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

Ref:	**McCL7893**
Delivered:	**28/10/11**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

IN THE MATTER OF THE PARTITION ACTS 1868 AND 1876

BETWEEN:

THE LAW SOCIETY OF NORTHERN IRELAND
(as Attorney of A)

Plaintiff:

-and-

B

Defendant.

McCLOSKEY J

I INTRODUCTION

[1] The protagonists in this litigation are :

(a) The Law Society of Northern Ireland ("*the Society*").

(b) A, formerly a partner in the firm of C, Solicitors.

(c) B, wife of A.

The Society was appointed attorney of A, by order of the court dated 6th November 2008.

[2] By originating summons the Society, *qua* attorney of A, seeks an order for sale of the family home, in lieu of partition thereof, pursuant to the Partition Acts 1868 and 1876, coupled with all necessary and consequential directions, accounts and enquiries. It is the Society's case that A and B were formerly joint legal and beneficial owners of the family home. Their assumed joint legal title was severed by virtue of the Society charging A's interest, with the result that they are now, it is contended, tenants in common in equal and divided shares. The Society was appointed attorney of A in circumstances where A was suspended from practice and has been the subject of disciplinary proceedings, now completed, relating to alleged financial irregularities and improprieties, concerning particularly the handling of clients' monies. It is against this background that the court ordered that the Society be appointed attorney of A pursuant to paragraph 22A of Schedule 1 to the Solicitors (Northern Ireland) Order 1976, thereby empowering the Society to exercise any of the powers enshrined in Article 23 which include, per paragraph (5), the power:

> "*to manage, let, sell, mortgage, charge or otherwise dispose of and convey, assign, transfer, surrender, sub lease or grant in fee any property whatsoever of the solicitor or in which he has any estate, title, right or interest or any part thereof on such terms and conditions as the Society think fit*"

The attorneyship proceedings represent the first stage in the litigation saga which has unfolded.

[3] The Society now invokes the provisions of the Partition Acts 1868 and 1876 and seeks an order for sale (in lieu of partition) of the family home. Section 3 of the 1868 Act empowers the court to grant this relief. It provides that if it appears to the court that a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property -

> "*…the court may, if it thinks fit, on the request of any of the parties interested and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly and may give all necessary or proper consequential directions*".

Section 4 is engaged in circumstances where one of the parties owns one moiety or upwards in the property to which the suit relates. It provides:

> "*In a suit for partition, where … a decree for partition might have been made, then, if the party or parties interested, individually or collectively, to the extent of one moiety or*

upwards in the property to which the suit relates request the court to direct a sale of the property and a distribution of the proceeds instead of the division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly and give all necessary or proper consequential directions".

Thus, in a case to which Section 4 applies (such as the present), the qualifying phrase "*unless it sees good reason to the contrary*" invests the court with a discretion to refuse to make an order for sale.

II THE EVIDENCE

The Mortgages

[4] Much of the evidence considered by the court in this matter is contained in affidavits filed by both parties. These were supplemented by the sworn evidence of B, to which I shall make particular reference *infra*. I begin by rehearsing certain uncontested facts of a basic nature:

(a) The family home was purchased in 1990, with the assistance of a mortgage of almost 100%.

(b) It was remortgaged some nine years later pursuant to a mortgage dated 24th August 1999 in favour of Woolwich PLC ("*the Woolwich mortgage*"), designed to finance professional liabilities and/or a private business venture undertaken by A, in the amount of some £300,000.

(c) From 25th September 2002, the family home was subject to a further mortgage in favour of Future Mortgages 1 Limited ("*the Futures Mortgage*"). This further mortgage had the same purpose and effect, the amount on this occasion being some £81,000 (including insurance policy commitments).

(d) By further mortgage dated 25th August 2009, A purported to demise to the Society "*all such estate, right and interest as the mortgagor has in the Property* [the family home]". This was immediately registered by the Society as a charge against the family home.

The evidence establishes that from early 2003 for a period of some four years the money required to finance the mortgage repayments originated from the accounts of Messrs. C, Solicitors. Since 2007 the mortgage repayments (exceeding £3,000 per month) have been funded by members of B's family.

Other Financial Liabilities

[5] As this litigation progressed, the Society's assertions about A's debts evolved. Ultimately, it was averred that these consist of the following (in round terms):

(a) The Society's costs of the intervention: £64,000.

(b) Tax debt to HMRC: £62,000.

(c) VAT debt to HMRC: £5,300.

(d) Unpaid excess on the "Chambers claim": £24,000.

(e) Total excess calculated on notified claims: £171,000.

(f) Claim by D on the partnership account: £764,000.

(g) Claim by D for payments to "Indemnis": £194,000.

Thus it is suggested that A currently has relevant debts totalling approximately £1.28 million. It is accepted that the partnership debts (by some measure, the largest individual component) have not yet been audited or verified. While the submission on behalf of B that this schedule cannot be viewed as a final reckoning has some merit, it is undisputed that A has concrete financial liabilities in excess of £300,000: see (a) – (e) above. The court notes the possibility that, in the final reckoning, there might be some modest balancing in favour of A.

[6] Although the Society has a statutory charge on the former partnership premises, it is suggested that, having regard to current valuations, this property has little or no equity by virtue of a prior mortgage. At the final stage of these proceedings, it was represented to the court, unchallenged, that D is now a declared bankrupt and that the trustee in bankruptcy has written off the partnership premises as, effectively, a worthless asset. The estimated value of the family home has oscillated with the passage of time. In the attorneyship proceedings, A swore an affidavit suggesting that the asking price was £1.4 million. At a later stage, a valuation of £975,000 materialised. At this juncture, the evidence is to the effect that the estimated value of the family home has shrunk to £700,000, to which certain economically realistic caveats must be attached. As outlined above, the family home is subject to two mortgages and the current debts to the building societies concerned total some £482,000. Repayments have continued, with the result that the mortgage arrears are not increasing. The equity in the family home is, therefore, somewhere in the region of £200,000. Based on the Society's investigation of A's affairs, it is averred that the only substantial asset held by him is his interest in the family home. This is uncontested. On behalf of the Society, the following averment in the affidavit of A (sworn in the attorneyship proceedings) is highlighted:

> *"Along with my wife A I jointly own the family home …"*.

