

THE HIGH COURT

[2018 No. 515 SP]

BETWEEN

GERARD O'MALLEY

PLAINTIFF

AND

KAY BREEN AND MARY BREEN

DEFENDANTS

JUDGMENT of Mr. Justice Tony O'Connor delivered on the 13th of September 2019

Introduction

1. This judgment considers whether and how:-

- (i) the presumption of a resulting trust,
- (ii) the presumption of advancement and
- (iii) the severance of a joint tenancy

are applied when determining the beneficial ownership of a buy-to-let property at Distillery Mews, Dundalk ("**Dundalk property**"). In 2000, the Dundalk property was purchased jointly with a mortgage in the joint names of the first named defendant ("**Kay Breen**") and her late estranged husband ("**the deceased**") that was discharged in 2008 by the deceased.

2. In addition to undisputed facts supported by public records, the parties identified on two sheets of paper prepared during the hearing of these proceedings other facts which are agreed. After taking instructions, counsel for the plaintiff, who is the executor to the estate of the deceased ("**the estate**"), 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 Dundalk property in 2008. It was also acknowledged that the estate could not benefit from

the discharge in 2008 if it was undertaken to prejudice Kay Breen. The parties further opted to rely on evidence of belief adduced on affidavit, which in many instances cause a conflict of interpretation which this Court cannot resolve.

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 plaintiff informed the Court that the plaintiff was willing to accept the worst possible interpretation from the discharge in 2008, which may affect the interest of the estate.

Background facts

4. The deceased was married to Kay Breen in 1986. The deceased called regularly to the family home in Dundalk after moving out in 1996 and was involved in the activities of the two children of the marriage. Relations with the deceased following his departure were described by Kay Breen as “*cordial*”. Kay Breen owns and resides in the family home where the two children grew up. The deceased did not enter into a separation agreement and did not provide maintenance to Kay Breen. However, Kay Breen accepts that the deceased “*did fund the education of the two children*”. She further explains her recent discovery that the deceased had furnished his address in County Down to the Irish Revenue for them as a married couple and had used any of her “*unused tax allowances*” in returns.

5. The second named defendant (“**Mary Breen**”) averred in her affidavit sworn on the 29th January, 2019, (without contradiction from Kay Breen) that she was “*in a committed co-habiting relationship*” with the deceased in 2000. Mary Breen further averred that she was not aware when the mortgage in 2008 was discharged that the Dundalk property had been purchased by the deceased and Kay Breen in 2000. At the time of his death on 22nd February, 2017, the deceased and Mary Breen had lived together for many years in Co. Down with their four dependent children, the eldest of which was

sixteen in February 2017. Mary Breen owns that home where she and her four children now reside.

6. A petition to the High Court of Northern Ireland for divorce resulted in a “*decree nisi absolute (Divorce)*” on the 6th January, 2017, in respect of the marriage of the deceased to Kay Breen. Kay Breen averred in her affidavit sworn on 26th November, 2018, that “[h]ad the deceased not been in his last illness the matter of ancillary orders for financial settlement would have been pursued”.

7. The deceased and Mary Breen subsequently married in Newry on 24th January, 2017. The deceased, by his last will and testament made on that day, bequeathed the Dundalk property to Kay Breen in addition to their former family home in Dundalk. Included in his bequests to Mary Breen was their jointly-owned holiday home in Kincasslagh, Co. Donegal (“**Donegal property**”).

8. The plaintiff, who is a brother of Mary Breen, initially renounced his entitlement to administer the estate. After obtaining leave of the court to revoke his renouncement, the plaintiff obtained a grant of probate on 21st June, 2018, which referred to a nil value for net assets. The plaintiff, in his grounding affidavit sworn in October 2018, elaborates by stating “*that the estate is in all likelihood insolvent*”.

The Crux

9. The Dundalk property was purchased for IR£190,000 in May 2000 with a IR£160,000 mortgage loan from AIB plc (“**AIB**”) in the joint names of the deceased and Kay Breen. The deceased paid the balance of IR£30,000 from his own funds. “*By agreement of [the deceased] and Kay Breen the entire rental income from [the Dundalk property] was taken by [the deceased], and was to be used to pay the mortgage over the [Dundalk] property*”.

10. Following his death, Kay Breen avers that she has 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 needed to, having been bequeathed to me in the last will of the deceased*”. Kay Breen accepts that she did not directly contribute financially to the purchase of the Dundalk property. The Court has not been furnished with accounts or records for the management of the Dundalk property.

11. The twenty-year policy to secure IR£160,000 on the death of either the deceased or Kay Breen was arranged by the deceased and it was a condition of the mortgage to have same in place. The deceased discharged the monthly premium of IR£42.83 (€54.38) for that policy until his death despite the redemption of the AIB mortgage in 2008. Kay Breen was paid the proceeds of that policy in July 2017 following notification that the deceased had died and that AIB had no right to receive the proceeds.

