that she held only 42% share in the legal and beneficial interest thereby in fact causing her to suffer disadvantage.

- Failing to have any or sufficient regard to, or bring to bear on his decision, the concession by the Executor that he was willing to accept the worst possible interpretation from the discharge in 2008, which was that the transaction was fraudulently entered into by the deceased.

- In failing to have regard to a Waiver furnished by the deceased to the Bank which was a pre-condition to the deceased obtaining the loan from the Bank of Ireland.

- In finding that the joint tenancy was or could have been severed and the interest of Kay Breen alienated by a fraudulent act, and in failing to find that the Executor was estopped from alleging a severance.

- In finding, in so far as he did, that the purported mortgaging of the First Property in 2008 was or could be valid.

- In failing to have regard to the fact that the rental income on the First Property would have continued to reduce the AIB mortgage, and that only three years of capital repayments remained outstanding (at the deceased's date of death), and that the actual effect of the 2008 transaction was to replace one loan with another and increase the borrowing secured on the First Property and extend the mortgage term by 8 years, and that Kay Breen suffered prejudice by the transaction of which she had no knowledge.

- In applying *Laskar v Laskar* [2008] EWCA Civ 347 as that decision did not involve a purported re-mortgaging of property in a deceitful manner.

- In failing to find that the interest of the deceased passed to Kay Breen by survivorship.

- In finding that Kay Breen took the interest of the deceased subject to the 2008 mortgage.

- In finding that the 2008 mortgage had any effect on the holding of the First Property insofar as Kay Breen was concerned, or any effect at all on the First Property.

- In not acceding that Bank of Ireland be a party or at minimum a notice party to the proceedings when they were aware there was a problem with the title to the First Property at least from 14 July 2014.

- by finding that Kay Breen took the interest of the deceased subject to a mortgage to which she was not a party to and of which she had no notice.

- In not requiring vouched assessment as to whether or not the estate of the deceased was solvent or not solvent, as, if the estate was solvent, these proceedings would not have been necessary.

The orders sought *in lieu* on behalf of Kay Breen were in essence that she acquired the First Property by survivorship, freed from any mortgage, or alternatively holds an interest commensurate with such interest as would have been bequeathed to her at the deceased's date of death had the rental income continued to pay down the AIB loan.

The Respondent's Notice delivered on behalf of the Executor effectively joins issue with the grounds set out in the Notice of Appeal.

Preliminary

51. Before addressing what I consider to be the primary issues arising in this appeal I will address certain grounds raised in the Notice of Appeal that are also raised as preliminary matters in the appellant's Submissions.

52. The first relates to the argument that the Executor has not vouched that the estate is insolvent, and that these proceedings would not be necessary if the estate is in fact solvent. This must be rejected. The Executor averred in his first affidavit that "…the Estate is in all likelihood insolvent" and that the assets, including the First Property, need to be realised. He deposes to the balance due to the Bank as being €567,834 as of September, 2018, and that the Second Property is valued at €300,000 and the First Property at €220,000; while property values may have improved since then, the balance due to the Bank will have attracted interest.

53. The Executor's evidence is sufficient to establish on a *prima facie* basis that estate is insolvent. The appellant merely avers that she has "through my Solicitors, been told that the Estate of the Deceased is insolvent" and complains that she has been given limited

information as to the liabilities of the estate. She did subsequently obtain some disclosure, but she might have pursued discovery, or adduced her own valuation evidence, or sought to cross examine the Executor on his affidavit, but for whatever reason the choice was made not to do any of these things.

54. In those circumstances the High Court, and, in my view, this court, must accept the Executor's evidence that, as a matter of probability, the estate is insolvent. I would also observe that, if the estate turns out to be solvent and there are 'surplus' proceeds from the sale of the First Property after discharge of the deceased debts, funeral and testamentary expenses, these will pass to Kay Breen under the terms of the deceased's will save to the extent that they may abate in accordance with the provisions of the Succession Act, 1965.

55. The second matter is the Waiver which was furnished to satisfy pre-condition (a)(iii) in the 2008 loan offer, by which the Bank required a copy of the Separation Agreement or order of separation or divorce or a certificate from a solicitor as to the amount of financial obligations, if any, "AND confirm that a deed of waiver has been executed". The appellant's Submission complains that this document, which does appear to have been sent to the Bank by the deceased with a letter of 6 October, 2008, has never been produced. Kay Breen knew nothing of this document, and had no privity with the Bank.

56. While it may have been desirable that this document, or at least a copy, be produced, its absence is not material in light of the Executor's concession that the court should take the worst view possible of the 2008 transaction. The court must assume that the original waiver, if it exists, was not signed by Kay Breen. However, for reasons explored further later in this judgment under the heading of 'Severance', that cannot *of itself* render the 2008 loan invalid in circumstances where the loan monies were in fact drawn down by the deceased and Mary Breen; nor can it of itself affect the validity or otherwise of security provided to the Bank pursuant to the loan agreement.

57. Thirdly the appellant raises the absence of the Bank as a party or notice party, and the undoubted fact that as a result the Bank's attitude to the 2008 transactions, and in particular whether the Bank is still relying on the First Property as security, is not known.

58. Counsel for the Executor informed this court that the trial judge, on making inquiry, was informed that the Bank did not wish to be involved in these proceedings, and Counsel for Kay Breen did not disagree with that. In my view it was not necessary for the Bank to be a party or notice party for the High Court to determine the questions raised by the Executor, nor is it necessary now in order for this court to determine the appeal. From the correspondence exhibited it seems likely that the Bank has been aware of an issue in respect of their security over the First Property since July 2014, and possibly as early as 2011. It was for the Bank to take such action as it might consider appropriate. It has not sought to participate in these proceedings. It is not clear whether it has taken any steps to enforce such security as it holds, and the High Court and this court has not been made aware of any proceedings having been brought by the Bank against the estate.

59. Fourthly the appellant raises the issue of the alleged use by the deceased of surplus tax-free allowances attributable to Kay Breen based on their marriage and her continuing to reside with him in his tax returns of the rental income from the First Property up to the date of his death. The complaint is that the deceased's accountant would have had all his tax records, but these were not produced. But it was for Kay Breen to pursue discovery (including non-party discovery) and disclosure as she saw fit in advance of the hearing, and she cannot now complain of a lack of evidence on this subject. Moreover, the suggestion that this can be addressed at this late stage when there has been no application to adduce further evidence and no application for discovery before this court simply cannot be sustained.

Issues

60. In my view the primary issues relate to the legal and beneficial ownership of the First Property, determined as of the date of purchase in 2000, and, in the case of the beneficial ownership, in the light of subsequent payments and events. I will first address the legal ownership of the First Property. The next issue that falls to be considered is whether the presumption of a resulting trust arose, or whether a presumption of equality/constructive trust of 50% applies. This includes consideration of whether the trial judge was correct to find that the common intentions of the deceased and Kay Breen in 2000 could not be ascertained or otherwise inferred, and whether, if a presumption of resulting trust arose, it was displaced by the doctrine of advancement. It is only if these issues are decided in favour of the Executor that the proportions in which the trial judge decided the beneficial ownership is held fall to be reviewed.

61. The further key issue of what effect, if any, the transactions in 2008 (in particular the Mortgage dated 10 October, 2008 to the Bank – "the re-mortgage") had on the legal and beneficial ownership of the First Property, and whether a severance was effected, will also be considered. I will also address an argument made on behalf of Kay Breen for the imposition of a constructive trust in light of the 2008 transactions.