The family home consists of a dwelling house, some external office accommodation and grounds and, by virtue of its nature and characteristics, would not be suitable for partition. This too is uncontested.

[7] HMRC, in an attempt to realise its tax debt, brought bankruptcy proceedings against A. These were opposed by the Society, as attorney of A. The proceedings were ultimately compromised on the basis of the Society undertaking to HMRC in the following terms:

> *"The Law Society … undertakes to the Petitioner to pursue all reasonable steps to procure a sale of the debtor's dwelling. In the event that the property is sold, the Attorney will, after discharge of all secured debts, and debts having statutory priority, apply the remaining proceeds to the petition debt provided that the debtor is solvent at the time such proceeds come into the attorney's possession"*.

It was represented to the court that this undertaking stimulated the conditional withdrawal of the bankruptcy petition, with HMRC reserving a right to reinstate same. While these proceedings became unexpectedly protracted, no reinstatement of the bankruptcy petition against A has occurred to date.

[8] The case made in the Society's affidavits is that even if the court orders a sale of the family home, thereby realising A's 50% interest, there is a real risk that, in the ultimate financial reckoning, there will be a financial shortfall giving rise to a compounding with A's creditors generally. This claim is based upon , *inter alia,* the following averments in the fourth affidavit sworn by the Plaintiff's principal deponent:

> *"I am further advised by Marsh Claims Limited who are the claims handlers for the Law Society of Northern Ireland Master Policy that the excesses due in respect of notified claims amount to £171,500. This again would be a joint and several liability with the other partners …*
>
> *I have been provided with a schedule prepared by Harbinson Mulholland, Chartered Accountants, on behalf of D, the solicitor's former partner. This document suggests that in the winding up of the partnership, there is a claim by D against the solicitor for an amount in excess of £760,000. Despite requests we have not yet received clarification as to the composition of this count."*

No claims have been notified by any creditor to A. Nor has any creditor initiated proceedings against him, to date. In their letter dated 1st April 2009 to D, Harbinson Mulholland state:

> *"Please note that we have allocated the capital account of A to be an asset on the balance sheet as at 1st October 2007. You will note that this balance is £764,255 at 31st December 2008 and the accounts assume that this balance is recoverable in full."*

A is described as a *former* partner, who retired from the partnership on 30th September 2007. It would appear that the accounts for the period in question (15 months, ending on 31st December 2008) remain in draft. The Society's affidavits contain the following averments:

> *"In the course of defending the Plaintiff's application for a power of attorney, D offered to make available to the Plaintiff the value of his share of the equity in his home. It appeared that the full value of his equity was £140,000 at its height. In order to realise that the Plaintiff would have had to await sale of the property and face the inevitable delay in dealing with E interest and the Plaintiff was subject to the vagaries of the current property market. Instead, D raised a loan of £150,000 from his brother-in-law secured against his home and paid that sum in its entirety to the Plaintiff. The Plaintiff has used that sum to discharge liabilities of the practice, in particular counsels' fees and a liability to a former client."*

The Attorneyship Proceedings

[9] By order dated 15th November 2008, the Society was appointed attorney of A and D under the Solicitors (NI) Order 1976 ("*the 1976 Order*"). By letter dated 3rd June 2009, addressed to B, the Society's solicitors stated:

> *"It has now become clear that to deal with your husband's creditors and protect his former clients, it will be necessary to realise funds from his share of the equity in your matrimonial home. It is our client's intention to instruct estate agents to place the property back on the market and we write now to request your consent to this course of action. Given the consequences this will have on yourself, we respectfully suggest that you immediately instruct solicitors to advise you. Please deal with this matter urgently as if we do not receive your consent to this course of action within seven days we shall have no alternative other than to issue partition proceedings to sever your interest from that of your husband's in the property"*.

Within twenty-four hours, a letter bearing B's signature, dated 4th June 2009, was prepared in reply. The two main themes of this letter are, in my view, resistance and enquiry. The letter stated, *inter alia*:

> *"I note this is not a power of attorney over my affairs …*
>
> *I believe it would be ultra vires the power of attorney to deal with the matrimonial home when I have a legitimate substantial interest in same."*

By letter dated 24th July 2009, the Society's solicitors rejoined, distinguishing between A's asserted interest in the matrimonial home and that of B. This was followed by a letter dated 27th July 2009, in reply, again bearing B's signature. Notably, in the first of these letters, the author expressed an unambiguous intention to instruct "*my own solicitors regarding my and my family's interest in the matrimonial home*", while the second letter made reference to "*my own advisers*". The next material step, chronologically, consisted of initiation of these partition proceedings by the Society, on 13th August 2009. On 11th September 2009, the Society's solicitors wrote to Messrs. Henvey Solicitors (who remain on record for B) for the first time: this firm does not appear to have featured in events previously. On 22nd September 2009, Messrs. Henvey entered an Appearance for B.

B's Affidavits

[10] On 28th January 2010 B swore the first of her three affidavits in these proceedings. This first affidavit is to the effect that she has been married to her husband for a period of just under thirty years and there are nine children of the family, with ages ranging from ten to twenty-eight years, seven of whom continue to live in the family home. She is a teacher by profession and, unsurprisingly, did not work during substantial periods of the marriage. She further avers that the family unit –

> *"… has been devastated by the collapse of my husband's professional life. The pressure of same has at times been almost on the verge of being intolerable and I have serious concerns as to the potential effect of losing our family home at this juncture upon our personal family lives, my own health and the welfare of our children particularly given the ages and the stages of education which the younger children have reached. It should be noted that I have not had a holiday since 2001"*.

