THE COURT OF APPEAL

APPROVED

Record No: 2022 157

Neutral Citation No. [2023] IECA 15

Whelan J.

Faherty J.

Haughton J.

BETWEEN/

GERARD HARAHILL

PLAINTIFF/RESPONDENT

-AND-

JOHN KANE

DEFENDANT/APPELLANT

-AND-

LUCY PINFOLD (AKA LUCY KANE)

NOTICE PARTY

JUDGMENT of Mr. Justice Haughton delivered *ex tempore* on 23rd day of January 2023

1. Two matters are listed before the court today, the first to be considered is an application brought by notice of motion issued on 1 July 2022 by the respondent, the Collector General of the Revenue Commissioners (who I shall refer to as the Revenue Commissioners) seeking an order pursuant to the inherent jurisdiction of the court striking out or dismissing the within appeal on the basis that it is bound to fail or is frivolous and vexatious and/or an abuse of the process. It was grounded on an affidavit of Michael Commons, a solicitor in the firm of Ivor Fitzpatrick & Co. sworn on 1 July 2022. The appellant, John Kane, swore a replying affidavit on 12 October 2022 to which Mr. Commons responded in a supplemental affidavit sworn on 20 October 2022.
2. The second matter before the court is John Kane's appeal from the High Court judgment of Barr J. delivered on 16 March 2022 pursuant to which he appointed a receiver by way of equitable execution over certain property registered in the name of the notice party, Lucy Pinfold, and whereby he rejected her claim to be beneficial owner of that property.
3. John Kane raises a single ground of appeal to which I shall refer later. Logic dictates that the Revenue Commissioners' motion to dismiss should be determined first and this judgment, therefore, focuses primarily on that motion.
4. Although the papers are quite extensive, because Mr. Commons understandably exhibits the affidavits and exhibits that were used in the High Court, there is only one ground of appeal raised by John Kane and the present application raises a net point as to whether he should be allowed to pursue his appeal on that ground.

Background

5. On 3 July 2009, the plaintiff, in his capacity as Collector General of the Revenue Commissioners, obtained a judgment against John Kane to the sum of €4,941,997.52 on account of unpaid taxes. Since that date, the Revenue Commissioners have taken a variety of steps to attempt to execute upon the said judgment against assets owned by John Kane.

6. By notice of motion dated 11 April 2019 grounded on an affidavit of John Magee, Inspector of Taxes, an application was made pursuant to the provisions of Order 45 Rule 9 of the Rules of the Superior Courts to appoint a receiver by way of equitable execution over the property comprised in folio 3048F of the register in County Cavan.
7. The property in question consists of now defunct licensed premises formally known as "The Bent Elbow" (hereinafter referred to as "The Bent Elbow"), which had been partly converted into an auto workshop. The property was registered in the ownership of the notice party, Lucy Pinfold, on 22 February 2016. At that time Lucy Pinfold was the partner of John Kane and she subsequently married him on 15 April 2017.
8. In his first written submission, John Kane informs the Court that they have four minor children of which Lucy Pinfold is sole carer and provider. He says they are now separated and that there are family proceedings currently before the Cavan Circuit Court.
9. As deposed to by Mr. Commons, it was and remains the belief of the Revenue Commissioners that the property was in fact purchased by John Kane using funds derived from his motor sales and repair business and that it was registered in the name of Lucy Pinfold in an attempt to put it beyond the reach of his creditors and of the Revenue Commissioners in particular.
10. The receivership notice of motion was served on John Kane on 11 April 2019 and on Lucy Pinfold on 18 April 2019. Importantly, an affidavit of personal service on John Kane was sworn by Graham Macken, solicitor, on 16 April 2019 but he chose not to participate in the application and did not file any affidavits or adduce any evidence. He did not attend before the High Court at any point.
11. John Kane was imprisoned in early January 2022 for contempt but did not make any application or certainly no formal application to attend court when the receivership application was heard on 8 February 2022.

