

THE HIGH COURT**1995 No. 587 Sp****BETWEEN****C.D.****PLAINTIFF****AND****W.D. AND BARCLAYS BANK PLC****DEFENDANTS****Judgment of Mrs. Justice McGuinness delivered on the 5th day of February 1997**

In these proceedings, the Plaintiff, who is the wife of the first named Defendant, brings a claim pursuant to Section 12 of the Married Women's Status Act, 1957 that she is entitled to a beneficial interest in lands in County Kilkenny held in her husband's sole name. She also seeks a declaration that the second named Defendant's claim, if any, to be secured on the said lands affects only her husband's beneficial share in the said lands.

The lands in question are farm lands comprised in and described in Folio 7567 of the Register of Freeholders of County Kilkenny. The folio, a certified copy of which was handed into Court, shows that as and from the 21st July, 1972 W.D., the first named defendant, is full owner of the lands. On 8th September, 1989, a charge was registered in favour of the second named Defendant, Barclays Bank Ireland Limited, for present and future advances repayable with interest. The lands themselves consist of 26 acres, 3 roods and 30 perches. The family home of the Plaintiff and the first named Defendant does not form part of these lands and they have never lived in a family home on the lands. The lands are, and have at all relevant times been, used by the first named Defendant in his business as a farmer.

THE HEARING

At the opening of the hearing before this Court, an application was made on behalf of the Solicitors for the Plaintiff to come off record in the case. The Plaintiff consented to this application and an Order to this effect was made. The Plaintiff was accompanied in Court by a Mr. Looney, whom she wished to have with her as a friend to assist her. Counsel for the second named Defendant objected to the presence of Mr. Looney on the grounds that he had been involved on behalf of both the Plaintiff and the first named Defendant in previous negotiations with Barclays Bank.

I was conscious of some undesirable elements in allowing such a person to be present in Court, in particular, in a case which was to be heard in camera. I had also formed the impression that the advices being given by Mr. Looney to the Plaintiff appeared to be of a quasi-legal nature and to deal with matters which would more properly be dealt with by a Solicitor. Nevertheless, bearing in mind the disadvantages of a personal litigant, I permitted Mr. Looney to remain in Court to assist Mrs. D. while stressing that his role was strictly limited to taking notes on her behalf and quietly making suggestions and assisting her generally during the hearing as had been set out in an Order made by the Supreme Court in a similar situation on 13th October, 1995 in the case of **Seamus Quinn -v- The Governor and Company of the Bank of Ireland and Martin A. Harvey, Timothy Bracken and Breda Morey.**

In the event, Mrs. D. herself gave her evidence and set out the basis of her claim clearly and cogently and was not unduly disadvantaged by the absence of legal representation.

The first named Defendant was also unrepresented and had been so at all stages of the proceedings. At the outset, he made it clear that in the circumstances he was not opposing his wife's claim. He had not filed any Affidavit in the proceedings, but at the

request of the Court, he gave oral evidence of certain factual matters, mainly by way of clarification.

The second named Defendant was fully represented by Solicitor and Counsel. The evidence of the second named Defendant was fully and clearly set out on Affidavit sworn by Mark McParland, Solicitor, on behalf of the bank.

The Plaintiff's Special Summons which was issued on the 11th June, 1995 was originally grounded on an Affidavit sworn by her on the 10th July, 1995. On the day of hearing of the proceedings, she submitted a second Affidavit to the Court which had, as I understood the matter, been drafted with the assistance and advice of Mr. Looney. While this Affidavit had not been served in time on either Defendant, in the circumstances, I permitted it to be opened to the Court. Unfortunately, it consisted largely of allegations of various kinds of improper conduct against the second named Defendant and its servants and agents which could not in any circumstances form a relevant part of the evidence in the proceedings before the Court. Whether or not such allegations were based in fact, they were relevant only to the bank's separate proceedings for possession against the second named Defendant. This was pointed out to the parties. The Plaintiff's evidence therefore consisted of her grounding Affidavit and the relevant parts of her second Affidavit sworn on the 21st January, 1997 and her oral evidence.