The A/B family have occupied their present home since its purchase in 1990 and it has consistently been the subject of heavy mortgages, for the reasons given. It was purchased for £165,000, with the assistance of a very large mortgage. The 1999 Woolwich mortgage was raised for the main purpose of meeting her husband's professional and business liabilities of around £300,000. B further avers:

> *"I would be entitled to a large majority, if not all, of the equity in the matrimonial home"*.

Since 2007 the mortgage repayments have been funded by loans to B from family members. Other evidence suggests that during recent years she has had a modest, though not guaranteed or continuous, income of around £1,500 per month as a supply teacher.

[11] As these proceedings evolved, further affidavits, incorporating substantial documentary exhibits, were served on behalf of the Society. In due course, the case was listed for trial on 22nd June 2010. B was then represented by senior counsel, Mr. O'Hara QC, for the first time. Mr. O'Hara applied to the court for an adjournment on the ground that he had just received further instructions of a highly significant nature from his client. An adjournment was granted and, in compliance with the conditions thereof, B swore a second affidavit. In this, she, firstly, elaborated on the circumstances in which the mortgage on the family home was first substantially increased, to meet a pressing liability in the C practice *and* to finance a private business venture which her husband was developing. Some three years later, her husband raised the question of further borrowings to finance this venture. The affidavit continues:

> *"What I did know was that my husband was carrying too much of the burden in C and the prospect of losing a lot of money with Indemnis. He was more and more withdrawn and obviously stressed, pressured and unwell. I feared that if I did not go along with him on his plan to raise more money, his life might be at risk from himself. However, I was also terrified of the amount of money which the mortgage on our home would be extended to …*
>
> *Despite my anger and resentment at the position which I was in I also had to consider how good my husband was and is to me as his wife and to our children as their father. He worked all the time for us. He did not spend extravagantly on himself or take big holidays or buy expensive cars or eat or drink lavishly. I could not face the prospect of not agreeing to borrow more money and my husband then taking his life – that would have left me to explain to our children that their father died because of my refusal to agree to the mortgage being extended …*
>
> ***After weeks of tension, arguments, emotion and serious thought I told my husband that I would sign the documents to extend the mortgage on the condition that this new debt with Future Mortgages combined with the Woolwich mortgage brought to an end his interest in our family home. I made him agree to this in order to protect myself and our children from any attempt to claim our home in the future. Once my***

> ***husband agreed to this, I signed the necessary papers and told my husband that he was not to come back to me at any time in the future looking for more money to be released from the house because it could not and would not be given."***

[My emphasis].

Accordingly, in her second affidavit, B made the case that in 2003 she and her husband had agreed that he would relinquish to her the entirety of his interest in the family home. The affidavit continues:

> *"I have been advised and accept entirely that the matters which I have addressed above ought to have been explained in my first affidavit. However, when I consulted with the lawyers who were representing me in early January with a view to giving instructions for that affidavit, I did not know the solicitor and junior counsel who were representing me. If I had known them, then I would have felt less constrained about setting out what I have explained above. It is difficult for me, even now, to convey in words the feelings and emotions that I felt at that time and at the present. There was and is a mixture of shame, embarrassment and disbelief that I face the prospect of losing our family home. I regret that my emotions prevented me from giving the instructions to my legal team in a complete way. While I apologise for that, I still find it difficult to cope with the indignity of having to explain to strangers what I consider to be hugely private matters …"*

The advent and content of this affidavit resulted in B being cross-examined at the trial.

<u>B's Sworn Evidence.</u>

[12] When the trial resumed, B was cross-examined. She explained in some detail the circumstances in which the agreement asserted by her had been made, elaborating on the contents of her second affidavit. The thrust and flavour of B's sworn evidence are best captured by reproducing *verbatim* certain of her replies:

> *"I considered it a binding, lifelong agreement between my husband and me …*
>
> *We both came to it with free will …*
>
> *It was a very important agreement …*

I considered that the house was not mine …

My husband accepted this … he had run up debts regarding the family home – I left him in no doubt – he had gone too far …

I told him that he had previously taken more than his share from the family home …I wanted to keep my home safe for myself and my children … My home is a sanctuary for my children and me …

I told him he was losing all his share in the home if I was to sign the Future Mortgages documents …

There was a clear understanding – he did not own the family home any more – it was my house …

He was completely happy that he got the money – it seemed to lessen his anxiety – he said he understood that he no longer had any share in the family home …

It was a firm and binding and private agreement between my husband and me. We trusted each other – I did not need to formalise it – I did not want other lawyers to know about our private business…

I felt that as I was the owner of the property I would take responsibility for making the home safe …"

B testified that, consequent upon this agreement, she took two steps in particular. Firstly, she opened a bank account in her own name for the first time since she had been married. Secondly, she arranged to work as a teacher with as much frequency as possible.

[13] It was put to B that her evidence about the agreement was not credible in light of her failure to make this case on earlier occasions when clear opportunities arose – particularly in the context of correspondence to and from the Society, the initiation of two sets of legal proceedings and the swearing of her first affidavit. It was further suggested that the case now made is inconsistent with certain earlier letters noted in paragraph [9] above. B's replies included the following:

"This was a very upsetting time …

There was an avalanche of letters arriving on a daily basis …

> *I was trying to get my head around all this. I felt in a very hopeless situation …*
>
> *I was fighting with myself and wrestling with things …*
>
> *I am a very private person …*
>
> *The agreement between my husband and me was very private. There was a lot of husband and wife dispute and hurt … I felt very embarrassed, humiliated …*
>
> *The whole circumstances of the agreement were so upsetting, a private matter. I felt I could not put this in the public arena. Only the most trusted and special people knew about this …*
>
> *I was living from day to day. I was just surviving, really. My priority was to preserve the mental and physical wellbeing of my family … I was the leader … there was a multitude of factors, more important than a house …*
>
> *I was just scrambling around trying to find out information, trying to find out what was going on … I was mentally paralysed. The letters from the Law Society were very frightening …*
>
> *I just hoped all the problems would go away … They were coming from every angle … They were more than I could cope with. I was desperately trying to carry on. Our family was exposed, it was the talk of the legal community … I was at the end of my energies …*
>
> *After my husband's heart attack* [one year later] *I made a commitment to myself not to mention the agreement again … I wanted to draw a line under that episode of my life.*"

