

Neutral Citation No. [2006] NICH 1

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)*

Delivered: **07.03.2006**

2002 No. 2743

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

MARY CATHERINE COPELAND

Plaintiff;

-and-

ALAN KNIGHT

Defendant.

WEIR J

[1] The plaintiff in this action sues as the mother and personal representative of Therese Anne Kelly (“the deceased”) who died intestate on 30 July 2001 at the untimely age of 41 years. Letters of administration were granted to the plaintiff on 29 March 2002.

The Evidence

[2] The deceased was one of a family of seven, five sisters and two brothers. She left school with good ‘O’ Levels and joined the Civil Service where she was as a clerical officer throughout her working life. She married a Mr Kelly and they lived together at the house which is central to the dispute in this action at 105 Upper Lisburn Road, Belfast (“Lisburn Road”). There were no children of the marriage and she and Mr Kelly subsequently divorced. As part of the financial arrangements made upon the divorce the

matrimonial home was in 1995 transferred into the sole name of the deceased and there at that time she continued to reside.

[3] In about 1993 the defendant, who had known the deceased socially through her husband, met her again in the Europa Hotel at a time when she and her husband had parted. At that time he had been separated from his wife for some years. The defendant and the deceased became friendly and ultimately began to stay together either at Lisburn Road or at his home at Rafferty's Hill outside Hillsborough. After some months the defendant noticed that the deceased was drinking to excess and on a few occasions upon returning home found her to be very drunk. He then began to find bottles of vodka concealed, chiefly at Lisburn Road. By 1996 the deceased and the defendant were living most of the time at Rafferty's Hill. The defendant's evidence was that in 1996 they decided to live permanently at Rafferty's Hill and to let out Lisburn Road. Some painting work was done and it was rented to four students. Unfortunately that letting was not successful as the students caused a good deal of damage so that the letting was terminated in or around 1997. Thereafter the property lay vacant for a period and at this time, according to the defendant, the deceased's drinking was much worse with the result that in about November 1997 she was admitted as an in-patient to Shaftesbury Square Hospital.

[4] Evidence in relation to her pattern of alcohol abuse from that point onwards was helpfully provided by a Mr Keating, a community psychiatric nurse specialising in addiction who was responsible for trying to assist the deceased for much of the period between that first referral to Shaftesbury Square and her untimely death less than four years later. Aided by the deceased's clinical in-and-out patient notes and his own recollection of the deceased Mr Keating gave a detailed and moving picture of a lady who, despite the considerable medical support that she received, was unable to successfully address her alcohol abuse. In June 1998 she was admitted to Downshire Hospital for four weeks and at that time there was a note of an interview with her made by one of the doctors saying "difficulties with family - [the defendant] has taken control of the money to help her with drinking." The doctor also noted that she said that she had a good relationship with the defendant. Within two weeks of her discharge from hospital on that occasion she again relapsed. Her pattern of drinking was to drink for a consecutive period of four to five days to the extent of perhaps a litre of vodka per day followed by abstinence for a number of weeks followed by repetition of the heavy drinking. Mr Keating's evidence was that normally he visited her at Rafferty's Hill by appointment and that when he called she was sometimes under the influence of alcohol and sometimes not. When sober he found her a very pleasant woman with a great interest in the house at Rafferty's Hill and the improvements being made to it by the defendant. In May 2000 Mr Keating arranged that she be again admitted to Downshire Hospital and he had no contact with her after that. It is recorded in the hospital notes for that

admission that the deceased told staff that her family thought that the defendant was after her money and that there was conflict between her and her brothers and sisters. She told nursing staff that the defendant was of great support to her. Mr Keating referred to the fact that at his meetings with her one of her bones of contention was that the defendant's ex-wife was living in what the deceased called "her house". This appears to have been a reference to the fact that the defendant had arranged for his former wife to live at Lisburn Road.