THE FACTS

The Plaintiff and the first named Defendant were married on the 9th August, 1983 and they have three children aged ten, eight and seven. The Plaintiff is a nurse by profession and the first named Defendant is a farmer. For the first six years of their marriage, they lived in the home of the Plaintiff's mother in Abbeyleix. Throughout the marriage, the Plaintiff has worked in her profession as a nurse, at first full time and at a later stage part time. In her evidence, the Plaintiff said that during the six years in Abbeyleix, she made

fairly minimal contributions to her mother's household since her mother was aware that she was saving for a home for herself and the first named Defendant. At the time of the marriage, she had savings of her own of in or about £2,000. The Plaintiff states that between these savings and the savings she made from her earnings between 1983 and 1989 she contributed a sum of in or about £25,000 to the building and furnishing of the couple's present family home at Feereigh, Donaghmore, County Laois. The evidence of the amount of her contribution was challenged in cross-examination by Counsel for the bank and no actual receipts were produced in evidence. However, the Plaintiff appeared to me to be a good manager and financially careful and I accept her evidence as regards her contribution. I also accept her evidence that she obtained some building materials such as second-hand windows from members of her family and that these were also used for the family home. The Plaintiff and the first named Defendant agree that the Plaintiff paid for or otherwise provided the materials used in the building while the first named Defendant either carried out the labour himself or, where necessary, paid for other labour costs. The Plaintiff also provided monies for the furnishing of the family home.

The said family home was not however a new house but an extension and adaptation of the house already occupied by the first named Defendant's widowed mother and other members of his family. The building works which were carried out, and to which the Plaintiff contributed, seem to have been the creation of a separate apartment for the accommodation of the Plaintiff, the first named Defendant and their family. They moved to this accommodation in or about 1989 and continue to reside there as their family home.

The Plaintiff in part rests her claim to a beneficial interest in the lands in Folio 7567, County Kilkenny (which I will call "the Kilkenny lands") on her contribution in cash and kind to the building and furnishing of this family home.

The Plaintiff in her evidence also stated that throughout the marriage she received very little by way of housekeeping money or other contributions to the household maintenance from her husband. By and large, she used her earnings as a nurse to provide

for the day to day expenses of the household while her husband used his monies in operating the farming enterprise both on the Kilkenny lands and on other lands in Laois which he held jointly with his brother P. It appears that the husband and the wife operated virtually separately as far as the finances of the family were concerned. The husband agreed with his wife's evidence in this regard.

The Plaintiff also rests her claim on an assertion that, at an early stage in the marriage and from time to time thereafter, her husband told her that he would put the Kilkenny lands into their joint names. She was unable to give any detail as to dates and times when such an undertaking was given and it was clear that no steps, such as consulting a solicitor, were ever taken to put such an undertaking into effect. She was however adamant that she had relied on her husband's statements and considered herself to be a joint owner of the lands.

The husband, in evidence, gave a much more casual impression of any statement made by him. He admitted that a transfer into joint names "*would have been spoken of*" but that there were many problems "*higher in his head*" than the question of transferring any property to his wife. Under cross-examination, he admitted that he had told the bank in 1986 that he was the sole owner of the lands and that in 1986 he would certainly have regarded himself as being the sole owner.

It should of course also be noted that there is no matrimonial dispute between the Plaintiff and the first named Defendant and there are no proceedings whether pursuant to the Judicial Separation and Family Law Reform Act, 1989 or otherwise between them other than the wife's present claim pursuant to the Married Women's Status Act, 1957. Neither has the wife made any claim to beneficial ownership of a share in the family home (which is held in the husband's sole name) nor to beneficial ownership of any other lands which the husband holds jointly with members of his family.