When asked about the failure to make this case in her first affidavit, B replied, *inter alia*:

> "*At that time I trusted no one, because my family had been so badly abused …*
>
> *It was very embarrassing and humiliating and hurtful … I didn't entrust my private business or the secrets of my marriage to anyone … I closed in, I was suffering so much …*

I wasn't even aware I hadn't told [my lawyers] *about the agreement – but I had blanked it out …*

After time, I began to trust them somewhat …

It upset me to have to divulge the agreement … it was so hard to part with it."

[14] B also gave evidence about the circumstances in which the family home came to be placed on the market for sale, in 2008. At that stage, the mortgage repayments were being made with money provided by her mother and sisters. B did not wish this to continue and, following discussions with her children, she went to the estate agent and arranged for him to visit the property and take photographs. In total, she went to the estate agent's office around four times. Her evidence was:

"*I placed the family home on the market for sale … it was my house that I was selling*

It was not a matter for my husband …

It was a decision for me and the children …

I told him I was doing it, but not to gain his permission …"

B testified that over one year later, no firm offers having been received, the house was taken off the market. The proposed sale had been extremely upsetting for the children and her sisters had agreed to maintain the mortgage repayments as this would further the education and emotional and mental health of the children.

III THE PARTIES' ARGUMENTS

[15] The Society's contentions are helpfully reduced to three basic propositions:

(a) The family home is owned beneficially and legally by A and B in equal shares.

(b) There is no reason why the amounts charged against this jointly held asset, of almost £400,000, should accrue against A's share alone.

(c) A's demonstrated legal interest in the family home entitles him to an order for sale in lieu of partition.

Notably, each of these propositions rests on the contention that A and B are joint legal and beneficial owners of the family home. As regards Convention rights, it is accepted by Mr. Maxwell that the remedy sought by the Society will interfere with B's rights under Article 8 ECHR and Article 1 of The First Protocol, together with her children's rights under Article 8. There is no dispute between the parties about the

legitimacy of the aim sought to be achieved by the remedy of a sale order, namely satisfaction of B's creditors. Furthermore, such order would plainly be in accordance with the law. Thus the issue becomes one of proportionality. Mr. Maxwell's submission is that the interference is no more than is necessary for the purpose of achieving the aims in play and, indeed, will not result in establishing a sufficient fund for those purposes. Reliance is placed on ***In the Matter of a Solicitor*** [2004] NICH 2. The Society's submissions also draw attention to *A's* rights under Article 1 of The First Protocol, bearing in mind that the Society is (merely) A's attorney in bringing these proceedings and A jointly owns the family home with his wife, legally and beneficially, in equal shares. It is acknowledged that the requirements of proportionality should be reflected in the imposition of a suitable stay of execution of the court's final order.

[16] It was submitted robustly on behalf of the Society that the court should reject B's claims about the 2002 agreement. It is accepted that this entails an issue of credibility, to be determined by the court on the basis of all the evidence. The Society's case is that B's evidence about this matter is contrived and untruthful. The Society's primary riposte to the 2002 agreement asserted by B is that fails for want of credibility. It was contended, bluntly, that B's evidence about this matter should be rejected as untruthful. It was further submitted that any such agreement is unenforceable by virtue of Section 2 of the Statute of Frauds and is not redeemed by part performance, as the payment of money is insufficient in this respect. Mr. Maxwell further argued that the equities now raised by B are defeated by the doctrine of Laches. It was submitted that the period of limitation for enforcement of an oral contract is six years dating from the breach, with the result that the limitation period has now expired. It was further submitted that B is in any event estopped from asserting a proprietary claim to her husband's interest in the family home at this remove. Finally, Mr. Maxwell argued that under Section 4 of the Registration of Deeds Act 1970 the charge registered by the Society against the family home on 25th August 2009 (on notice to B) takes priority over the claim now asserted by her.

[17] On behalf of the Society, Mr. Maxwell, while acknowledging that Section 4 of the 1868 Act invests the court with a discretion, submits that this places a burden on the resisting party which has not been discharged. The position of the Society is compared to that of a receiver or a trustee in bankruptcy. In the absence of either divorce or separation proceedings, no question of applying for ancillary relief arises, with the result that the respective equitable interests of the parties must be determined in accordance with case law and the principles of equity. It is further submitted that, *prima facie*, the legal and beneficial interests of the parties in the family home are joint and equal. Relying on ***Stack –v- Dowden*** [2007] 2 AC 432, it is contended that B has failed to discharge the burden of establishing a common intention of the parties that their beneficial interests in the family home would differ from their legal interests. Objectively, evaluating the entire relationship of the parties, no such intention is established inferentially.

[18] The submissions of Mr O'Hara QC and Mr. McNamee, on behalf of B, reflect initially the complaint advanced in her affidavit about the paucity of financial information. They also highlight the engagement of B's rights under Article 8 ECHR and Article 1 of The First Protocol thereto each of which is, of course, a protected Convention right under the regime of the Human Rights Act 1998. In accordance with Section 6 of this enactment, the court must not act in a manner incompatible with any of the protected Convention rights. It is submitted that B can lay claim to each of the rights in play, while the Article 8 rights of other family members are also engaged. It is further submitted that the relief pursued by the Society would interfere with B's enjoyment of these rights, thereby giving rise to issues of legitimate aim and proportionality. The legitimate aim in play is characterised as the avoidance of A's bankruptcy and is attacked on this basis, independently, it is submitted, having regard to her asserted equitable interest and the impact which this would have on her family life.