62. While the parties' submissions have made reference to editions of eminent textbooks that post-date the Land and Conveyancing Law Reform Act, 2009, I will in some instances refer to the earlier editions because of the changes brought about by that Act, the coming into operation of which post-dated the purchases of the First and Second Properties.

Legal ownership in 2000

63. As to the creation of joint tenancies, Wylie on *Irish Land Law*, (3rd Ed., Second Impression, Butterworths, 1999) states:

> "[7.12] The common law preferred a joint tenancy and so there arose a presumption at law in favour of such a tenancy whenever a conveyance to two or more persons was being construed."

Similarly, Lyall *Land Law in Ireland* (Second Ed., Round Hall, 2000) states at p.430:

"1. At law

At common law there is a presumption in favour of a joint tenancy rather than a tenancy in common. Thus if land is conveyed:

to A and B in fee simple

prima facie they hold the legal title as joint tenants."

This common law presumption may be rebutted if any of the 'four unities' are not present: these are the unities of possession, interest, title and time.

I do not understand these principles to have been in controversy between the parties.

64. The purchase of the First Property in 2000 involved the deceased and Kay Breen entering into a Building Agreement, and an Agreement to Purchase, with the building company on 24 May 2000. Following the build the transaction was completed by the Conveyance dated 11 December 2000 of the First Property – strictly speaking a conveyance of the site only, but one which now had a building constructed on it – to the deceased and Kay Breen as purchasers "TO HOLD the same unto and to the use of the Purchaser in fee simple".

65. This was a conveyance into joint names, and the four unities were present in that both the deceased and Kay Breen became entitled to possession of the entirety of the First Property (and to the receipt of the rent), they acquired the same legal interest i.e. the fee simple, they acquired by the same title i.e. under the Conveyance dated 11 December 2000, and they took vested interests at the same time.

66. Accordingly, the starting point is that the presumption applied: by virtue of the Conveyance dated 11 December 2000 the deceased and Kay Breen became legal owners of the First Property as joint tenants. In consequence the right of survivorship applied in respect of the *legal* ownership of the First Property.

Beneficial ownership

67. Equity took a different view of co-ownership, and adopted the maxim 'equity leans against joint tenancies'. Even where parties took the legal estate as joint tenants, the application of equitable rules can split the ownership and result in the legal and beneficial ownership being held differently. The trial judge at para.24 quotes from the 5th Edition of Wylie *Irish Land Law* part of para. 8.15, and a similar passage appears in the 3rd Edition (1997) which is worth setting out in full:

"[7.11] – This is a complicated subject, largely owing to the different attitudes taken by the common law, on the one hand, and equity on the other, to these two forms of co-ownership. The result is that in considering the effect of a particular disposition one must always distinguish between the legal ownership of the property and the equitable ownership. As we shall see, it will frequently be the case that the co-owners will hold the legal estate or interest in the property as joint tenants, so that the right of survivorship applies, but that that legal estate or interest is held by the joint

tenants for themselves in equity as tenants in common. In this case, on the death of one co-owner his legal estate or interest passes to the surviving co-owner, but that survivor must hold the legal estate or interest in trust for the deceased co-owner's estate and his beneficial share under the tenancy in common will pass according to the terms of his will or on intestacy. The legal estate or interest in the property, therefore, remains inviolate, whereas the equitable estate or interest becomes the subject of undivided shares held on trust for different people.

We must consider, therefore, the subject of creation of joint tenancies and tenancies in common both at law and in equity. And in this connection it should be noted that there is a special statutory encouragement to create a joint tenancy in the family home contained in s.14 of the Republic's Family Home Protection Act 1976. This reads:

No stamp duty, land registration fee, Registry of Deeds fee or court fee shall be payable on any transaction creating a joint tenancy between spouses in respect of a family home where the home was immediately prior to such transaction owned by either spouse or by both spouses otherwise as joint tenants.

It is not clear from the section whether it is concerned with legal or equitable 'ownership' of the family home, or both, but in terms of policy the protection afforded by the right of survivorship is at its most effective if both legal and equitable ownership are held on joint tenancy by the spouses (a common conveyancing device)."

I accept this as a correct statement concerning the division between legal and beneficial ownership in the context of co-ownership. It is also worth noting the legislative policy that provides a special incentive for putting a family home into joint names, thereby giving greater protection to a spouse who does not contribute financially, or not to the same extent, to the purchase price.

As Wylie goes on to point out (3rd Ed., para. 7.18) –

"Equity could not, of course, directly overrule the common law, so frequently today a court will accept that the parties take the property as joint tenants at law, but will insist that they hold it on trust for themselves as tenants in common in equity."

The presumption of a resulting trust v. the presumption of equality/a constructive trust

68. While there are a number of circumstances in which equity may intervene to find such a resulting trust, the only one relevant to this appeal is where purchase money is provided in unequal shares. This was long the law in England – since *Lake v Gibson* (1729) 1 Eq Ca Abr 290 - although since Lord Diplock's dicta in *Pettitt v Pettitt* [1970] AC 777 there has been a shift away from this presumption to use of a constructive trust based on the common intention of the parties, or (in the absence of sufficient evidence as to their real intentions), based on an inferred or imputed bargain.

69. The presumption of a resulting trust has also long been applied in our courts – see *O'Connell v Harrison* [1927] IR 330, and more recently in *Stanley v Kieran and anor* [2011] IESC 19 Denham J. approved the following statement from *Delaney, Equity and the Law of Trusts in Ireland* (4th Ed. Dublin 2007) at p.161:

> "… where a person provides the purchase money for property, whether real or personal, which is conveyed or transferred to another person or to himself and the other person jointly, it is presumed that the latter holds the property on a resulting trust for the person who provided the purchase money."

Its effect is that the joint purchasers are *presumed* to take the beneficial interest in the property as tenants in common, proportionate to their respective contributions. On the death of one of two joint tenants the survivor then takes the whole legal interest but must hold that part of the beneficial interest to which the deceased was entitled by virtue of his or her financial contribution in trust for the deceased's estate. However, it has always been accepted that it is only a presumption, and it is one that may be rebutted by evidence of contrary intention, or may be displaced by a presumption of advancement.

70. In his submissions counsel on behalf of Kay Breen relies heavily on modern English law as set out in the House of Lords decision in *Stack v Dowden* [2007] 2 AC 432, the seminal case on property rights between a cohabiting couple. There it was held that where the parties jointly hold a legal interest, the starting point is that the shares are presumed to be divided between the beneficial owners equally – the presumption of equality. As Baroness Hale says, at para.56:

> "…The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership….In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

At para. 59 Baroness Hale poses the question as to how this is to be done – is it by reference to the presumption of a resulting trust based on financial contributions, or is it to be proved "by looking at all the relevant circumstances in order to discern the parties' common intention?" She answers this by stating that –

> "60. The presumption of resulting trust is not a rule of law. According to Lord Diplock in *Pettitt v Pettitt* [1970] AC 777, at 823H, the equitable presumptions of intention are 'no more than a consensus of judicial opinion disclosed by reported cases as to the most likely inference of fact to be drawn in the absence of any evidence to the contrary'. Equity, being concerned with commercial realities, presumed against gifts and other windfalls (such as survivorship). But even equity was prepared to presume a gift where the recipient was the provider's wife or child. These days, the importance to be attached to who paid for what in a domestic context may be very different from its importance in other contexts or long ago. As K Gray and S F Gray, in *Elements of Land Law*, 4th edition 2005, point out at p.864, para 10.21:

> 'In recent decades a new pragmatism has become apparent in the law of trusts. English courts have eventually conceded that the classical theory of resulting trusts, with its fixation on the intentions presumed to have been formulated contemporaneously with the acquisition of title, has substantially broken down….Simultaneously the balance of emphasis in the law of trusts has transferred from crude factors of money contribution (which are preeminent in the resulting trust) towards more subtle factors of intentional bargain (which are the foundational premise of the constructive trust)…But the undoubted consequence is that the doctrine of resulting trust has conceded much of its field of application to the constructive trust, which is nowadays fast becoming the primary phenomenon in the area of implied trusts.'