[5] Mr Keating's assessment of the deceased during the period between the end of 1997 and the end of 1999 was that she and the defendant were in a relationship and in his opinion people who are chronic abusers of alcohol do depend on someone to look after them. He assessed her as quite trusting and said "she would have put trust in [the defendant]." In his view she was open to exploitation when drinking but was an intelligent lady. Her physical health was also progressively deteriorating as her alcohol dependence continued. He knew that she had lost her driving licence in February 1997 following a small collision, had returned to work in January 1998 following her discharge from Shaftsbury Square but was unable to continue for long and in June 1998 he had noted "returned to work, unable to remain abstinent, again off on sick leave, plans to retire on medical grounds."

[6] While these events were afflicting the deceased's personal life there were developments in respect of Lisburn Road. The defendant says that he asked the deceased whether she wanted to move back to Lisburn Road and when she said that she did not he asked her whether she was going to sell it and she said that she was. According to him the deceased asked him whether he would like to buy it but he replied that he could not afford to. However, within a couple of weeks he apparently felt that he might be able to raise the funds by re-mortgaging Rafferty's Hill. He said that they discussed a price in or around late 1997 and that they looked at prices being sought for other similar houses in the locality and ended up agreeing a price of £59,000 that was to be financed by means of his intended re-mortgage. However, due to the existence of outstanding judgments against him, it proved impossible at that time to accomplish the re-mortgage. Rather surprisingly in view of the impecuniosity that these efforts to remortgage might be thought to indicate, the defendant claimed that instead he then proceeded to finance the purchase by means of cash payments by instalments made to the deceased over a period of some months during 1998 and 1999. These payments were said to have been in Irish punts derived from his business activities as a retailer of furniture in shopping malls around Dublin. According to the defendant he kept a record of these payments by using an old duplicate account book belonging to his business. His practice was, when paying an instalment, to get the deceased to sign the top copy and retain it leaving him with the carbon in the book for his records. He gave evidence that the book was kept in a briefcase which was stolen from his home in 2001 making it impossible for

him to now establish by any documentary evidence that he did make these payments. When asked what the deceased had done with these cash sums the defendant said that she had told him that a sister of hers who worked in one of the banks was going to open an account in the Isle of Man on her behalf or that her mother, the plaintiff in the present action, already had an account in the Isle of Man that could be used. However the defendant admitted that he never confirmed with the deceased that either of these arrangements had actually been put in place nor did he actually know what had become of any of the money.

[7] A matter that is not in dispute between the parties is that on 3 June 1999 the defendant did discharge two outstanding mortgages on Lisburn Road. This was done by way of bank drafts drawn upon the defendant's account with the Ulster Bank at Ballynahinch. The two mortgages totalled £14,092.29. It is further agreed that later that month the deceased received a cheque for £9,367.26 from the Civil Service which was her lump sum on the termination of her employment due to ill health and that this cheque was lodged to the defendant's account at Ballynahinch. The defendant claimed in evidence that the cheque was dealt with in this way at the request of the deceased who asked the defendant to cash the cheque for her in order to avoid its being put through her account in case that might affect her entitlement to state benefits. According to the defendant the deceased told him that she wished to use some of that money to lend 10,000 punts to her brother in Dublin, Mr Billy Copeland, and the defendant asserted that at two separate meetings in the Dublin area he met Billy Copeland and gave him first 6,000 punts and subsequently 4,000 punts. He said that in order to make up the difference between the amount of the cheque and the lesser value of the punt payments made to Mr Copeland he gave the deceased £1,500 in cash but, as with the instalments paid to her in respect of Lisburn Road, he did not actually know what she had done with it. Mr Billy Copeland denied in evidence that the defendant had paid him any sum.