I now turn to the evidence in regard to the second named Defendant, Barclays Bank Plc, formerly Barclays Bank Ireland Limited. The lands the subject matter of these

proceedings (the Kilkenny lands) were charged by Mr. D. to Barclays Bank by virtue of a Deed of Charge dated the 26th May, 1986.

The charge was granted as part of the security required for a Joint Commercial Loan Account for the first named Defendant and his brother, P. D., who owned lands jointly with him in Laois and apparently farmed with him. The lands in Laois also formed part of the security but the family home of the Plaintiff and the first named Defendant was in no way involved.

The loan from the second named Defendant was not the first involvement in borrowings and indebtedness of the first named Defendant. In his own evidence, he says that in or about the time of his marriage he (or he and his brother) owed a large sum to the Bank of Ireland and it appears that the loan from the second named Defendant was part of a re-financing package for the farming enterprise.

The first named Defendant and his brother defaulted on the loan and the second named Defendant brought proceedings against them by way of Special Summons on 3rd May, 1991 seeking an Order for possession of the Kilkenny lands and the Laois lands and an Order for the sale of the lands in default of payment of the sums then due and owing on the Commercial Loan Account which then amounted to £65,000 odd. There is no need here to detail the proceedings and negotiations which ensued, most of which are irrelevant to the Plaintiff's present claim. In summary, on 14th October, 1991, an Order of Possession over both the Laois and Kilkenny lands was granted to Barclays Bank by Mrs. Justice Denham in this Court. After further unsuccessful negotiations, Execution Orders of Possession issued and were executed, though with some difficulties which gave rise to Orders made by Laffoy J. on 22nd May, 1995 and 15th June, 1995. The position at present is that the bank, in accordance with the Court Orders, has sold the Laois lands but has not at yet sold the Kilkenny lands.

In his Affidavit sworn on behalf of the second named Defendant, Mr. McParland avers that the bank proceedings and the Court Orders were not only served on the first

named Defendant and his brother but also on the Plaintiff for her information. In evidence, the Plaintiff admits that she was served with the documents but says that she neither understood them nor took any notice of them. She regarded them as solely her husband's business. She had enough on her mind what with the children, the household and her employment without having to cope with her husband's difficulties with the bank. However, she does admit that she took some active part in verbal negotiations with the bank's representatives at the family home on the 5th October, 1994, the day of execution of the Order of Possession of the Laois lands. She also concedes that at no stage before the issue of the present proceedings in June 1995 did she in any way indicate to the bank that she had any proprietary claim on the Kilkenny lands. She explains this submission by saying that she was unaware that she had any rights.

THE LAW

Considering the evidence as a whole, it is hard to avoid the conclusion that the Plaintiff's action is more a last ditch effort to rescue some form of asset from the bank than a true dispute between herself and her husband. Nevertheless, it seems proper that the Court should consider, firstly, if she has any sustainable claim on the Kilkenny lands under Section 12 of the Married Women's Status Act, 1957 and, secondly, if she has such a claim, whether her claim can have any priority over the bank's undoubted rights as established in their proceedings against the first named Defendant and his brother.

Section 12 of the Married Women's Status Act, 1957, insofar as it is relevant, provides as follows:-

"12(1) This section applies to the determination of any question arising between husband and wife as to the title to or possession of any property.

(2) Either party or any person concerned may apply in a summary way to the High Court or (at the option of the applicant irrespective of the value of the property in dispute) to the Circuit Court to determine the question and the Court may make such Order with respect to the property in dispute and as to the costs consequent on the application as the Court thinks proper"

During the 1970's and 1980's, a considerable line of case law was developed in this Court in regard to the effect of direct and indirect financial contributions by spouses in acquiring a beneficial interest in matrimonial property. This line of cases stemmed from the decisions of the learned Kenny J. in Heavey -v- Heavey (1974) 111 I.L.T.R. 1 and C. -v- C. [1976] I.R. 254 and developed through the law of resulting and constructive trusts. A clear and authoritative statement of the law in this area is to be found in the judgment of the learned Finlay P. (as he then was) in the case of W. -v- W. [1981] I.L.R.M. 202 at pages 204 to 205. I quote the paragraphs relevant to contributions made by a wife:-

"1. Where a wife contributes by money to the purchase of a property by her husband in his sole name in the absence of evidence of some inconsistent agreement or arrangement the Court will decide that the wife is entitled to an equitable interest in that property approximately proportionate to the extent of her contribution as against the total value of the property at the time the contribution was made ...