The Donegal property and Bank of Ireland loan

12. In October 2008, the deceased and Mary Breen purchased the Donegal property for €480,000 in their joint names. They received a loan from Bank of Ireland Mortgage Bank (“**Bank of Ireland**”) on the 10th October, 2008, in the sum of €750,000. The loan was used to fund the purchase of the Donegal property and to discharge another outstanding loan. €143,741.32 of the loan was used to redeem the AIB mortgage on the Dundalk property.

13. The Bank of Ireland loan required a charge over both the Dundalk property and the Donegal property which were purportedly created. Kay Breen was not informed of the redemption nor of the newly created charge in favour of Bank of Ireland. Mary Breen asserts that “*she was asked to sign and agreed to sign the mortgage of both properties*” and that she was not aware in 2008 that Kay Breen was registered as joint owner of the Dundalk property.

14. Mary Breen acknowledges that a life policy for her benefit taken out in 2008, which was not assigned to Bank of Ireland, led to her receipt of the proceeds of that policy in August 2017.

15. The plaintiff, when commencing these proceedings, expressed a belief on affidavit that it was the intention of the deceased and Bank of Ireland that the Dundalk property would be conveyed to the deceased and Mary Breen subject to the mortgage. This belief of the plaintiff executor, who was not privy to the 2008 transactions and who cannot adduce any supporting evidence, is one of those beliefs expressed on affidavit that the Court cannot rely upon.

16. In October 2018, solicitors for the plaintiff advised Bank of Ireland that it would “*issue these proceedings without including the Bank*” if they did not hear from the Bank of Ireland within fourteen days. Bank of Ireland was not joined and has not sought to join in these proceedings.

Disputed intentions

17. There is no agreement as to the intention of the deceased and Kay Breen at the time of the acquisition of the Dundalk property in 2000. The plaintiff agrees that he has no evidence to support his “*understanding that the purpose of the deceased in acquiring the property was to provide an income from the [Dundalk] property to fund the education of the two children from the marriage with [Kay Breen]*”. Mary Breen avers that “*the idea*” of purchasing the Dundalk property “*was to secure*” the education costs of the two children. Kay Breen in her affidavit mentions her assumption that the purchase of the jointly held Dundalk property “*was an effort to take account of his responsibilities to [Kay Breen] and his two children.*”

18. In short, this Court cannot determine a common intention of the deceased and Kay Breen when the Dundalk 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.

Effect of bequeathing Dundalk property to Kay Breen

19. The plaintiff argues that the bequest of the Dundalk property to Kay Breen demonstrates that the deceased (who had been a practising solicitor) identified that Kay Breen did not have a right of survivorship. Counsel for Kay Breen replied that the bequest shows that the deceased always intended for Kay Breen to own the property.

20. During the hearing, the Court expressed concern about inferring intentions without having oral evidence and cross-examination when a contest arose.

Liabilities of the estate

21. As of September 2018, the existing balance due to Bank of Ireland was €567,834, with interest continuing to accrue. The plaintiff avers that the Donegal property is now valued at €300,000 and is therefore insufficient to discharge the debt. The Dundalk property is valued at around €220,000. Counsel for the plaintiff informed the Court that the proceeds of sale from both properties could, with negotiation, allow the plaintiff to discharge or settle most debts of the deceased. While Mary Breen agrees to the sale of the Donegal property, Kay Breen declines to accept that her interest in the Dundalk property should be available to the Bank of Ireland or to the estate.

Alternatives posed on behalf of the plaintiff and Mary Breen

22. The plaintiff 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 in equal shares. 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.

The law of co-ownership

24. Co-ownership often involves a split in the ownership of the property into the legal ownership and the equitable or beneficial ownership. As Wylie notes:-

"... 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 the 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." (Wylie, *Irish Land Law*, 5th ed., Bloomsbury Professional, 2013, at para. 8.15).

Presumption of resulting trusts

25. In *Dyer v. Dyer* (1788) 2 Cox Eq Cas 92; (1788) 30 ER 42, Eyre CB said "... *the trust of a legal estate ... results to the man who advances the purchase money*" irrespective of who takes the legal title (p. 93). This gives rise to the presumption of a resulting trust which Biehler suggests as resting on the principle that equity intends bargains not gifts (Biehler, *Equity and the Law of Trusts in Ireland*, 6th ed., Roundhall, 2016, p. 159).

26. Denham J. in *Stanley v. Kieran* [2011] IESC 19 (unreported, Supreme Court, 7th June, 2011), at para. 28 stated "[t]here is a presumption that the provider of funds for the purchase of the property is the beneficial owner." In that case, the appellant plaintiff had advanced all of the monies for the purchase of the relevant property. Further, there was no evidence adduced to rebut the presumption.

Unequal contributions

27. In *Laskar v. Laskar* [2008] EWCA Civ 347 ("**Laskar**") a mother exercised her right to purchase a council property at a discount. The mother and her 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 discharged the repayments and outgoings.