[19] Mr. O'Hara's submissions draw attention to the ever escalating mortgage relating to the family home. In 1990, this was almost £160,000. By 1999, it had almost tripled, to a sum in excess of £400,000. In September 2002, this increased to almost £500,000. Mr. O'Hara further submitted that it is inherently plausible that B, in 2002, took steps to secure the whole of the family home for her benefit and that of her children, having regard to the increasingly parlous financial activities and circumstances of her husband. It is argued that, objectively, the agreement asserted by B is unsurprising. Furthermore, the mortgage repayments during the period 2003 – 2007 were characterised by Mr. O'Hara as the actions of a responsible and self-respecting husband and father whose conduct had placed the sole family asset (the matrimonial home) in grave jeopardy and had created acute matrimonial tensions and strains. It was submitted that A had a real and obvious interest in ensuring that this asset was preserved and, in particular, that a home remained available for his wife and children. Such conduct, it was submitted, is not inconsistent with the transfer of interest in 2002 asserted by B.

IV CONCLUSIONS

Ownership of the Matrimonial Home

[20] Bearing in mind the issue which became the centrepiece of these proceedings, the applicable legal principles are contained in ***Stack –v- Dowden*** [2007] 2 AC 432. In that case, by a majority, the House of Lords held that where a domestic property is conveyed into the joint names of cohabitants without any declaration of trust there is a *prima facie* case that both the legal and beneficial interests in the property are joint and equal. Where it is contended that equity should not follow the law, the onus of proof lays on the party thus contending. This onus entails establishing that the parties had a common intention that the beneficial interests would differ from their legal interests and in what way. Lord Hope stated:

> "[5] … *Parties are, of course, free to enter into whatever bargain they wish and, so long as it is clearly expressed and can be proved, the court will give effect to it.*"

The task of the court, in discerning the parties' common intention, entails scrutinising the whole course of their conduct relating to the property in question. The true intentions of the parties can be discerned from a broad range of factors, extending well beyond that of their respective financial contributions. Their Lordships held, finally, that cases in which joint legal owners are found to have intended that their beneficial interests should differ from their legal interests will be very unusual. There are three majority judgments in which these principles are formulated with varying degrees of emphasis.

[21] The importance of the terms of the parties' common intention, where this issue arises, has long been recognised: see Snell's Equity (32nd Edition), paragraph 24-041 *et sequitur.* In paragraph 24-049, the authors summarise the effect of ***Stack –v- Dowden*** in the following terms:

> "*Where an express trust has not been declared, then the starting point is that the parties would have intended the beneficial ownership of property to follow the legal title to it. So the sole registered proprietor is presumed to be the sole beneficial owner and where the property has been registered in the names of the parties as joint proprietors, it is presumed that they hold for themselves as beneficial joint tenants. This will be the case even where the claimant has made no financial contribution at all to purchasing the property. The effect of the presumption is to allocate the burden of proof as to the beneficial ownership of the property. The parties who alleges that this presumption does not reflect the parties' true intentions bears the burden of proving that the beneficial interests were different. The claimant alleging the common intention constructive trust therefore bears the burden of proving it. The trust is proved to the usual civil standard on the balance of probabilities. But the presumption that the joint registered proprietors of a property intended to hold it on a beneficial joint tenancy is not readily displaced. The facts would need to be very unusual.*"

As the opinions of the Judicial Committee in ***Stack –v- Dowden*** make clear, the court must be alert to the intensely factual sensitivity of every case. In ***Lloyds Bank –v- Rosset*** [1991] 1 AC 107, Lord Bridge, in words which resonate strongly in the real world of informal husband and wife agreements, particularly in circumstances where family needs and priorities collide with outside business or professional financial strains, spoke of "… *evidence of express discussions between the*

partners, however imperfectly remembered and however imprecise their terms may have been" (at p. 132).

[22] The opinions of the Judicial Committee in ***Stack –v- Dowden*** also provide some illumination on the operation of the doctrines of proprietary estoppel and constructive trust in this sphere. Lord Walker in particular opined that proprietary estoppel and "common interest" constructive trusts should not be assimilated. He stated:

> "[37] … *Proprietary estoppel typically consists of asserting an equitable claim against the conscience of the 'true' owner. The claim is a 'mere equity'. It is to be satisfied by the minimum award necessary to do justice … which may sometimes lead to no more than a monetary award. A 'common intention' constructive trust, by contrast, is identifying the true beneficial owner or owners and the size of their beneficial interests*".

Baroness Hale, with whom all members of the majority concurred, stated that where in a conveyance there is an express declaration of trust –

> "[49] … *No one now doubts that such an express declaration of trust is conclusive* ***unless varied by subsequent agreement or affected by proprietary estoppel ...***".

[My emphasis].

Notably, subsequent agreement and proprietary estoppel are put forward as alternatives in this passage. In a later passage, Baroness Hale adverts to the limitations of the statutory registration of title regime: see paragraph [50]. In paragraph [68], Her Ladyship formulates the principle that the burden rests on the person seeking to show an intention that the parties' beneficial interests differs from their legal interests and in what way. In paragraph [69], she states:

> "*In law, context is everything and the domestic context is very different from the commercial world. Every case will turn on its own facts. Many more factors than financial contributions may be relevant to divining the parties' true intentions.*"

In the same passage, Baroness Hale cautions against undue reliance being placed on who pays for what, including the mortgage liability, in the case of a couple who are joint legal owners of the family home. She observes further that the individual characters and personalities of the parties may be a material factor. In paragraph [70], she highlights the truism that the parties' *initial* intentions are capable of altering subsequently. A court of first instance reading these passages as a whole

alerted to the importance of appreciating the factually sensitive context of each individual case.