There is no need for me to rehearse all the developments in the case law since *Pettitt v Pettitt* and *Gissing v Gissing*, discussed over more than 70 pages following the quoted passage, by Chadwick L.J. in *Oxley v Hiscock* [2004] EWCA 546, [2004] Fam 211, and most importantly by my noble and learned friend, Lord Walker of Gestingthorpe in his opinion. The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties shared intentions, actual, inferred or imputed, with respect to the property in light of their whole course of conduct in relation to it."

71. Baroness Hale then indicates how the parties' intentions may be ascertained:

> "69. In law, 'context is everything' and the domestic context is very different from the commercial world. Each case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intention. These include: any advice or discussions at the time of the transfer which cast light upon their intentions then; the reasons why the home was acquired in their joint names; the reasons why (if it be the case) the survivor was authorised to give a receipt for the capital moneys; the purpose for which the home was acquired; the nature of the parties' relationship; whether they had children for whom they both had responsibility to provide a home; how the purchase was financed, both initially and subsequently; how the parties arranged their finances, whether separately or together or a bit of both; how they discharged the outgoings on the property and their other household expenses".

This passage was quoted with apparent approval by O'Connor J. in *Kenny v Kenny* [2019] IEHC 76.

72. Counsel for the appellant therefore argued that the onus rests on the Executor, as the party agitating for a greater beneficial share, to adduce some evidence to support the conclusion that the deceased intended the First Property would be held on a 58%/42% basis, because he had contributed his own funds towards the purchase. He argued that there was no evidence that the deceased intended anything other than a holding of the beneficial interest on a 50/50 basis. Counsel also argued that the deceased's contribution was at a modest

level in the context of the overall purchase price, and that this was not sufficient to establish an intention that he was to hold 58% of the beneficial interest. Counsel submitted that when the court looks at all the circumstances and has regard to the subsistence of a lawful marriage and the deceased's obligations to Kay Breen (to whom no maintenance was paid) and their children, the intention that should be inferred was that both the legal and beneficial interest would be held 50/50 as joint tenants, and both being subject to the right of survivorship. It was argued that this inference is supported by that fact that the deceased was a solicitor of 15 years standing at the time that the First Property was acquired and would have been well aware that a transfer into joint names created a joint tenancy.

73. Counsel for the Executor accepted that the Irish courts, while not bound by UK decisions, may find them persuasive. He submitted that *Stack v Dowden* should be distinguished as it concerned an unmarried but co-habiting couple in a house which they bought and occupied together *as their home*, until the breakdown of their relationship, and related purely to a 'domestic consumer context'. Counsel argued that the property in this case was an investment for the children's education entered into after the breakdown of the marriage, and constitutes a commercial transaction, and that the presumption of a resulting trust should apply.

74. There is support for this argument even within the judgments in *Stack*. Baroness Hale observes at para. 42:

> "42. Another development has been the recognition in the courts that, to put it at its lowest, the interpretation to be put on the behaviour of people living together in an intimate relationship may be different from the interpretation to be put upon similar behaviour between commercial men. To put it at its highest, an outcome which might seem just in a purely commercial transaction may appear highly unjust in a transaction between husband and wife or cohabitant and cohabitant."

Lord Hope, at para. 3 states -

> "Traditionally, English Law has always distinguished between legal ownership in land and its beneficial ownership. The trusts under which the land is held will determine the extent of each party's beneficial ownership. Where the parties have dealt with each other at arms length it makes sense to start from the position that there is a resulting trust according to how much each party contributed."

He also agreed with Baroness Hale as to the onus of proof, stating at para. 4 that "In a case of joint legal ownership it is on the party who wishes to show that the beneficial interests are divided other than equally.", and he went on to state:

> "5. The advantage of this approach is that everyone will know where they stand with regard to property when they enter into their relationship. Parties are, of course, free to enter into whatever bargain they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it. But for the rest the state of the legal title will determine the right starting point. The onus is then on the party who

contends that the beneficial interests are divided between them otherwise than as the title shows to demonstrate this on the facts."

75. Counsel for the Executor referred the court to the Court of Appeal of England and Wales decision in *Laskar v. Laskar* [2008] EWCA Civ 347, which it will be recalled concerned a dispute between mother and daughter over the beneficial ownership of jointly acquired council property which they anticipated would be let out, with the rental income being used to service the mortgage. Neuberger L.J. refers to *Stack* (in which he also delivered a judgment), and whether remarks in Lady Hale's speech indicated that her reasoning was intended to apply to personal relationships other than co-habiting couples:

"15. The appellant contends that the reasoning of the majority of the House of Lords in *Stack v Dowden* [2007] UKHL 17 [2007] AC 432 compels a finding in the present case that the beneficial ownership of the property was held in equal shares by the parties. As Chadwick LJ pointed out when giving permission to appeal, Stack was decided after HHJ Levy gave his decision in this case. In Stack the two parties who purchased the house in question were living together in a long-term sexual relationship, and had children when they purchased the house, which they intended to be, and indeed was occupied as, their family home. It is by no means clear to me that the approach laid down by Baroness Hale of Richmond in that case was intended to apply in a case such as this. In this case, although the parties were mother and daughter and not in that sense in an arm's length commercial relationship, they had independent lives, and, as I have already indicated, the purchase of the property was not really for the purpose of providing a home for them. The daughter hardly lived there at the time it was purchased, and did not live there much if at all afterwards, and the mother did not live there for long. The property was purchased primarily as an investment.

16. Lady Hale's speech began by identifying the problem to be addressed as relating to a "cohabiting couple" – see paragraph 40 (and see paragraph 14 of the speech of Lord Walder of Gestingthorpe). But a number of remarks in the course of her speech indicate that her reasoning was intended to apply to other personal relationships, at least where the property is purchased as a home for two (or indeed more than two) people who are the legal owners – see especially at paragraph 58 with the reference to 'the domestic consumer context'. Accordingly I think HHJ Behrens was right to conclude in *Adekunle v Ritchie* [2007] in the Leeds County Court that the reasoning in Stack applied to a case where a house was purchased by a mother and son in joint names as a home for them both.

17. It was argued that this case was midway between the cohabitation cases of co-ownership where property is bought for living in, such as *Stack*, and arm's length commercial cases of co-ownership, where property is bought for development or letting. In the latter sort of case, the reasoning in *Stack v Downden* would not be appropriate and the resulting trust presumption still appears to apply. In this case, the primary purpose of the purchase of the property was as an investment, not as a

home. In other words this was a purchase which, at least primarily, was not in 'the domestic consumer context' but in a commercial context. To my mind it would not be right to apply the reasoning in *Stack v Dowden* to such a case as this, where the parties primarily purchased the property as an investment for rental income and capital appreciation, even where their relationship is a [familiar] one".

76. Thus in *Laskar* Neuberger LJ distinguished the case from *Stack*, and he went on to hold:

"18. If, however, the presumption in *Stack* would apply here, then I consider that it would have been rebutted anyway. On the facts in *Stack* there was a departure from the presumption of equality, and the outcome was that the shares of the beneficial interest were substantially proportionate to the financial contributions of the parties. This, in my opinion, would be a stronger case for departing from the presumption of equality even if it does apply.