12. However, Lucy Pinfold filed two affidavits in response to the application and she contended that the sum of €42,000 that was required to purchase The Bent Elbow was funded entirely by using a combination of savings from her own resources and the proceeds of sale of a tractor. She exhibited statements of a number of bank accounts purporting to support this contention. In response, the Revenue Commissioners, through Mr. Magee's further affidavits, demonstrated that Lucy Pinfold never had sufficient income or means to generate the funds that were required to purchase the property. There was no accumulation of savings in or payments from any of the bank accounts exhibited to her bank accounts that were in any way consistent with her claim to have funded and paid for the property and that the most probable explanation in the circumstances was that the funds were in fact provided by John Kane and that he was the true beneficial owner of the property.
13. In particular, Mr. Magee exhibited a statement from an Ulster Bank account in the name of a UK company, David Brady and Springboard Mortgage Limited, which appeared to be controlled by John Kane and received monies generated by his undisclosed car sales business, and from which payments were made in August 2015 consistent with payments being made to purchase and develop The Bent Elbow for use as an auto repair business.
14. That account demonstrates that at or about the time of the purchase on 20 August 2015, there was a cash out payment of €5,000 from that account which would equate to the deposit on the property, and on 21 August 2015 a payment out of that account of €25,000 to Mr. Frank Greene who is an auctioneer. The statement also records further payments out shortly there afterwards, for instance, a cash out payment of €3,000 on 27 August 2015; further cash out of 4,550 on the same day; a cash payment on 4 September of €1,200; and also a significant payment out on 30 November 2015 of €14,724.25. A combination of these payments would of course have been sufficient to discharge the balance of the purchase money on the subject property.
15. The trial judge found, at paragraph 127 and 128 of his judgment as follows:

"[127.] For the reasons set out herein, the court finds that the notice party did not provide the funds that were used to purchase the property from her own resources.

[128.] The court is satisfied that the true beneficial owner of the property is in fact the defendant."

That is to say, John Kane. The trial judge continued -

"The court accepts the evidence given by Mr. Magee on behalf of the plaintiff in relation to the probable sources for the funds that were used to purchase the property. In this regard, the court accepts the averments made by Mr. Magee at paras. 17-20 of his affidavit sworn 4th April, 2019, as further elaborated upon in his affidavit sworn on 11th September, 2019 at paras. 50-55. The court is satisfied that on the balance of probabilities, the defendant is the beneficial owner of the property."

It is important to observe that these conclusions are based on findings of fact firmly based on the evidence that was before the trial judge and his careful analysis of that evidence in his judgment.

16. Accordingly by High Court Order dated 26 May 2022, Barr J. appointed Myles Kirby as a receiver by way of equitable execution over the property.

17. No appeal from this judgment was lodged by or on behalf of Lucy Pinfold. John Kane did file an appeal and the sole ground raised and the orders sought are as follows:

"The learned judge ignored totally the right of a wife to have her husband's income and in stating that John Kane paid for the property stated she had no income whatsoever or entitlement to any of her husband's income contrary to law, logic and reason and contrary to the Constitution."

The appellant sought an order that Lucy Pinfold is the owner of The Bent Elbow.

18. John Kane swore a replying affidavit in response to the notice of motion and that also purports to support his appeal and the following averments are of note.

19. At paragraph 4 of his affidavit he says:

"[4.] The learned judge is totally wrong in deciding I am the owner of the property and that my wife Lucy Kane has no interest.

[5.] Before entering the judgment, itself I say and I believe that a wife is the owner and entitled to 50% of every property, in a marriage, irrespective of who paid for what. 99% of the wives in this country do not work as they look after the family home and are still entitled to 50% of all the assets.

[6.] But they are not responsible for the debts or any part of them unless they themselves incurred them.

[7.] Lucy Kane had no involvement whatsoever in this case in regard to taxes or any alleged tax improprieties."

20. In further averments, he presents arguments in support of the sole ground of appeal based on Article 41 of the Constitution which guarantees to protect the family and recognises that by her life in the home *"woman gives to the State the support without which the common good cannot be achieved"* and that the State *"shall, therefore endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home."*
21. In paragraphs 14 – 17 of his affidavit, John Kane identifies that what he asserts are errors in particular findings of fact by the trial judge.
22. In paragraph 18 he alleges a "personal vendetta" by Mr. Magee against him.
23. In paragraph 19 he states that the trial judge was in error "in *presuming that the sources of the funds determines title to property*" which he asserts "*is determined by the title deeds and these are conclusive evidence*." And in paragraphs 20 and 23 he relies on the registration of Lucy Pinfold as owner on 22 February 2016.
24. He asserts that LP Commercial, a UK registered company identified by Lucy Pinfold as a company from which he received some monies of which Mr. Magee identified as an auto trading company connected to John Kane "*has nothing to do with his case*."