28. In the Court of Appeal, it was argued on behalf of the daughter appellant “*that there is a presumption that the beneficial interests were the same as the legal interests, and that the presumption was not rebutted in this case.*” (para. 12). In the alternative, it was submitted that the discount of some £29,000 should have apportioned equally between the parties and that the joint liability for the mortgage should be treated as a contribution towards the purchase price.

29. At para. 15, Neuberger L.J. distinguished the facts from those in *Stack v. Dowden* [2007] UKHL 17; [2007] 2 AC 432; [2007] 2 All ER 929, by identifying that the latter involved a property purchased by a couple with children whereas *Laskar* related to an investment property. At para. 19, Neuberger J. mentioned that the mother in *Laskar* had other children who were dependent and the appellant daughter had been brought in as a co-purchaser primarily because the mother could not afford the purchase on her own.

30. Ultimately, he saw “... *no reason 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 ...*” (para. 21).

31. Having determined that the discount should be attributed to the mother, Neuberger L.J. concluded that in the absence of an agreement or understanding “... *it would be right to treat the mortgage loan of £43,000 as representing a contribution of £21,500 by each of the parties as the two joint purchasers of the property.*” (para. 28). After calculating as described in para. 32, he decided that the daughter had a 33% interest in the property.

32. Rightly, he thought it “*sensible to stand back and see whether that looks a fair result*” and determined that it “*seems not unreasonable.*” (para. 33).

Intention to benefit

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 the 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 of 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 and thereby both contributed to the purchase.

Doctrine of advancement

36. The plaintiff submitted that the limited, antiquated and dubious presumption of advancement, whereby a husband is presumed to make a gift to his wife, ought not apply in circumstances where an investment property was purchased between an estranged husband and wife. Counsel for Kay Breen submitted originally that “*there is no presumption of advancement because there was no gift ...*”. However, supplemental written submissions were filed in July 2019 to the effect that if the Court found that there was a resulting trust, then the presumption of advancement would apply unless there was evidence to rebut such presumption. Counsel for Kay Breen argued that no such evidence was before the Court.

37. The doctrine of advancement has been the subject of debate as to its repugnancy to the Constitution and more particularly the guarantee of equality under Article 40. It has been weakened greatly in England and Wales (see *Stack v. Dowden*). The claim before this Court now does not permit or require a ruling on the constitutionality of the presumption. Nevertheless, it is accepted that the presumption harks back to a different era and the Court recognises the need to modernise the application of the doctrine to accommodate changes in society and the make-up of family units.

38. In this case, the deceased and Kay Breen were living apart at the time of the purchase of the Dundalk property. In fact, the deceased was in “*a committed co-habiting relationship*” with Mary Breen and had children with her. Most significantly, the Dundalk property was an investment property and was not a family home. In those circumstances, the Court declines to apply the doctrine of advancement.

Learned contributions

39. This Court acknowledges the following valuable contributions referred to in submissions with a view to future modern consideration of similar circumstances having substantially more evidence:-

- (i) Professor Biehler’s note that the principle of proportionate interest deriving from the rationale behind the resulting trust “*has ensured a degree of consistency in decision-making*” but that this has “*perhaps been at the expense of an element of flexibility which might in certain circumstances be desirable.*” (Biehler, *Equity and the Law of Trusts in Ireland*, 6th ed., Roundhall, 2016, p. 210).
- (ii) Professor Mee’s argument that the category of presumed resulting trusts appears to be “*indefensible in modern times*” (“The Past, Present and Future of Resulting Trusts” (2017) 70(1) *Current Legal Problems* 189 at p. 191).

This Court acknowledges that “[i]t is hard to reconcile with modern sensibilities this emphasis on the separate intentions of the individual contributions and the assumption that each person’s intention is determinative in respect of the portion of the ownership that she has brought with her contribution to the purchase price.” (p. 213).

40. The necessity to use concepts or principles of constructive trust, unjust enrichment, unconscionability of transactions and reasonable expectations, as used in other jurisdictions, does not arise here:-

- (i) due to the state of the evidence;
- (ii) because these are not family law proceedings; and
- (iii) because this claim is confined to a jointly-owned investment property.

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 plaintiff 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.

Severance

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.

46. The Court will hear the parties if requested about the precise terms of any declaration or other order which may be sought in addition to the reliefs sought in the Special Summons.

Proposed orders

47. Subject to hearing counsel on a convenient day, the Court proposes to make the following orders which track the issues identified in para. 15 of the Special Summons:-

- (i) Kay Breen has a legal and beneficial interest in the Dundalk property;
- (ii) Kay Breen holds a beneficial interest in the Dundalk property for the estate of the deceased;
- (iii) Kay Breen does not hold her interest in the Dundalk property subject to the mortgage with Bank of Ireland;
- (iv) The 2008 mortgage over the Dundalk property severed any joint tenancy in the Dundalk property;
- (v) The bequest of the deceased's interest in the Dundalk property to Kay Breen under the will of the deceased is subject to any enforceable mortgage of the interest of the deceased in the Dundalk property;
- (vi) Liberty to apply on notice to all other parties.