[23] In the sole dissenting opinion of Lord Neuberger, one finds the following statement:

> "[128] *A constructive trust does not only arise from an express or implied agreement or understanding. It can also arise in a number of circumstances in which it can be said that the conscience of the legal owner is affected. For instance, it may well be that facts which justified a proprietary estoppel against one of the parties in favour of the other would give rise to a constructive trust.*"

This passage serves as a reminder of the long established principle that equity intervenes to prevent fraud or other unconscionable behaviour. The close kinship between the doctrines of proprietary estoppel and constructive trust are noted in Snell (*op. cit*), paragraph 12-023. There is also a notable acknowledgement of the particularly close association between the doctrines of constructive trust and proprietary estoppel in the realm of the joint acquisition of land in Halsbury's Laws of England [4th Edition Re-Issue], Volume 16(2), paragraph 1089. In this passage, the authors suggest that the inquiry to be conducted by the court is threefold in nature:

> *"(a) Whether an equity in favour of B arises out of the conduct and relationship of the parties;*
>
> *(b) What is the extent of the equity, if one is established; and*
>
> *(c) What is the relief appropriate to satisfy the equity."*

This passage continues :

> *"The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine of proprietary estoppel; in the end the court must look at the matter in the round."*

Finally, the authors note that proprietary estoppel may operate as either a cause of action or a defence.

[24] In Snell, one finds the following formulation of the doctrine of proprietary estoppel:

> *"Where by his words or conduct one party to a transaction freely makes to the other a clear and unequivocal promise or assurance which is intended to affect the legal relations*

> *between them (whether contractual or otherwise) or was reasonably understood by the other party to have that effect and, before it is withdrawn, the other party acts upon it, altering his or her position so that it would be inequitable to permit the first party to withdraw the promise, the party making the promise or assurance will not be permitted to act inconsistently with it. …*
>
> *The principal issue is whether D's representation had a sufficiently material influence on C's conduct to make it inequitable for D to depart from it."*

(Paragraph 12-009).

In a later passage, the authors observe that the same evidence is capable in principle of establishing both the agreement asserted and the promisee's reliance thereon (see paragraph 24-054). The concept of detriment is not to be approached in an unduly technical or narrow fashion (paragraph 12-020). In essence, the authors advance the simple proposition that where the court finds a common intention between the two parties (whether married or otherwise) about the allocation of beneficial interests, a constructive trust in favour of the party asserting such interest is established. Where a constructive trust is established, the claimant is entitled to his agreed beneficial share (paragraph 24-047).

[25] As a perusal of the foregoing paragraphs confirms, these proceedings proved to be organic in nature. Ultimately, the character and extent of their evolution was reflected in the intense focus in both parties' arguments on B's evidence about the events surrounding the remortgaging of the family home in September 2002. The summary of the evidence set out above exposes the timing of B's claims in this respect, the circumstances in which she first made these claims and the factors said by the Society to undermine them. I have reflected carefully on all of these matters. Both parties were agreed – and I concur – that the principal task for the court in this respect entails an assessment of credibility, veracity and reliability. Having conducted this exercise, I resolve this issue in favour of B. I do so unhesitatingly, for two basic reasons. The first is that I found her to be a manifestly truthful witness. The second is that, in my view, the various contra indicating factors on which the Society relies fall well short of justifying a rejection of B's evidence. In short, they are, in my view, eclipsed by her powerful and compellingly truthful sworn evidence. Having subjected her evidence to critical scrutiny, I fully accept her explanations for failing to explicitly assert her claims at an earlier stage.

[26] I shall address particularly the issue concerning the June/July 2009 letters, as this featured so prominently in the Society's challenge to B's evidence. I find that she is mistaken in her recollection of this discrete matter. True it is that both letters bear her signature. However, I find, as a matter of probability, that the composition of the letters was influenced – wholly or partly - by A. In content, syntax and structural layout they bear the very clear stamp of an experienced legal practitioner.

The alternative analysis of this aspect of the evidence is that B, rather than being mistaken in her recollection, was, subconsciously or otherwise, reluctant and resistant to exposing her husband's hand in these letters, motivated by an instinctive fear that this could in some way be detrimental to him and/or the family as a whole. As an outstandingly loyal, devoted and model wife and mother, this would not, objectively, be surprising. This alternative analysis seems to me marginally less likely, though perfectly plausible. Whichever analysis is correct, I conclude that neither is detrimental to B's claim that in or around September 2002 her husband relinquished his one half share in the matrimonial home to her, in consideration of a financially crippling remortgaging arrangement designed exclusively to bolster his faltering and increasingly perilous professional and business activities. It is common case that prior to September 2002 B was the legal and beneficial owner of a one half share in the matrimonial home. The effect of these findings is that from September 2002 she acquired, in equity, a beneficial interest in the remaining one half share, extinguishing her husband's previously existing one half legal and beneficial interest. I conclude that B has discharged her burden and I find this to be one of those exceptional cases contemplated in ***Stack –v- Dowden***.

[27] To this main conclusion I add the following. In their helpful final formulation of the issues to be determined by the court, the parties have included the following issue:

> *"If there was an agreement, did it extend to the whole of A's interest in the home or did it extend only to the further loan taken out in 2002?"*

Consistent with my assessment of B as a witness and the findings set out above, I find without hesitation that the agreement struck between A and B in or around September 2002 embraced the whole of A's then existing legal and beneficial interest (a one half share) in the family home. A critical, fair and objective evaluation of all the evidence impels firmly to this conclusion.

Constructive Trust and Proprietary Estoppel

[28] I have rehearsed *in extenso* above the governing legal principles. Giving effect to my findings in paragraphs [25] – [27], I conclude that there is both a constructive trust and a proprietary estoppel in B's favour. The constructive trust is based on the above findings. For the avoidance of any doubt, I find that there was an unequivocal intention on the part of both husband and wife in 2002 that A would relinquish the entirety of his share in the family home to B. This finding is based on my acceptance of B's evidence about the 2002 agreement and an objective assessment of the evidence bearing on the circumstances relating to the family home and the family as a whole at that time. As regards proprietary estoppel, applying the Halsbury "template", I find:

(a) A clear equity in favour of B arises out of the conduct and relationship of husband and wife.