[8] After the building society mortgages had been discharged in June 1999 a Mrs Marion Murphy, a conveyancing clerk in the firm of Messrs Madden & Finucane, Solicitors, was instructed to prepare a Deed of Assignment of Lisburn Road from the deceased to the defendant and she did so. Mrs Murphy gave evidence but, although she was very willing to assist the court and in my view strove to give her evidence honestly, her recollection of the details of this transaction after the passage of time was very incomplete. Furthermore, although her file of papers relating to the matter was produced it was I regret to say, so badly kept and so incomplete that it was quite impossible for the witness to accurately reconstruct the course of the transaction and I do not consider that I could reliably draw any conclusions as to the precise, or even the approximate, sequence of events surrounding it. One thing which is clear is that she was asked to act on behalf of both the deceased and the defendant and did so. It appears that at some stage and in

some manner that it is also impossible to identify, the Deed of Assignment found its way from Madden and Finucane to the deceased and that the deceased signed it following which, in some again uncertain manner, it made its way back to the solicitors. It purports to have been witnessed by a Mr Richmond who was apparently a carpenter doing work at Rafferty's Hill at about the time of its execution, although even that date cannot be ascertained with any precision since Mrs Murphy does not know how or when she came to put the date "20 September 1999" on the Deed. Furthermore, although her name appears as a witness to the signature of the deceased Mrs Murphy's evidence was that she did not in fact witness it and must have added her name subsequently and she knew nothing about the other witness. Her evidence was that if the deed had been witnessed in her office the witnesses would have been from within the firm and it was that that caused her to believe that the deed must have left the office for the purpose of being executed by the deceased. There was no dispute that the signature upon the deed is in fact that of the deceased.

[9] It was agreed by Mrs Murphy that the deceased received no independent advice nor was she advised to obtain such. Mrs Murphy said that she was concerned that the house was being sold at an undervalue but that the deceased had told her that it had already been done and she frankly agreed that she did not advise the deceased as to what steps she could take if the house had been sold at an undervalue and said that with hindsight she should have alerted someone but did not. She agreed that she never sought any evidence that the purchase money had been paid to the deceased by the defendant. She further confirmed that at the time of this transaction the threshold for stamp duty was £60,000.

[10] There was valuation evidence on behalf of the plaintiff from an estate agent, Mr Samuel Dunlop, who said that he had been asked in July 2003 to provide a valuation of Lisburn Road as at June 1999. He had not had an opportunity to inspect the property internally but had "walked past it". His valuation was one of £85,000 but he readily agreed in cross-examination that the internal state of the property is relevant to value and that his valuation was based upon the assumption that the property was in the same state in 1999 as when he saw it in 2003. On being shown a list of improvements totalling £20,000 which the defendant claimed to have carried out after his purchase Mr Dunlop's view was that in 1999 and prior to such works being carried out the value would have been about £70,000 to £75,000.

[11] The defendant was closely cross-examined by Mr Mark Orr QC on behalf of the plaintiff as to the source of the cash which he claimed to have paid either to or on behalf of the deceased. Mr Orr was assisted in his task by the availability of accounts prepared by a firm of chartered accountants acting on the defendant's behalf showing the monies available to him during the period when he claims to have made these payments. He acknowledged that

the information contained in the accounts had been provided by him to the accountants for the purposes of enquiries raised by the Inland Revenue. Mr Orr asked the defendant to demonstrate from those accounts where he could have obtained the substantial amount of cash that he claimed to have paid to the deceased in the months between October 1998 and June 1999 but the defendant was quite unable to do so. It is important to note that these accounts purported to include all unlogged cash receipts by the defendant throughout a three year period that included the critical period in question. Asked how the price of £59,000 was arrived at, the defendant said that he believed that they had walked up and looked in the window of a local estate agent. He agreed that neither of them had any independent advice as to value nor was any valuation obtained. He said that it was mentioned between them that the stamp duty threshold was £60,000 and that a price over the threshold would attract stamp duty. He agreed that documents produced showed that he had sold the house to his son in July 2001 for £140,000 although his memory was that the consideration was £135,000. In his view that was the market value at that time with the benefit of the works of repair and improvement that he had meanwhile undertaken. He also gave evidence that an extension that had at some time been constructed to the rear of the house did not have the benefit of planning permission or building regulation approval and that those matters had had to be rectified retrospectively after he became the owner. He further agreed that in August 1999, as appeared from a letter on the Madden and Finucane conveyancing file, he was endeavouring to raise funds from the Ulster Bank on the security of Lisburn Road and he believed that he was in fact given an increased facility on his account on the strength of that security.