19. First, as in Stack (see paragraphs 90–92) the two parties in this case kept their financial affairs separate. Secondly, unlike in Stack, the property was not primarily purchased as a home for either party let alone for the parties to share. As I have explained, the property was primarily purchased as an investment. Thirdly, the respondent had three or four other children, one of whom was under ten at the time; there is no reason to think that she intended the appellant to receive what would have amounted to a significant gift not shared with the other children. Fourthly, if, as I believe to be correct, for the reasons I shall shortly give, the discount is treated as a contribution to the purchase by the respondent, the parties' contributions to the purchase price were significantly different, as in Stack (see paragraphs 89). Fifthly, it appears that the reason that the appellant was brought in as a co-purchaser was primarily because the respondent could not afford the purchase on her own.

20. It is right to mention that there is another presumption, rather longer established than that in Stack, which could be said to apply here, namely the presumption of advancement as between parent and child. As the property was purchased in the joint names of mother and daughter, it seems to me that, insofar as the respondent's contribution was greater and would have led to her having in excess of a fifty percent share of the beneficial interest, there is a presumption that she intended a gift of that excess to her daughter. The presumption of advancement still exists, although it was said as long ago as 1970 to be a relatively weak presumption which can be rebutted on comparatively slight evidence (see per Lord Upjohn in Pettit v Pettit [1970] 1 AC 777 at 814). I would add that it is even weaker where, as here, the child was over 18 years of age and managed her own affairs at the time of the transaction. Mr Thrower, for the appellant, made it clear that he accepted that the presumption was not applicable and was not pressing it here. In my judgment that was realistic.

21. Accordingly, even if the presumption of equality laid down in Stack does apply in this case, or even if the presumption of advancement could apply, it seems to me that, for the reasons I have given, either presumption would be rebutted on these facts. Accordingly, as in Stack (as explained by Lord Hope in paragraph 11) I can see no

reason not fall back on the resulting trust analysis, namely that in the absence of any relevant discussion between the parties, their respective beneficial shares should reflect the size of their contributions to the purchase price, subject to any subsequent actions or discussions having the effect of varying those shares."

77. Counsel for Kay Breen submitted that the trial judge placed too much reliance on *Laskar*. Counsel points to differences in fact to the instant appeal, in particular that the council tenancy had been transferred to the plaintiff's sole name after the cessation of her relationship with her husband, and that the dispute was between a mother and daughter, not a husband and wife. He also submitted that *Stack* should be applied instead of *Laskar* arguing that the fact that the First Property was let out, and a rental income derived, cannot credibly be said to take the purchase out of the domestic context and put it into the commercial context.

78. In my view in *Stack* there may have been good reason for adopting the use of the constructive trust as a device for determining the beneficial interest in homes purchased by unmarried couples – whether in one name or in joint names - at a time when family law legislation, that now gives the courts greater discretion and powers in relation to determination of beneficial interests and the making of financial and property adjustment orders, did not apply to them. I also recognise the rationale for extending this to a parent and child purchasing jointly with the intention of residing together in property. However the courts in England appear to have applied this only in cases which concern the home in which the couple live or intend to live, and not to commercial or 'arms length' transactions, or the acquisition of property in which the couple do not intend to reside together, where the presumption of a resulting trust still applies, as the decision in *Laskar* demonstrates. I am also cognisant that since Stack was decided and as recently as 2011 in *Stanley v Kieran* the Irish Supreme Court applied the presumption of a resulting trust to resolve a dispute as to beneficial ownership between a cohabiting couple in respect of property acquired at a time when they were still co-habiting. For these reasons it seems to me that this court should be slow to resort to a constructive trust when this dispute is not between co-habitees, and does not relate to a 'family home', that this court should, at least in the first instance, apply existing rules and presumptions. The trial judge correctly cites *Standing v Bowring* (1885) 31 Ch D 282 as authority for the proposition that the relevant time for establishing evidence of intention to make a gift is at the time of the transfer. We are primarily concerned here with the initial purchase, and the deceased's contribution of IR£30,000.

79. I have come to the conclusion that when all the circumstances as they existed in 2000 are taken into account it should be inferred that in arranging for the purchase of the First Property in joint names the deceased intended that it should be held legally *and beneficially* in equal shares.

80. At the time of the acquisition of the First Property, the deceased and Kay Breen had two children aged 11 and 14. Kay Breen was in a situation where she had given up her own career to raise those children (the deceased left their family home when the children were

6 and 9). While deriving a small income as a substitute teacher, she required financial assistance from her own parents. She and the deceased had no separation agreement, and no formal agreement in relation to maintenance for herself, or for the children. She could have sought, and, it is reasonable to presume that she would have obtained, orders from the courts for the payment of maintenance for her, and in respect of the children, and for the making of proper provision for her by way or financial or property adjustment. Her evidence that the First Property was to be held jointly by them in order to take account of the deceased's responsibilities to her and his two children, while certainly based on an assumption rather than direct representations by the deceased, is corroborated by the circumstances. She avers as follows at para. 18 of her first affidavit:

> "I clearly did act in a manner that reduced any financial burden on the Deceased in that I had given up my own teaching career to raise and look after our children thereby giving more time to the Deceased to pursue his profession without the cost of childcare. I was not in receipt of and did not pursue a claim for maintenance from the Deceased. *The property purchase was a recognition of that*." [Emphasis added]

81. That is a statement of fact by a person in a position to aver to it. She was never cross examined on it. Furthermore, I think it critical in this regard that as of the date of the purchase of the First Property the deceased and Kay Breen remained married and that he had financial responsibilities to her, and their children, morally and legally, which responsibilities were likely to continue for some time. His relationship with Mary Breen was five years old, and she was expecting their first child at the time of the acquisition of the First Property (it was purchased in May 2000 and their first child was born in July).

82. When this context is combined with the facts that (a) the deceased was party to the legal agreements which resulted in Kay Breen being named as the joint owner of the First Property, (b) that he was an experienced solicitor well capable of understanding the difficulties that would inevitably have presented themselves had the legal ownership and beneficial ownership diverged (bearing in mind that his own firm did the conveyancing for the transaction and that he could thus have readily documented any divergence from joint and equal interests had he wished to achieve this), (c) that at no point did he ever record – notwithstanding the context – that the £30,000 was to be treated as a separate contribution by him, and (d) that he never imposed any stipulation to that effect on Kay Breen, it seems to me that there is adequate evidence from which the deceased's intentions at the time may be inferred. The proper inference from the material before the court was that the IR£30,000 was advanced by him from his own funds in recognition of Kay Breen's contribution to reducing the financial burdens arising in the course of their raising their children, and for the purposes of obtaining a property which would be jointly owned by them and would provide rental income that would be used to discharge the mortgage payments, the life policy, and discharge or defray the cost of the children's education. That is not consistent with an intention that he would retain a greater interest in the property than that of Kay Breen.

83. It follows that in my view the trial judge erred in finding that he could not determine the intentions of the deceased and Kay Breen when the First Property was purchased, and in expressing his concern about inferring intentions without hearing oral evidence and cross examination.

84. It also follows that in my view the presumption of a resulting trust did not arise in the first place.

85. Even if I am wrong in this, in my view there was sufficient evidence – as set out above - from which a contrary intention should be inferred, such that the presumption was rebutted.

86. For the sake of completeness I should briefly address the reliance by Kay Breen on the fact that the deceased devised the First Property to her in his will, and in her second affidavit, in the same vein her reliance on the letter of 19 September 2016 sent by the deceased to her solicitors accompanying the form that he was required to file detailing his assets/liabilities/proposals in the context of the divorce proceedings, to draw the inference that "the 1st Property was always intended to come to me".