(b) The extent of the equity (which can be expressed in various ways, in the present context) operates to extinguish A's former interest in the matrimonial home, thereby vesting in B the full legal and beneficial interest therein.

(c) There is only one form of relief in play: as rehearsed in paragraph [2] above, the Society seeks an order for sale of the family home and the appropriate form of relief is to refuse this application.

The present case is, in my view, an illustration of the propinquity of the doctrines of constructive trust and proprietary estoppel.

Laches and Limitation

[29] The well known maxim "*delay defeats equity*" seems to me a paradigm example of an open textured, intrinsically flexible principle. I refer to the discussion in Snell, paragraph 5-016 *et sequitur* which, tellingly, begins with the pithy statement:

> "*This maxim is also dangerous …*
>
> *Without heavy qualification* [statements based on this maxim] *are incorrect.*"

I refer also to Wylie's Irish Land Law [3rd edition], paragraph 3.066. In my view, there is no question of rights accruing to B pursuant to the 2002 agreement having been **infringed.** Thus the doctrine of *laches* has no application. Furthermore, I have already analysed above the conduct of B and have made findings in respect thereof, including the issue of the timing of the advancement of her claim regarding the 2002 husband/wife agreement. I find further that it is eminently understandable and objectively explicable that B did not take any formal steps to assert her claim prior to the initiation of these proceedings. She had no ascertainable reason for doing so. In particular, there was no challenge to her interest in the family home until the abovementioned letters began. It follows that the claim, which she has advanced by way of defensive shield, is not defeated by the doctrine of *laches* in any event.

[30] It is further contended on behalf of the Society that B's assertion of the 2002 husband/wife agreement is statute barred. I conclude that this submission is misconceived. B is not a plaintiff or a claimant in any litigation. She is, rather, resisting an application brought by the Society for an order permitting the sale of the family home. Limitation operates as a shield, rather than a sword. This is the basic theme of the passages in Snell, paragraphs 5.16 – 5.18, upon which this submission was based. I refer also to the discussion and doctrinal exposition in Halsbury [5th edition], paragraph 901 and McGhee, Limitation Periods [6th edition, Chs. 1 and 2

generally]. Limitation periods are based on the date upon which a cause of action accrues. Fundamentally, they are concerned with the assertion and vindication of rights by the initiation and pursuit of legal proceedings. This analysis, in my view, has no application to B. In my estimation, the only cause of action in play in the current proceedings is that upon which the Society's claim is based. In the alternative, taking into account that this discrete submission is founded on an assertion of breach of contract, I find no evidence of any breach by A of the 2002 agreement between husband and wife. The notion of a failure to perform a contractual obligation is manifestly inapplicable to the nature of the agreement here and the context in which it was struck. This was an informal, domestic agreement which did not, I find, include any express or implied term that it would be followed by a formal, legal transfer of A's interest to B. At its zenith, the Society's case, in my estimation, can only be based on a contention that A, by his affidavit sworn in the attorneyship proceedings (see paragraph [6], above), was guilty of a clearly expressed breach of contract. This affidavit was sworn in November 2008. **If** this is to be analysed as an act evincing a breach of contract, the cause of action did not accrue until then. On this analysis, the limitation period of six years has, plainly, not elapsed.

Part Performance

[31] Having rehearsed *in extenso* the principles to be distilled from ***Stack –v- Dowden*** and the main principles of the doctrines of proprietary estoppel and constructive trust, the Society's contention that the effective assertion of B's legal and beneficial interest in the entirety of the family home is dependent upon the demonstration of a legally effective act of part performance on her part seems to me fallacious. Insofar as this **is** required as a matter of law, I find sufficient evidence thereof in B's conduct subsequent to 2002 (rehearsed, in summary, in paragraphs [10]-[15] above), including the arrangements for the payment of the family home mortgages during the past four years approximately. B returned to work, earned a regular income, opened her personal bank account for the first time, took no holidays, clearly (by inference) deterred her husband from making further demands on the family home and demanded, successfully, that the funds for the mortgage repayments be channelled through her new personal bank account.

[32] The main argument advanced on behalf of the Society was that (insofar as this is a legal requirement) the mortgage repayment arrangements during the past four years approximately are incapable of establishing part performance of the asserted 2002 husband/wife agreement. I reject this submission. In the first place, it appears to me irreconcilable with the modern law, as declared by the House of Lords in ***Stack –v- Dowden***. Secondly, it finds no ringing endorsement in the somewhat diffident comments of Professor Wylie in Irish Conveyancing Law (3rd Edition), paragraph 6.59. Thirdly, it is undermined by the dicta of the House of Lords in ***Steadman –v- Steadman*** [1976] AC 536: see especially per Lord Reid (p. 541), Lord Simon (p. 565) and Lord Salmon (p. 570). I reject the Society's argument on the further ground that Section 2 of the Statute of Frauds (Ireland) 1695 is based

upon *an action brought by the asserted beneficiary in question.* That is not this case. As already recorded in the context of the Society's limitation argument, B is bringing no action. Moreover, as noted by Professor Wylie, the doctrine of part performance normally arises when pleaded by a plaintiff, by way of rejoinder to a Statute of Frauds defence (paragraph 6.51, *op. cit.*). The Society's argument founders accordingly.

Priority of the Society's Registered Charge

[33] It follows inexorably from the findings set out above that this issue must be determined against the Society. A was legally incapable of demising to the Society an interest in the family home which he did not hold. The registration of this charge by the Society was legally ineffective in consequence.

Other Issues

[34] These can be disposed of in very brief compass:

(a) As foreshadowed in paragraphs [6] - [9] above and on the basis of the evidence summarised therein, I find that the timing of this application by the Society cannot properly be challenged.