3. Where a wife contributes either directly towards the repayment of mortgage instalments or contributes to a general family fund thus releasing her husband from an obligation which he otherwise would have to discharge liabilities out of that fund and permitting him to repay mortgage instalments she will in the absence of proof of

an inconsistent agreement or arrangement be entitled to an equitable share in the property which had been mortgaged and in respect of which the mortgage was redeemed approximately proportionate to her contribution to the mortgage repayments: to the value of the mortgage thus redeemed and to the total value of the property at the relevant time. It is not expressly stated in the decision to which I have referred but I assume that the fundamental principles underlying this rule of law is that the redemption of any form of charge or mortgage on property in truth consists of the acquisition by the owner or mortgagor of an estate in the property with which he had parted at the time of the creating of the mortgage or charge and that there can be no distinction in principle between the contribution made to the acquisition of that interest and the contribution made to the acquisition of an interest in property by an original purchase ...

5. Where a wife expends monies or carries out work in the improvement of a property which has been originally acquired by and the legal ownership in which it is solely in her husband, she will have no claim in respect of such contributions unless she established by evidence that from the circumstances surrounding the making of it she was led to believe (or of course that it was specifically agreed) that she would be recompensed for it. Even where such a right to recompense is established either by an express agreement or by circumstances in which the wife making the contribution was led to such belief it is a right to recompense in monies only and cannot and does not constitute a right to claim an equitable share in the estate of the property concerned."

These principles received the approval of the Supreme Court in the case of **McC. -v- McC.**

[1986] I.L.R.M. 1 in which Henchy J. stated:-

"When the wife's contribution has been indirect (such as contributing, by means of her earnings, to a general family fund) the Court will in the absence of any express

or implied agreement to the contrary, infer a trust in favour of the wife, on the grounds that she has to that extent relieved the husband of the financial burden he incurred in purchasing the house."

The Supreme Court again approved this approach in *N. (E.) -v- N. (R.)* [1992] 2 I.R. 116.

While it is accepted on the evidence of the wife in the present proceedings that she made a substantial direct contribution to either the improvement or the provision of the family home, she has not made any claim to a beneficial interest in that property. Her present claim applies only to the Kilkenny lands. These lands had been acquired by her husband in his sole name in 1972, eleven years prior to the marriage. It is clear that she made no direct contribution to the acquisition of these lands.

With regard to indirect contributions, the wife, by her own earnings and her expenditure of these earnings on the needs of the household, undoubtedly contributed to what the learned Finlay P. described as the "general family fund" and thus freed her husband to use any earnings of his own in the farming business. However, such an indirect contribution could not have resulted in the wife having acquired any interest in the Kilkenny lands between the marriage in 1983 and the date of the bank's charge in 1986 since the husband was already the full owner and the lands at that stage appear to have been unencumbered. By 1986, therefore, the wife had no beneficial interest in the lands resulting from the operation of a trust based on either direct or indirect contributions. If the wife had no proprietary rights in the form of a beneficial interest in the Kilkenny lands in 1986 at the stage when the second named Defendant bank acquired the charge, then the entire ownership of the lands both legal and beneficial was available to the husband to use as security in obtaining his loan from the bank.