87. In my view it is equally possible to infer from this letter, and the devise in the Will, that the deceased believed the First Property – or a share in it – was his to give by will on his death. Such a belief is inconsistent with a belief on his part that Kay Breen would be entitled by survivorship. Quite apart from that, the letter and the Will are so removed in time from the circumstances that prevailed in 2000 that I do not believe that it would be safe to extrapolate from them the inferences as to the deceased's intentions in 2000 that Kay Breen invites the court to draw.

88. It also follows that it is not necessary to consider the alternative argument, rejected by the trial judge, that the presumption of a resulting trust was rebutted by the presumption of advancement. I would however comment that while cases such as *O'Meara v Bank of Scotland* [2011] IEHC 402 and *Kenny v Kenny* [2019] IEHC 76 demonstrate that the presumption still has application – particularly when parent/person in loco parentis and child are concerned, I share the trial judge's view that it is a presumption that was of greater importance in the past in resolving property claims by a wife against a husband. I note Neuberger L.J.'s comment in *Laskar* at para. 20 where he records that in England and Wales it is regarded as "a relatively weak presumption which can be rebutted on comparatively slight evidence". I also read with interest the following passage from the written Submission on behalf of the Executor:

> "a. The presumption of advancement is a concept springing from a time when married women did not have equal property rights with their husband. That was effectively resolved in Ireland by the Married Woman's Status Act 1957. Thereafter the doctrine of advancement has declined although never formally abolished. By reason of the fact that the presumption applied only between a husband and a wife, but not between a wife and a husband, it must be regarded as of doubtful constitutional validity on the basis of equality. (See Biehler Equity [6th Ed. 2017] at p.184 and Keane Equity and Law of Trusts [3rd Ed. 2017] at para 12.54) The presumption of

advancement arises between spouses almost invariably in relation to the matrimonial home. It being the presumed intention that the husband had a duty to provide a home for his spouse.

b. Researches do not show any case in which the presumption of advancement has applied in cases of estranged spouses (although of course there are many cases where there is a specific intention to provide for an estranged spouse)..."

While there may be much to be said for these views, it will be for other courts to address on appropriate facts.

Apportioning the beneficial interest

89. It also follows that the issue of apportioning the beneficial interest simply does not arise, and it is not necessary to review the trial judge's finding at the second hearing that the deceased "actually provided" IR£30,000 for the initial purchase of the First Property, and his ensuing conclusion that the equitable interests were held as to 58% for the estate and 42% for Kay Breen. Had it been necessary to do so I would without hesitation have found that the deceased did indeed contribute IR£30,000 towards the initial purchase, and not IR£15,000 as suggested in counsel's submissions on behalf of Kay Breen, there being no basis in evidence for the lower figure, and I would have found that this should not be disregarded as *de minimus*. I would also have agreed with the trial judge that the joint liability on foot of the AIB mortgage meant that the repayment of that should be credited equally to the deceased and Kay Breen, notwithstanding that it was in fact repaid out of the monies borrowed by the deceased and Mary Breen from the Bank in 2008.

90. The position, therefore, as it prevailed before the transactions in 2008, was that the deceased and Kay Breen held the legal and beneficial interests in the First Property as joint tenants in equal shares. This brings me to consideration of the issue of severance of the joint tenancy.

Severance

91. The Executor argued that the transactions in 2008 had the effect of severing the joint tenancy in both law and in equity, whereas counsel for Kay Breen argued that there was no severance and that the right of survivorship applied, such that on the deceased's death Kay Breen became sole legal and beneficial owner of the First Property. If a severance occurred as a result of the 2008 transactions, and the deceased and Kay Breen thereafter held the legal interest as tenants in common, it follows that the deceased's one half legal and beneficial share devolved on his estate. This would mean that on sale of the entirety of the First Property the Executor and Kay Breen would be required to join in any conveyance to a purchaser and that the net proceeds of sale would fall to be distributed 50% to the estate and 50% to Kay Breen.

92. The trial judge determined that the redemption of the AIB mortgage and the re-mortgage to the Bank in 2008 by the deceased in 2008 served to alienate his interest in the property, and severed the unity of interest, thus severing the joint tenancy.

93. The parties agreed that s.30 of the Land and Conveyancing Reform Act 2009, which now prohibits severance by one joint tenant "without the prior knowledge and consent of the non-severing joint tenant(s)" has no application, as the commencement of that provision postdates the transaction entered into in 2008.

94. Accordingly the pre-existing principles apply. The starting point is that it is a maxim of equity that "equity leans against joint tenancies". See the decision of Edwards J. in the Circuit Appeal of *Sheehy v. Talbot* [2008] IEHC 207.

95. Wylie, 3rd Ed., (1997) on severance by alienation states:

> "[7.31] A severance is also effected by a partial alienation, i.e. the creation or transfer of a lesser interest in the property. However, it seems that the interest created or transferred must pass such rights in the property as are inconsistent with the right of survivorship. Thus it has been held that the creation of a life estate by a joint tenant will sever the joint tenancy, as will the granting of a mortgage."

For this last proposition Wylie cites as authority *York v Stone* (1709) 1 Salk 158 and *Re Pollard's Estate* (1863) 3 De GJ & s 541. It also has long been the case that one joint tenant may sever a joint tenancy without the consent or even knowledge of another joint tenant, a position which was altered by the Act of 2009. In my view the deceased's transactions in 2008 were clearly inconsistent with the right of survivorship.

96. Counsel for Kay Breen raised three alternative arguments as reasons why severance should not apply.

(i) Fraud

97. First it was said that the 2008 transaction involved the purported conveyance by Mary Breen of an interest she never held, and if the true position had been known by the Bank the loan would not have been given. It was argued that the 2008 transactions were a fraud on the Bank, and void *ab initio*, and that they could not be relied on by the deceased, and hence the Executor, as a basis for severance of the joint tenancy on the basis of the maxim *ex turpi causa non oritur actio*.

98. There is an absence of direct evidence of the deceased's intentions in 2008. The Executor's averred belief that the deceased intended to obtain a conveyance by himself and Kay Breen to the deceased and Mary Breen, and that this was not done was merely an "error", seems to have no basis in fact and is not plausible if, as I accept, Kay Breen had no knowledge of the transactions. It is also notable that Mary Breen avers that she was unaware that the First Property was in the joint names of the deceased and Kay Breen. In my view it is not possible to put a benign construction on the deceased's intentions, particularly given that he was an experienced solicitor, and his firm gave an incorrect and misleading undertaking as to title. Perhaps he aspired to do things regularly, but unfortunately that did not happen. In my view the only reasonable inference from the known facts is that the deceased fraudulently misrepresented to the Bank that he and Mary Breen were owners of the First Property and that he thereby secured the 2008 loan facility, and that the deceased

thereafter fraudulently executed, and procured Mary Breen's execution of, the re-mortgage to the Bank. In any event the concession made by counsel for the Executor – that the High Court should adopt the interpretation of the 2008 transactions most favourable to Kay Breen – in my view obliges the court to proceed on the basis of such a finding.

99. In proceeding on the basis of this finding I would emphasise that I find no evidence to suggest that Mary Breen was party to any fraudulent misrepresentations – indeed the evidence points to her being an innocent party. In so far as she co-signed acceptance of the Bank's loan offer, and related documents, including the re-mortgage, and this represented that she was a co-owner with the title to re-mortgage, in my view the court must proceed on the basis that these were innocent misrepresentations on her part. It is significant in this regard that she was not cross examined on her affidavits or her state of knowledge when signing these documents.