(b) As further foreshadowed in paragraphs [6] – [9] above, I also find that the undisputed interference with the rights of those concerned under Article 8 and Article 1 of The first Protocol ECHR has a legitimate aim, is in accordance with the law and, at this remove and on the basis of all the evidence now available, is proportionate. If the Society's application for an order for sale had been successful, in the interests of proportionality I would not have permitted sale of the family home until a further period of twelve months had elapsed and I would also have granted liberty to apply, having regard to the depressed state of the property market.

Conclusion and Disposal

[35] It follows from the above findings and conclusions that the Society's application must be dismissed. Having considered the parties' submissions, the final order of the court will incorporate the following elements:

(a) A dismiss of the originating summons.

(b) A declaration that the Society holds the undivided half share in the legal tenancy common in the matrimonial home and property on trust for the benefit of B absolutely.

(c) A declaration that B's legal and equitable interest has priority over the Society's mortgage in respect of the matrimonial home and property, dated 25th August 2009.

(d) An order requiring the Society to transfer the aforementioned interest to B subject to the interests of the two relevant mortgagees, within a period of six weeks.

Costs

[36] It was submitted on behalf of the Society that its costs should be recovered as a first charge on the property through the mechanism of a charge incorporating a power of sale. The central contention advanced on behalf of B was that the Society should pay her costs, giving effect to the general rule that costs follow the event.

[37] The legal framework within which the issue of costs falls to be determined by the court is constituted by three inter-related elements. The first is the discretion invested in the court by Section 59 of the Judicature (NI) Act 1978. The second is Order 62 of the Rules of the Court of Judicature, enshrining a series of rules contemplated by Section 59. The third is such general principles as can be distilled from the reported cases. The rather unusual nature of the litigation culminating in this judgment, the course of the proceedings and the final outcome in the present case combine to demonstrate the wisdom of conferring a discretion on the court in the matter of costs.

[38] The first submission of the Society drew attention to a passage in Valentine, Civil Proceedings in the Supreme Court, paragraph 17.53:

> "***Costs out of a fund ...***
>
> *Where litigation concerns the disposal or administration of property or a fund, such as probate actions, partition, administration of an estate and partnership dissolution, it is common to award all parties, except a losing appellant, their costs out of the common fund if they have litigated reasonably. Fund includes any estate or real or personal property held for the benefit of persons or a class by a trustee/personal representative, whether in his possession or not …*".

The second submission on behalf of the Society relied on Order 62, Rule 6(2) of the Rules of the Court of Judicature, which provides:

> "*Where a person is or has been a party to any proceedings in the capacity of trustee … he shall be entitled to the costs of those proceedings, insofar as they are not recovered from or paid by any other person, out of the funds held by him in*

> *that capacity … and the court may order otherwise only on the ground that he has acted unreasonably*".

On behalf of B, counsel drew to the attention of the court the statement of Girvan J in ***Glass –v- McManus*** [1996] NI 401, pp. 413-414:

> "*Under the Partition Acts the court has a discretion in relation to costs. The original rule of the Court of Chancery with respect to costs of partition suits was that no costs would be given up to the hearing but that the subsequent costs of issuing, executing and confirming the commission should be borne by the property in relation to the value of the joint tenants' interests. Daniels Chancery Practice suggests that subsequent to the Partition Acts where an order for sale is made the practice is to order that the entire costs of the parties be borne out of the property. It is clear, however, that the matter remains in the discretion of the court …*".

In those cases where a Defendant is successful, thereby engaging the general rule that costs follow the event, the principle to be applied was formulated by Atkin LJ in these terms:

> "*In the case of a wholly successful Defendant, in my opinion the judge must give the Defendant his costs unless there is evidence that the Defendant (i) brought about the litigation or (ii) has done something connected with the institution or the conduct of the suit calculated to occasion unnecessary litigation and expense or (iii) has done some wrongful act in the course of the transaction of which the Plaintiff complains*".

(***Ritter –v- Godfrey*** [1920] 2 KB 47, p. 60).

This passage was cited with approval by the Northern Ireland Court of Appeal in ***Re Kavanagh's Application*** [1997] NI 368, at p. 382.

[39] As recorded above, the Society was appointed attorney of A under the Solicitors (Northern Ireland) Order 1976. In such capacity, the Society was enabled to exercise any of the powers contained in Article 23, which includes a power to sell any property in which the solicitor has an interest. This partition suit was duly brought by the Society *qua* the solicitor's attorney. I consider that the suggested analogy between the Society, acting thus, and a trustee is far from exact. The Society was at all times operating within the ambit of a specific and unique statutory regime. The species of proceedings culminating in this judgment is not readily comparable with anything else. These considerations contra indicate the contention that the issue of costs is embraced by Order 62, Rule 6(2). This contention is further

undermined by the absence of any reference in this Rule to proceedings brought by the Society as statutory attorney of the solicitor concerned.

[40] Ultimately, in exercising the court's discretion, I take into account particularly that following the assertion by B of the case to which the court acceded, the Society continued to pursue these proceedings in circumstances where no replying affidavit by A was filed and no attempt was made to adduce evidence from A as a competent, though not compellable, witness. There was no suggestion that he was an unwilling witness. Indeed, the impression conveyed to the court was that the Society did not seek his instructions in relation to the case made by B. The intimate proximity between the Society and A cannot be overlooked. From the inception of these proceedings, the Society stood in A's shoes and could recover no redress to which A would not be entitled. The final outcome of these proceedings is one of outright failure for the Society and absolute success for B. I take into account the statutory regime and the position of the Society therein, together with the public interest dimension. There is merit in the Society's submission that B did not make the case ultimately espoused by her until these proceedings were under way and certain costs had been incurred. Of course, as I have already observed, this did not dissuade the Society from continuing. Nonetheless, I consider that this factor should be reflected in the court's determination of the costs issue.

[41] Taking everything into account, I conclude that the fair and reasonable exercise of the court's discretion is to order the Society to pay 60 % of B's costs, to be taxed in default of agreement.