Submissions of Counsel

[12] Mr Orr firstly contended that the court should be satisfied that the defendant did not at the material time have the funds to make the payments to the deceased which he claimed to have done. In those circumstances he submitted that the starting point was that the defendant was liable to the estate of the deceased for at least the net sum to be arrived at by deducting from the £59,000 consideration the payments made by the defendant to discharge the mortgages but adding back the amount of the cheque in respect of the severance payment made to the deceased by her employer which the defendant admittedly lodged to the credit of his own bank account and which Mr Orr submitted the defendant had not repaid to or to the order of the defendant as he claimed. Mr Orr submitted that on this approach the net sum due to the estate at whatever was found to be the date of the assignment was a net £54,264.97 to which interest at court rates should be applied. What the actual date of the assignment should be taken as is a matter of some conjecture since the papers including the conveyancing file suggest a number of possibilities.

[13] Mr Orr's second submission was that the evidence establishes that £59,000 was an undervalue and that in this case there was undue influence and an unconscionable bargain. If either of those submissions were accepted then the court should as a minimum substitute what it found to be the correct market value and could also order an account of profits made by the defendant arising from his admitted sale of Lisburn Road to his son in 2001 at a price of £140,000. He relied upon the principle enunciated by Dunn LJ in O'Sullivan v Management Agency and Music Limited and Others [1985] 3 All ER 351 at 365H namely:

"..... the court can achieve practical justice between the parties by obliging the wrongdoer to give up his profits and advantages, while at the same time compensating him for any work that he has actually performed pursuant to the transaction."

[14] Mr Power in the course of his realistic submissions on behalf of the defendant acknowledged that his client had been unable to demonstrate to the court from his accounts the source of the claimed cash payments. He did not dispute Mr Orr's submissions as to the law of undue influence and the making of unconscionable bargains but submitted that in a situation such as this where two people live together in a relationship it is extremely difficult to delve into the detail of the relationship. In his submission, even if I were to make a finding of undue influence or the existence of an unconscionable bargain the correct consideration should not be presumed to be the figure of £70,000 to £75,000 identified by the expert witness because, apart from anything else, the witness had not seen the property in its actual state at the time that the agreement was made and also because the agreement was made in 1998 and not 1999 which was the year to which the witness's evidence related.

Conclusions on the facts

[15] I am satisfied that the deceased did agree to sell Lisburn Road to the defendant for the sum of £59,000 and that at the time when she did so she was in a depleted physical and mental state and was heavily dependent upon the defendant for physical and emotional support and was living under his roof. I am satisfied, indeed it is not disputed, that she did not at any relevant time have any independent advice either as to the advisability of selling or as to the appropriate price. There is no corroboration that the defendant paid anything more than the sums required to redeem the two mortgages and in particular that he paid the balance in Irish punts in cash instalments directly to the deceased. Indeed, as Mr Orr convincingly demonstrated by his detailed cross-examination, all the evidence provided by the defendant as to his financial circumstances at the material time points towards his inability to make such payments. Contrary to the rather black picture which the

deceased's brother sought to paint of the defendant in his evidence, I have reached the conclusion that in 1998 and 1999 the defendant continued to feel considerable affection for the deceased and showed a real concern for her welfare. Independent confirmation of this was provided by Mr Keating. In those circumstances I cannot suppose that the defendant would have repeatedly handed large sums of money in cash to the deceased at a time when she was to his knowledge habitually and uncontrollably drinking to excess with serious consequences for her health. For all these reasons I am satisfied that the defendant did not pay to the deceased the balance of the agreed sum of £59,000 nor did he repay the superannuation lump sum either in the manner that he described or otherwise.