100. However even if it is accepted that the deceased acted fraudulently in 2008 there are a number of difficulties with the appellant's submissions.

101. Firstly, the suggestion that if the Bank had known the true circumstances it would not have made the loan, is problematic. It speculates, in the absence of any evidence, as to what the attitude of the Bank would have been. It could equally be speculated that the Bank would have been prepared to accept a mortgage by the deceased of his legal and beneficial interest in the First Property, and possibly lent less than €750,000 on lesser security.

102. Secondly, while undoubtedly the Bank could have treated the entire transaction as void if it had become aware of the true position *before* paying over any loan monies, i.e. while it was still executory, I am not satisfied that the 2008 transaction was void, in the sense of being a nullity, and without any possible legal effect. After the loan monies were drawn down the transaction was *voidable, at the suit of the Bank*.

Chitty on Contracts (32nd Ed. 2015, Sweet & Maxwell) states:-

> "[1-110] **Voidable Contracts**. A voidable contract is one where one or more of its parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract; or by affirmation of the contract to extinguish the power of avoidance. In English law, contracts may be voidable, e.g. for misrepresentation, duress, undue influence, minority, lack of mental capacity, drunkenness or undue statue. If the contract is wholly executory, the party entitled to avoid the contract can plead its voidability in an action against him. If it has been wholly or partly executed, he can claim to have it set aside and to be restored to his original position. But until the right of avoidance is exercised, the contract is valid. Thus if a contract for the sale of goods is voidable for fraud (but has not been avoided), the fraudulent party acquires a good title to the goods which he can transfer to an innocent purchaser for value. The right of avoidance must also be exercised promptly in most cases. It is theoretically possible for a contract to be avoidable by both parties thereto, e.g. if each defrauds the other, or both are drunk; but naturally instances of this are rare."

103. To similar effect, McDermott, *Contract Law* (2nd ed., 2017) states:-

> "[14.138] If the misrepresentee obtains full knowledge of the facts and existence of a misrepresentation *and* if the misrepresentee is aware of his right to rescind, then any declaration of intent to proceed with the contract, or any action which is evidence of such an intention, will be held to be an affirmation of the contract. When a contract is affirmed the misrepresentee loses any right to rescind the contract. In *Lutton v Saville* Carswell J held that the right to rescind is only lost if the misrepresentation is known to the misrepresentee. Thus the fact that the plaintiff was unaware of the existence of a misrepresentation at the time he retained a defective motor vehicle (the alleged act of affirmation) could not constitute an affirmation. Carswell J stated:
>
> > '[The purchaser] is regarded as having affirmed the contract when with full knowledge of the facts and of any misrepresentations made, and with full knowledge of his right to rescind the contract, he declares his intention to proceed or does some act from which such an intention may reasonably be inferred.'
>
> Loss of the right of rescission because of affirmation of the contract by the misrepresentee does not prevent the misrepresentee from obtaining a remedy in damages."

McDermott then addresses delay, which may bar the right to rescission or may in itself be evidence of affirmation.

104. It is also clear that rescission may be refused if it is not possible to substantially return the parties to their original position. In *Northern Bank Finance v Charlton* [1979] I.R. 149 Griffin J., who was in the majority in the Supreme Court, stated:-

> "95. An action (or counterclaim as the case may be) for rescission is the usual and normal form of proceeding for obtaining a judicial annulment of a contract induced by misrepresentation. As stated so succinctly in The Law of Actionable Misrepresentation by Spencer Bower and Turner, 3rd edition para. 249, the primary purpose of all proceedings for rescission, as contrasted with that of actions for damages, is to restore the 'status quo', to bring back the original position by undoing all that has intervened between it and the present. 'The purpose of the relief is not punishment but compensation' - per Lord Wright in Spence v. Crawford,1939 3 All E.R., 271 at p. 289. The rule is, therefore, that rescission cannot be enforced if events which have occurred since the contract and in which the representee has participated make it impossible to restore the parties substantially to their original position. If a contract cannot be rescinded 'in toto', it cannot be rescinded at all - see Cheshire and Fifoot, the Law of Contract 7th edition at p.246."

105. Applying these principles, the documents exhibited by the Executor make it clear that by 2014 the Bank must have been aware that the deceased had fraudulently misrepresented the position and that he and Mary Breen did not have title to mortgage the entire legal and

beneficial interest in the First Property. Despite this the Bank has never taken proceedings to declare the re-mortgage void, or rescind the 2008 transactions, or even seek damages for misrepresentation, and apparently the Bank did not wish to be involved in these proceedings. Leaving aside any issue of being barred by the Statute of Limitations, or the Civil Liability Act, 1961 (s.9(2)(b) of which imposes an absolute two year period from the date of death of a deceased in which to bring proceedings against an estate), it is clear that since becoming aware of the fraud the Bank continued to accept loan repayments, and will presumably receive the entire nett proceeds of sale of the Second Property (if that sale has not already occurred. Further, several years have now elapsed, and the Bank would be met by a compelling delay argument were it to seek rescission.

106. In these circumstances it is not credible that the Bank could now obtain rescission of the 2008 transactions. They were voidable at the suit of the Bank, but have not been avoided, and therefore have legal effect, in so far as they can have had legal effect. Moreover, as the above quoted passage from the judgment of Griffin J. indicates, there cannot be an *á la carte* approach to rescission – it is all or nothing. As a matter of general principle there does not seem to be scope for finding that part only of the legal effect of a voidable transaction can be avoided.

107. Critically in my view after discharge of the AIB mortgage the deceased was in principle entitled in law to grant a first charge by re-mortgage over such interest as he held in the First Property, and to do so without recourse to Kay Breen as it had never been a family home. Indeed even before 2008 the deceased could, at least in theory, have disposed of such interest as he held in the First Property. In my view the validity of the re-mortgage, it not having been avoided at the suit of the Bank, is not now affected by the fact that Mary Breen joined in the re-mortgage, notwithstanding that she had no interest to mortgage.

108. Thirdly, it must be questioned whether Kay Breen can rely on an argument that is based entirely on possible rights of a third party, namely the Bank, that was not a party to the proceedings. Halsbury, (13th Ed.) Vol.12 states:-

> "1055. **Jus tertii**. A particular application of the rules of evidence concerns the right to set up a just tertii. A claimant who is bound to establish a better title than his adversary must do so, and may not in general set up a just tertii…"

109. Murdoch's Dictionary of Irish Law (6th ed), defines *jus tertii*:

> "**Jus tertii**. [The right of a third person]. A defendant cannot, unless he has the consent of the true owner, claim as a defence that the plaintiff is not entitled to possession because a third party is the true owner. See *Webb v Ireland & AG* [1988] SC ILRM 565; *O'Beirne v Fox* [190] ELR 151…"

See also *Rhatigan v Gill*, [1999] 2 ILRM 427, where O'Sullivan J. stated, citing Salmond and Heuston on Tort, 21st Ed. p.47:

"The mere *de facto* and wrongful possession of land is a valid title of right against all persons who cannot show a better title in themselves, and is therefore sufficient to support an action of trespass against such persons. Just as a legal title to land without possession of it is insufficient for this purpose, so conversely the possession of it without legal title is enough. In other words, no Defendant in an action of trespass can plead the *jus tertii* the right of possession outstanding in some third person – as against the fact of possession in the Plaintiff. It is otherwise, of course, if the Defendant is himself the lawful owner or has done the act complained of by the authority, precedent or subsequent, of him who is thus rightfully entitled."