25. The court has considered oral and written submissions from the Revenue Commissioners and John Kane, including a further short written submission handed into court this day by John Kane.

Submissions and discussion

26. The inherent jurisdiction of the court to strike out an action that is frivolous or vexatious or bound to fail or an abuse of the process is well established. That this court as an appellate court also has such inherent jurisdiction cannot be doubted as it is inherent to the control of its own business, and it is of note that it was exercised by this court in other proceedings involving Lucy Pinfold. The courts have long recognised that the constitutional right of access to the courts does not mean that litigants should be allowed to continue unstateable counterclaims or otherwise abuse the process (see McKechnie J. in *Ewing v. Ireland* [2013] IESC 44 at paragraph 23).

27. As Clarke J. stated in *Keohane v. Hynes* [2014] IESC 66 at paragraph 6.6: "*the jurisdiction is to be sparingly exercised and only adopted when it is clear that the proceedings are bound to fail rather than where the plaintiff's case is very weak or where it is sought to have an early determination on some point of fact or law.*"

28. The court is not limited to considering the pleadings but is free to consider the evidence given on affidavit although the degree to which it is appropriate to assess the evidence is limited.

29. To prevent abuse of the process, a person may also be precluded from litigating an issue, including a matter of defence, that has not previously been decided when it is one that could with reasonable diligence have been brought forward in previous proceedings. The source of this rule is *Henderson v. Henderson* [1843] 3 Hare 100 where Wigram VC stated at page 114:

> "Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter[s] which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have,

from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

30. This was followed by Palles C.B. in *Cox v. Dublin City Distillers Co. Limited (No. 2)* [1915] 1 IR 345 and has been followed many times since in the High Court.
31. The rule is closely associated to the issues of estoppel or estoppel *per rem judicatam* but differs from *res judicata* principally because the court has a discretion when considering to apply the rule in *Henderson v. Henderson*.
32. The rule has also been applied by analogy to circumstances where there is no second set of proceedings between the parties but a party seeks to advance argument that could have been advanced at an earlier stage in the proceedings but failed to do so. An example of this is the decision of Clarke J. in *Re McInerney Homes Limited* [2011] IEHC 25. There Clarke J. had to consider whether *Henderson v. Henderson* principles had a role to play where an application was made to revisit a judgment on an application to confirm a scheme of arrangement in examinership proceedings between the time of its delivery and the formalisation of the court order. He stated that while the position was not exactly the same as in relation to a decision by the court whether or not to confirm the scheme of arrangement which takes place at the end of the examinership process, it seemed to him that the rationale behind the Supreme Court's decision in *Re Vantive Holdings* [2009] IESC 69 had significant application to the issue to which he had to consider. I now quote from his judgment at paragraph 3.11:

"If it is an abuse of process in an examinership, by analogy with *Henderson v. Henderson* not to put forward one's entire case on a petition and then seek to litigate a point not made on a second petition, then that principle applies whether consideration is being given to allowing

the new point to be advanced after the process has finally finished to the extent that a final order has been made and perfected or, if possibly with only slightly less force, where the process has in substance finished by the parties completing their evidence and argument and the court reaching a reasoned conclusion."

33. Most relevantly this court may, as a general principle, refuse to allow a party to raise an issue for the first time that has not been heard in and decided before the High Court unless there are exceptional circumstances in the interest of justice. This principle was set out in the following terms by Finlay C.J. in *KD v. MC* [1985] IR 697 where he stated at page 701:

> "It is a fundamental principle arising from the exclusively appellate jurisdiction of this Court in cases such as this that, save in the most exceptional circumstances, the Court should not hear and determine an issue which has not been tried and decided in the High Court. To that fundamental rule or principle there may be exceptions but they must be clearly required in the interest of justice."

34. Commenting on that in *Lough Swilly Shellfish Growers Co Op Society Limited v. Bradley* [2013] IEHC 16, O'Donnell J. at page 245 in an oft quoted passage stated:

> "There is a spectrum of cases in which a new issue is sought to be argued on appeal. At one extreme like cases such as those where argument of the point would necessarily involve new evidence and with a consequent effect on the evidence already given as in *KD v. MC*; or where a party seeks to make an argument which was actually abandoned in the High Court as in *Movie News Limited v. Galway County Council*.; or, for example where a party sought to make an argument which was diametrically opposed to that which had been advanced in the High Court and on the basis of which the High Court case had been argued and perhaps evidence adduced. In such cases, leave would not be granted to argue a new point of appeal."