[16] With regard to the value of the property at the date of sale I consider that the figure of £59,000 was chosen, not as the true value, but in order to keep the consideration below the stamp duty threshold. I am reinforced in this conclusion by the evidence of the defendant that he thought that the deceased would have felt that if there was a profit when all the work had been done she could expect to receive something out of it if they were still together. I am also satisfied, notwithstanding the presence of the standard receipt clause in the Deed of Assignment from the deceased to the defendant that the monies acknowledged by that clause to have been received were not in fact received by the deceased. The only witness in this action who claims to have been present when the deceased executed the deed was the defendant. His evidence relating to the execution was vague and he certainly did not suggest that any effort was made to explain to the deceased in any effective way the purport of what she was signing. Finally I have concluded, notwithstanding the absence of any vouching documentation other than the accounts previously mentioned for which the defendant was the source of the information, that the defendant did expend a sum of the order of £20,000 in improving Lisburn Road between the date of his acquisition and its later sale by him.

Decision

[17] This is in many ways a sad case. I am satisfied that the defendant genuinely cared for the deceased and that they had a close and loving relationship, at least until the point when, as the defendant described it, they reached a cross-roads following the deceased's discharge from Shaftesbury Square Hospital at the end of 1997 and she quickly resumed her excessive drinking. Thereafter the defendant chose to stay more frequently in Dublin when he had finished his day's business but I am satisfied that he continued to care for and about her. I am also satisfied that the deceased became progressively more dependent upon him as her addiction became more entrenched and her ability to function normally declined in tandem as evidenced by the loss of her driving licence, her employment and her general health. It was against that general background that the agreement to sell

Lisburn Road was made and I have concluded that at that point the defendant had, to borrow from the description in Snell's Equity, 31st ed. at para. 8-12, acquired over the deceased a measure of influence, or ascendancy, of which he then took unfair advantage. I am satisfied that at the time when this arrangement was made between them the deceased in her weakened state and without the benefit of any independent legal or valuation advice agreed to a course of action proposed by the defendant. I am also satisfied that the defendant took advantage of that dominant position by preferring his own interests to those of the deceased. Indeed he partially admitted that this was so in that he agreed that the purchase price of £59,000 was less than the full value and was dictated by the stamp duty threshold. When the defendant told me that the deceased might have felt that at a later stage when work had been done to the house and if the defendant had made a profit he would give her something out of the profits it may be that that was his thought rather than hers. In either event she did not receive any such share.

[18] It is difficult to estimate accurately the correct value of Lisburn Road at the date when the deceased agreed to sell to the defendant or to know with any precision when the figure was agreed. Bearing in mind that the valuer's estimate of the 1999 value was based upon a "walk by" in 2003 and that he cannot have been aware of the fact that there was no planning permission or building regulation approval extant for the rear extension, which situation subsequently had to be cured nor that the works of improvement had not been carried out at the time, doing my best on the evidence available I assess the true market value at £65,000.

[19] Turning to Mr Orr's second head of claim, namely that the defendant should be obliged to account for profit that he made as a result of the acquisition but giving credit for expenditure by him in bringing the house up to the condition in which it was at the date of sale to his son for £140,000, I have concluded that there is insufficient evidence to enable me to reach a conclusion in favour of the plaintiff. In the first place there had been an undoubted rise in the housing market between 1998 and 2001. Secondly the expenditure of the £20,000 by the defendant on repairing and modernising the property together with his work in regularising the defective planning and building regulation situation on the rear extension means that in my judgment it is quite impossible to say with any degree of confidence whether and, if so, to what extent the defendant benefited over and above the benefit that he undoubtedly received from his acquisition at an undervalue.

[20] I therefore order that the estate of the deceased is entitled to receive £65,000 less the sum of £4,725.03 being the net credit due to the defendant, a sum of £60,274.97. That sum will carry interest at the court rates prevailing from time to time from 8 June 1999 which I have concluded was the date of the sale. The defendant will pay the plaintiff's costs of this action to be taxed in default of agreement.