110. Whilst this is not an action in trespass in my view these statements of the principle of *jus tertii* apply by analogy to an argument that properly resides with the Bank, which was party to the 2008 transactions, and not with Kay Breen. As the Executor made plain in the High Court and in this court, there was no question of Kay Breen's *beneficial interest* being adversely affected by the 2008 transactions. That is the critical consideration. In making an argument based on fraud Counsel was making an argument that could only be made by the Bank to support a claim for rescission (however tenuous that argument) or damages, and I do believe that this was open to her. As the deceased was always entitled to sever the joint tenancy at any time, the fact that he severed the joint tenancy by partial alienation of his interest in the property does not amount to a fraud on her. It follows that manner in which he did so likewise cannot amount to a fraud on her. For this reason her case in fraud is in fact the case of the Bank.

111. Fourthly, I do not accept the argument that the maxim *ex turpi causa non oritur actio* has any application. Severance occurs by *operation of law* when one joint tenant alienates an interest in the property jointly held. It was always open to the deceased to alienate his interest in the First Property in his lifetime. His execution of the re-mortgage had the effect, at least in equity, of alienating his interest, and the severance occurred by operation of law. No authority was opened that would support any contrary view. Nor do I consider that the concession by the Executor that the court should take the worst view possible, from the estate's perspective, of the transactions in 2008, could entitle the court to undo the severance that arose by operation of law. It is well established that once severed it is not possible to re-establish a joint tenancy with a consequential right of survivorship, even by reuniting the four unities.

(ii) Constructive trust/unjust enrichment

112. Counsel put forward an alternative argument in which the court was asked to impose a constructive trust in favour of Kay Breen on account of unconscionable behaviour on the part of the deceased. Counsel cited the trial judge's own decision in *Kenny v Kenny* [2019] IEHC 76 where the following passages appear:

"22. Biehler describes a constructive trust as one:-

'which arises by operation of law and which ordinarily comes into being as a result of conduct and irrespective of the intention of the parties. In general terms it can be described as a trust which is imposed by equity in order to

satisfy the demands of 'justice and good conscience' to prevent deriving profit from fraudulent conduct or taking advantage of a fiduciary position'. (6th edition, p.228).

23. Keane states that a constructive trust is:-

> *'deemed by the law to exist, not where someone intends to create a trust or is presumed to have so intended, but in circumstances where it would be unconscionable for a person to deny another person's beneficial interest in a specific property.'* (3rd edition, para.13.01)

24. The plaintiff effectively relied on a model of remedial constructive trust which may arise in circumstances where a person would be unjustly enriched if they were permitted to attain property, as was recognised by the Supreme Court in *East Cork Foods Ltd v. O'Dwyer Steel Co.* [1978] IR 103. Keane identifies three essentials to a claim of 'unjust enrichment':-

    (i) The defendant has been enriched;
    (ii) This enrichment was at the expense of the plaintiff; and
    (iii) The enrichment was unjust. (para. 13.67).

25. There was also reference to Gilligan J.'s judgment in *In Re Varko Limited* [2012] IEHC 278 (unreported, High Court, 3rd February, 2012). He noted that the 'new model constructive trust' had been met with limited approval in this jurisdiction. He quoted Barron J in *N.A.D. v. T.D.* [1985] ILRM 153 who stated:-

> *'The constructive trust is imposed by operation of law independently of intention in order to satisfy the demands of justice and good conscience. Its imposition is dependent upon the conduct of the person upon whom the trust is imposed and prevents him from acting in breach of good faith. There is no fixed set of circumstances in which such a trust is imposed.'(para.39).*

26. Gilligan J. noted that Barron J. held that '*a prerequisite in constructive trust of this type was that there must be an element in the conduct of the person upon whom it is imposed which would make it inequitable for them to be allowed to assert his legal rights.*' (para.40)."

113. Counsel argued that the court should not let the deceased's unconscionable behaviour go unchecked and should, unless the 2008 transaction was held to be void, impose a trust such that the Executor holds the unencumbered interest of the deceased in the First Property on trust for Kay Breen.

114. In my view the trial judge was correct to reject this argument, although I would do so for somewhat different reasons. If the argument were correct it would undermine the fundamental principle of equity that entitled a joint owner, absent agreement to the contrary, to sever a joint tenancy during their lifetime without notice to the other joint tenant(s). As I have noted earlier, the deceased could at any time have severed the joint

tenancy by disposing of an interest in the First Property, and, as it was never a family home, he was entitled to do so (at that time) without the consent of or reference to Kay Breen. I would doubt that such a longstanding fundamental principle could be departed from by a court of law a without legislative change, as indeed happened with the passing of s.30 of the 2009 Act.

115. Moreover, insofar as the argument relies on unjust enrichment, it is unconvincing because at least two of the essentials to such a claim identified by Keane J. are missing: it cannot be said that any enrichment obtained by the deceased/the estate could be said to be "at the expense of" Kay Breen, in that her beneficial interest in the First Property was unaffected by the 2008 transactions. Nor, for the same reason, is a case made out that, if there was enrichment, it was "unjust" on Kay Breen. Indeed, it can be said that not only was Kay Breen's beneficial interest unaffected, but the deceased's conduct in maintaining the life insurance payments after discharge of the AIB mortgage ultimately provided her with an additional benefit when she received the proceeds of the policy in the sum of €203,213.92.

116. In truth it seems to me that the reliance on the concept of a constructive trust is adopted as an alternative method of arguing the case based on fraud/*ex turpi causa non oritur actio*, which I have already rejected.

117. For these reasons I do not accept the submissions by Counsel for Kay Breen that, assuming the 2008 transactions were a fraud on the Bank, it follows that there cannot have been a severance in law of the joint tenancy in the legal interest as a result of the re-mortgage, or that a constructive trust in her favour of the deceased's interest should be imposed.

(iii) Estoppel

118. The further argument pursued by the appellant was that the trial judge failed to address whether, in equity, the estate ought to be treated as being estopped from asserting a severance. Counsel relied on extracts from Conway *Co-Ownership of Land Partition Actions and Remedies* (2nd Ed. Bloomsbury Professional) which in turn rely on the New South Wales Supreme Court decision in *Goyal v Chandra* NSWSC 239, for the proposition that proprietary estoppel would intervene to preserve the joint tenancy. There Brereton J states:

> "[29] …I would also hold that where there is not a complete agreement [not to sever], nonetheless on principles of equitable estoppel, where one joint tenant has an expectation that he or she will acquire by survivorship the interest of the other and acts on that expectation to his or her detriment, and the other is implicated in the creation of the expectation and encourages the reliant activity of the first, then, at least ordinarily, it will be unconscionable for the second to act contrary to the expectation or assumption, and equity may preclude the second from severing the joint tenancy either by equitable estoppel or by imposing a constructive trust, the underlying elements of which in this field are substantially the same."

119. It is important to refer to circumstances that led to this statement in *Goyal v Chandra*. There the property had been first acquired by Dr. Goyal who borrowed to build a house

where he lived with his first wife. When they separated he raised more funds on the property to pay her by way of property settlement. He remarried in 1999, to the defendant, and they both contributed financially to renovation of the property, and they lived there. A couple of years later, in 2001, it was transferred into their joint names, after Dr. Chandra had received advice from a solicitor, and the borrowings were refinanced as two separate loans of $175,000 each, for which each was separately responsible, but with cross guarantees. Critically Dr. Goyal averred on affidavit that it was also mutually understood that the joint tenancy would come to an end *only* on the death of either of them.