35. Before continuing the quotation I should say that this case would seem to come within the first limb of what O'Donnell J. was talking about in *Lough Swilly* in that passage. He continues:

"At the other end of the continuum, like cases where a new formulation of argument was made in relation to a point advanced in the High Court, or where new materials were submitted, or perhaps where a new legal argument was sought to be advanced which was closely related to arguments already made in the High Court or a refinement of them, and which was not in any way dependent upon the evidence adduced. In such cases, while a court might impose terms as to costs, the court nevertheless retains the power in appropriate cases to permit the argument to be made."

36. The Revenue Commissioners, in support of their motion, submit that there are fundamental difficulties with the appeal such that it should be struck out. Firstly, they submit that Lucy Pinfold is the only person who has an interest in appealing against the finding made by the trial judge but she has elected not to appeal. They say that John Kane has no standing to appeal on her behalf and is not entitled to conduct an appeal on her behalf. They argue that John Kane is only entitled to appeal against the appointment of the receiver if he accepts the findings of fact made by the trial judge as being correct, mainly that Lucy Pinfold did not purchase The Bent Elbow out of her own means and resources and that John Kane is the true beneficial owner of the property. That of course is not the position John Kane has adopted. He seeks to dispute the trial judge's findings. In his written submission he asserts that "*the purchase of this property has absolutely no connection to this appellant other than it is a property owned by the appellant's wife, Lucy Kane*."

37. In my view the Revenue Commissioners' submissions are well made. Firstly, Lucy Pinfold made the case that not only was she registered as legal owner of the property, which was the case, but that she was also beneficial owner by virtue of her alleged financial contributions towards the purchase. Were she to have succeeded in the High Court the outcome would have been that she, and not John Kane or any other person, was the legal and beneficial owner of the property. That outcome would have been solely for her benefit, it was not one in which John Kane could have had any interest. It follows that only Lucy Pinfold could have standing to complain about the

finding in the High Court that she has no beneficial interest in the property but she of course has chosen not to appeal and John Kane cannot appeal on that basis on her behalf.

38. Secondly, John Kane did not avail of the opportunity to file any replying affidavits to those sworn by Mr. Magee or adduced any evidence to contradict the position adopted by the plaintiff, the Revenue Commissioners. Nor did he seek to cross-examine Mr. Magee. It is clear that he chose not to attend the High Court. It is notable that John Kane was not in imprisonment when the receivership application was served and during 2019 when the exchange of affidavits took place. He did not, as he could have done, apply to attend the hearing before Barr J. and address the court, nor did he engage legal representation.

39. His belated attempt at hearing today to suggest that he asked the prison authorities to enable him to attend court before Barr J. and that the prison authorities refused his request is entirely unsupported by evidence and is made far too late in the day. In any event, had he attended court he would have done so without the benefit of any evidence to support the argument that he now wishes to make in his appeal. He never advanced any argument during the course of the receivership application to suggest that Lucy Pinfold's evidence and arguments were correct or that he, or any company said to be controlled by him, had not paid or contributed towards the purchase, or that he had absolutely no connection to the purchase other than his relationship with Lucy Pinfold, whom he later married.

40. While John Kane does say he was incarcerated in Mountjoy Prison initially and then transferred to Wheatfield and denied access to the court this is not the full picture and in overall terms it is not correct to say that he was denied fair procedures. That he was served with the receivership motion is proven by the affidavit of service sworn by Graham Macken. He thereafter had the opportunity to consider the application and grounding affidavit and to swear replying affidavits, contest the evidence, seek to cross-examine and make submissions. This included the opportunity, if he saw fit, to contest the evidence adduced on affidavit by Lucy Pinfold.

41. As I have already stated, it is also not correct to say that because he was incarcerated, he could not have attended court. Arrangements are made on a daily basis for prisoners to attend court and he could have made a proper application for that purpose, and he would have been entitled to attend. He could have attended the High Court hearing remotely. I am satisfied that he elected not to oppose the application himself and that he chose not to participate or attend in the High Court. That choice may well have been tactical.