The wife also bases her claim on her evidence that her husband on a number of occasions undertook to transfer the lands into their joint names. Even were such an undertaking, without any further steps, sufficient to ground a claim for a half share in the lands,

it seems to me that the husband's evidence does not evince any serious intention to carry out such a transfer at any stage. He is in a sense now willing to cooperate with his wife in order to reduce the bank's claim, but the height of his evidence was that such a thing "would have been spoken of" but he had problems "higher in his head" than that. In cross-examination, as I have said, he was quite clear that in 1986 he regarded himself as the sole owner of the lands. It is also clear from the wife's own evidence that she took little or no interest in the husband's farming activities or in the land until she realised that the second named Defendant was about to take possession of it in October 1994. The fact is that when the bank's proceedings for possession were served on her she did not even read the papers handed to her as she regarded all that as being her husband's and his brother's business and nothing to do with her. This is not the attitude of a joint owner of the lands. Understandably, she felt she had enough to cope with in the household, the care of the children and her profession. Nevertheless, her evidence does not create the impression of one who believed over the years of the marriage that she had a proprietary interest and a half share in the Kilkenny lands. On the evidence, this aspect of the wife's claim cannot succeed.

In considering both these aspects of the wife's claim, one must of course clearly distinguish this type of claim pursuant to the Married Women's Status Act from a claim to a Property Adjustment Order under the Judicial Separation and Family Law Reform Act, 1989 or the Family Law Act, 1995, where the Court is directed to have regard to very many more factors and wider considerations than are possible under the Married Women's Status Act. In the present proceedings, judicial separation is not sought and happily the family remains intact. The considerations relevant to a Property Adjustment Order therefore are not applicable here.

On the evidence in this case, it seems to me clear that both the direct and indirect contributions of the wife went towards the acquisition or improvement and furnishing of the family home and had no relevance to the Kilkenny lands. Her claim to a beneficial interest due to contributions therefore also fails.

Counsel for the second named Defendant also made a number of submissions to me in regard to any possible priority of the wife's claim over that of the bank and, for the sake of completeness, I will also refer to these submissions.

Even if the wife were to establish a beneficial interest in the lands which existed at the time of the registration of the bank's charge, it does not appear to me that such a claim could take priority over the bank's charge. Under the Registration of Title Act, 1964, such an unregistered burden could only take effect and have priority if it came within Section 72 subsection (1)(j):-

"The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof save where upon enquiry made of such person the rights are not disclosed."

At no stage was Mrs. D. in actual occupation of the Kilkenny lands nor did she receive rents and profits from them.

Counsel for the second named Defendant also submitted, correctly in my view, that the Plaintiff was barred from her equitable remedy by her acquiescence in the obtaining of the commercial loan by her husband and in the registration of the charge. The Plaintiff, in evidence, stated that she was unaware of the significance of her husband's borrowings at the time (in 1986) and this may well be so. However, the Special Summons of the second named Defendant was served on her in May 1991 and the Order for Possession in December 1992. At no stage did the Plaintiff indicate to the second named Defendant that she had any claim to the lands or that she considered herself to be a joint owner.

On the 5th October, 1994, lengthy negotiations took place between the representatives of the second named Defendant and the first named Defendant, his brother and the Plaintiff. Although the Plaintiff appears to have taken an active part in these negotiations, she did not in any way assert that she was a joint owner of the lands or had any claim on

them. The first indication of her claim was the issuing of her present proceedings on the 11th June, 1995. As was stated by Lord Wensleydale in Archbold -v- Scully (1861) 9 H.L.C. 360 at 383:-

"If a party, who could object, lies by and knowingly permits another to incur an expense in doing an act under the belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce."

It appears to me that by her failure to put the second named Defendant on notice of her claim at any stage before June 1995 the Plaintiff acquiesced in the situation.

From another point of view, it could also be said that the Plaintiff is estopped by her conduct, including her negligence and silence, from asserting her claim as against the second named Defendant (see Doherty -v- Doherty [1991] 2 I.R. 458, judgment of Blayney J.).

I cannot but feel sympathy for the Plaintiff's financial difficulties, particularly as they seem to have arisen through no fault of her own, but for all the reasons set out above the Plaintiff's claim must fail.