120. Dr. Goyal repaid his loan to the bank. Dr. Chandra was diagnosed with cancer in 2002. In December 2003 she said to Dr. Goyal "After I die, this house is going to be yours", which Brereton J. found to be an acknowledgment by her of the underlying assumption on which Dr. Goyal had acted at the time of the transfer into joint names. Dr. Chandra defaulted in her payments, and with a deteriorating relationship left the home in 2004. Dr. Goyal took over her payments, including arrears, under threat from the bank on foot of the guarantee. In 2006 Dr. Chandra transferred her share to herself and sought to register this in order to complete a severance of the joint tenancy under NSW law, whereupon Dr. Goyal applied to court to prevent registration and hence severance of the joint tenancy.

121. What Brereton J. determined was an interlocutory application, but by the time of the matter came before him in 2006 Dr. Chandra was terminally ill. He stated that the case involved a "difficult" question of law "but because the practical effect of the outcome might well be final in any event, I think I ought to try as best I can to determine it". His determined that there was a serious question to be tried "that Dr. Chandra knew of and encouraged an expectation on the part of Dr. Goyal that if he transferred an interest as joint tenant to her, she would not, at least without his prior agreement, sever the joint tenancy by voluntary act" (para.[41]) He reached this conclusion on the evidence in the case before him:-

> "[38] The conversations referred to above, at the time of the transfer and at the time of the dispute about responsibility for Dr Chandra's loans, are evidence that Dr. Chandra knew of and encouraged (1) an expectation on the part of Dr Goyal that he would succeed to her interest in the property and (2) reliance to his detriment on that expectation by transferring his property into joint tenancy."

122. Brereton J only decided that that there was a serious issue to be tried. Apart from that it is clear that the evidence before him was materially different to the instant appeal; in particular there was evidence of agreement – or at least conversations leading to an expectation – that there would be no unilateral act of severance. There is no such evidence in the instant appeal to base an argument that the deceased agreed, or led Kay Breen to an expectation, that the deceased would never unilaterally sever the joint tenancy.

123. Counsel nevertheless submits that there was detrimental reliance by the appellant both in the agreement to use her one half of the rental income to service the mortgage, and also in her abstaining from pursuing any maintenance in respect of their two children. As to the former, the rental income was so used, and if the joint tenancy was severed in 2008 there was no adverse effect on the servicing of the AIB mortgage, which was redeemed to her

advantage. As to the latter, there is no evidence that in 2000 Kay Breen was intent on pursuing maintenance in respect of the two children to the marriage, and abstained from doing so; even if that is what occurred there is no evidence that a severance affected the continuing education of the two children or that Kay Breen thereby suffered detriment.

124. It is also worth noting that Brereton J in fact refused to grant an injunction, because the proceedings were between parties to a marriage, and under NSW Family Law Act the entire property would be subject to the discretionary property adjustment regime under which the court would have regard to the parties equitable interests in the property – so ultimately it mattered not whether there was a severance of the joint tenancy.

125. In conclusion on the issue of severance, I agree with the trial judge's finding that the redemption and replacement of the mortgage on the First Property in 2008 "resulted at a minimum in an alienation of the deceased's interest in the Dundalk property" and therefore effected a severance of the legal joint tenancy. The deceased was entitled to one half of the legal and beneficial interest, and, it was open to him to re-mortgage that to the Bank. No transfer of any interest in the First Property to Mary Breen was ever executed, so she never held any interest that she could mortgage, but it seems to me that her joining in the 2008 mortgage and purporting to mortgage an interest is *nihil ad rem*. It is also worth restating that the re-mortgage and severance clearly cannot have had any effect on the *extent* of Kay Breen's beneficial interest in the First Property, as she did not consent to the mortgage and more particularly did not execute any deed of mortgage. She continued to hold the *legal* interest in one half share, as tenant in common with the deceased. It follows that on his death the deceased's *legal* and beneficial interest devolved on his estate. This does not in any way prejudice Kay Breen as she continues to be entitled to her legal and beneficial interest of 50%.

Conclusion

126. I would therefore allow this appeal in part and vary the decision of the High Court to reflect the fact that the re-mortgage in 2008 effected a severance of the joint tenancy, and that at the date of the deceased's death the deceased and Kay Breen held the legal estate as tenants in common in equal shares, and held the beneficial interest in equal shares. I would propose that the following orders and declarations should be made in substitution for the answers given in the High Court to the questions (i)-(v) posed in the Amended Special Summons:

> "IT IS HEREBY ORDERED that the appeal herein be allowed in part and that the order and answers of the High Court be hereby vacated
>
> AND in lieu thereof and in answer to the questions posed in the amended Special Summons (but not adopting the same numbering) IT IS HEREBY DECLARED that -
>
> (a) in the year 2000 Conor Breen (now deceased) and the first named defendant Kay Breen acquired the legal and beneficial interest in the property 6 Distillery Mews, Distillery Lane, Dundalk, County Louth as joint tenants in equal shares;

(b) the said joint tenancy was severed by operation of law when the said Conor Breen executed a re-mortgage of his interest in the said property to Bank of Ireland Mortgage Bank in 2008;

(c) following the death of Conor Breen the legal and beneficial interests in the said property are held by the plaintiff as Executor of the estate of Conor Breen and the first named defendant Kay Breen as tenants in common in equal shares.

(d) Kay Breen does not hold her legal or beneficial interest in the said property subject to the re-mortgage with the Bank of Ireland Mortgage Bank in 2008.

AND IT IS FURTHER ORDERED that the Executor and Kay Breen be granted liberty to apply."

127. Neither the High Court nor this court were required to consider any question concerning rent receipts from the First Property, either before or after the death of the deceased, and I will not therefore address any further consequences of the orders and declarations proposed to be made herein. It is to be hoped that any further issues will be resolved by agreement, and that this appeal will bring an end to this litigation, and that no further costs will be incurred.

Costs

128. As is usual in judgements delivered electronically, I will indicate what I propose should be the orders of the court in respect of costs.

129. The trial judge ordered that the costs of all parties be paid out the estate of the deceased. In my view that was a proper order to make in circumstances where the Executor justifiably required the High Court's directions as to the legal and beneficial ownership of the First Property, and I would not interfere with the exercise of his discretion under O.99 r.2(1) R.S.C.

130. As to the costs of the appeal, the court must now have regard to s.169(1) of the Legal Services Regulation Act, 2015, which provides:

> "A party who is entirely successful in civil proceedings is entitled to an award of costs against a party who is not successful in those proceedings, unless the court orders otherwise, having regard to the particular nature and circumstances of the case, and the conduct of the proceedings by the parties, including…"

131. It cannot be said that any party has been entirely successful in this appeal. Kay Breen has improved her position by some 8% of the net value of the First Property, but the Executor has preserved the estate's entitlement to 50%. This court therefore has a broad discretion in relation to costs under O.99 r.2(1). In all the circumstances I would propose that both the Executor and Kay Breen be entitled to their costs of the appeal out of the estate, such costs to be adjudicated by a legal costs adjudicator in default of agreement. It seems to me that Mary Breen's interest in upholding the decision in the High Court coincided with the Executor's interest, and she did not actively participate in the appeal, and for these reasons I would not make any order as to her costs (if any) in the appeal.

132. Should any party seek any further or different orders, or seek different orders as to costs, they should notify the Court of Appeal Office and the other parties in writing within 21 days of the electronic delivery of this judgment, and the court will arrange a short hearing. Should there be no such notification the proposed orders and declarations, and costs orders, will be perfected and become the order of this court.

133. Costello J. and Murray J. having read this judgment have indicated that they agree with it.