42. Moreover, I agree with the Revenue Commissioners' submission that it is difficult to see how John Kane can have been prejudiced by his absence in circumstances where he continues to assert that he is not the beneficial owner of the property. If that is so, then he can have no bona fide interest in the outcome of the receivership application and he can have no objection to the appointment of a receiver over the property and if he has no interest in the property then he has to locus standi. This leads back to the conclusion that only Lucy Pinfold had standing to appeal and that she did not appeal that is an end of a matter.

43. It clear that the trial judge did engage with all the affidavit evidence that was before him and conducted a thorough and detailed analysis and made findings of fact on the basis of that evidence. In their written submissions, the Revenue Commissioners usefully refer at paragraph 22 to the case of *McDonagh v. Sunday Newspapers* [2017] 2 IRLM 217 where Charleton J. stated:

> "An appellant arguing for the reversal of an judgment founded on a rigorous analysis of affidavit evidence as to fact bears a heavy burden in seeking to demonstrate that a trial judge has fallen into such error if the decision made is untenable."

44. They also refer at paragraph 23 to the case of *Leopardstown Club Limited v. Templeville Developments* [2017] 2 ILRM where MacMenamin J. provided a useful summary of the position to be adopted by an appellate court in relation to findings of fact made by the court of first instance. He said:

> "Save where there is a clear and non-engagement with essential parts of the evidence, therefore,

an appeal court may not reverse the decision of a trial judge, by adverting to other evidence capable of being portrayed as inconsistent with the trial judge's primary findings of fact.

'Non-engagement' with evidence must mean that there was something truly glaring, which the trial judge simply did not deal with or advert to, and where what was omitted went to the very core of the essential validity of his findings. There is therefore a high threshold. In effect an appeal court must conclude that the judge's conclusion is so flawed to the extent that is it is not properly 'reasoned' at all. This would arise only in circumstances where findings of fact could not 'in all reason' be held to be supported by the evidence. 'Non-engagement' will not, therefore, be established by a process of identifying other parts of the evidence which might support a conclusion, other than that of the trial judge, when there are primary findings of fact."

45. The sole ground of appeal raised by John Kane does not contest the trial judge's findings of fact or plead that he failed to engage with the evidence. In his affidavit sworn in response to the motion John Kane now attempts to suggest that in certain respects the trial judge's finding of fact is flawed, including his findings as to the probable source of the purchase money. However, John Kane does not plead this in his notice of appeal but more importantly, in the High Court he did not bring forward evidence or make any alternative suggestion as to the source of the purchase monies. It's not now open to John Kane to contest the trial judge's findings of fact and his attempt to do so is, in my view, an abuse of the process in light of his election not to adduce evidence or take part in the High Court.

46. His attempt to appeal on an entirely new ground which in effect raises a new cause of action by way of defence to the appointment of the receiver, and which would necessitate evidence to ground it and when no relevant evidence was adduced in the High Court is at the top end of the spectrum identified by O'Donnell J. in *Lough Swilly*, such that the court should not allow the argument to be pursued on appeal. It seems to me that in all the circumstances his attempt to do so is an abuse of

the process and it may also fall foul by way of analogy of the rule in *Henderson v. Henderson*. Further, there are, in my view, no exceptional circumstances such as to persuade me that John Kane should be allowed to pursue this entirely new argument on appeal.

47. It is, however, appropriate to make some further reference to the appeal itself. In their submissions the Revenue Commissioners refer to the sole ground which asserts that the trial judge ignored the right of the wife to half of her husband's income and that the trial judge erred in finding that Lucy Pinfold had no income and had no entitlement to her husband's income and that this was contrary to the Constitution. It is submitted by the Revenue Commissioners that this gives rise to a number of difficulties. The first is that Lucy Pinfold contended consistently throughout the entire application that she provided all of the purchase monies out of her own savings and resources. It was never the case that she obtained any of the money in question from Mr. Kane or that he contributed in any way towards the acquisition of the property or that she had any entitlement to his income. I agree with their submission. Lucy Pinfold never made the case that the purchase monies came from John Kane's income to half of which she was entitled or that the property was, as he described it, a "marital asset". It may be said to be implicit in the sole ground of appeal that John Kane is suggesting that his income was used to purchase the property but that suggestion contradicts the case which Lucy Pinfold sought to make out on affidavit without objection or comment from John Kane, which was that she provided all the purchase monies from her own resources.

48. In his affidavit, John Kane argues that because Lucy Pinfold is the registered owner of the property that is determinative and conclusive evidence of title. This is not a ground of appeal, but in any event the submission misunderstands the nature of the registration system. It is true that under Section 31(1) of the Registration of Title Act 1964 the title of the registered owner is conclusive in the absence of actual fraud. However this only relates to the legal interest. The general policy of the Registration of Title Act 1964 is to keep trusts off the register. Section 92 expressly states that

notice of a trust, whether express, implied or constructive shall not be entered on the register. Accordingly, the argument that the registration of Lucy Pinfold as owner of itself prevents John Kane holding a beneficial interest in the property cannot succeed.

49. In his written submission, John Kane asserts that "*these proceedings were instigated to prevent the appellant from being able to work in the car sales business or able to start again so to speak.*" He refers to the right to earn a livelihood and submits that the appointment of a receiver over The Bent Elbow was "*to deny this appellant and the notice party the right to earn a livelihood.*" Implicit in this submission is that John Kane was or is earning a livelihood from the use of The Bent Elbow although he has never said so on affidavit. Such an implication is, to an extent, contradicted by his own affidavit sworn to oppose the motion in which he averred that he does not own the property. Leaving that aside, I do not see how this submission could assist him in appealing the trial judge's findings of fact which related to where the purchase monies originated and whether they were contributed by Lucy Pinfold. *Prima facie* the outstanding debt and limited recovery gave the Revenue Commissioners an entitlement to execute against property in which John Kane had an interest regardless of whether he might be using it to generate an income.

50. Moreover, in his second judgment delivered after a further round of affidavits and submissions, the trial judge affirmed his finding that John Kane was beneficial owner of the property and found that €3,726,380.35 approximately remained due and owing by John Kane to the Plaintiff and proceeded to make a finding that "*in all the circumstances it is just and convenient to appoint Mr. Kirby as a receiver by way of equitable execution over the property.*"

51. The Revenue Commissioners make the further point that John Kane and Lucy Pinfold did not marry until 2017, after the purchase of the property, and submit that the sole ground of appeal based on the right of a wife to half her husband's income and the suggestion that they are incompatible with Article 41.2 of the Constitution, are misconceived. The obvious point to make is that no such right, or any equivalent right that might be enjoyed by a non-marital partner, was asserted or argued

and no relevant evidence was adduced in the High Court by John Kane or indeed by Lucy Pinfold. It is an entirely new issue on which evidence and argument would have been required.

52. In light of this obvious point and the reasons given earlier for dismissing this appeal, it is not necessary to consider this submission any further or novel question such as whether the constitutional protection of the family in Article 41 may extend to a *de facto* family where the parents are not married. And if it does, whether John Kane or Lucy Pinfold could place any reliance on such a claim or call in aid the concepts of trust law. However, this much may be said: John Kane has adduced no authority, judicial or statutory, for the proposition that by virtue of marital home Lucy Pinfold would be entitled to a half share in the property. Such authority as exists is against such a proposition. In *BL v. ML* [1992] 2 IR 77 the Supreme Court rejected such a claim based on Article 41 of the Constitution finding that while that article recognised the fundamental rights of the family, it did not create any particular rights within the family, nor give any member rights, whether property or otherwise, against other members of the family. Finlay C.J. stated at page 107:

> "After careful consideration and with reluctance arising from the desirable objective which the principle outlined in the judgment of Barr J. would achieve, I conclude that to identify this right in the circumstances set out in this case is not to develop any known principle of the common law, but is rather to identify a brand new right and to secure it to the plaintiff. Unless that is something clearly and unambiguously warranted by the Constitution or made necessary for the protection of either a specified or unspecified right under it, it must constitute legislation and be a usurpation by the courts of the function of the legislature."

53. Although *BL v. ML* concerned a family home - a point noted by John Kane in his oral submissions - it seems to me that the principle it establishes applies with equal force to a claim by a spouse to have an automatic right by virtue of marriage to a half share in other property beneficially owned by the other spouse, and this court is bound by that decision.

54. For all of these reasons I would accede to this motion and dismiss the appeal as being bound to fail

and an abuse of the process.

Whelan and Faherty JJ. have indicated their agreement with this judgment and the order(s) proposed.