

**THE HIGH COURT**

**Record No. 2022/41M**

**[2024] IEHC 489**

**BETWEEN**

**G**

**APPLICANT**

**-and-**

**G**

**RESPONDENT**

**JUDGMENT of Ms. Justice Hyland delivered on 19 July 2024**

**Introduction**

1. This application came before me by way of notice of motion of 30 April 2024, whereby the following relief was sought: -

*“A declaration that each of the parties hereto hold a 50% interest in the properties listed in paragraph 2 of the terms of settlement dated 11 January 2023 as tenants in common”.*

2. The application arises in the context of family law proceedings where the applicant sought a divorce. Those proceedings were compromised and reduced to written terms of settlement that were ruled by Jordan J. on 11 January 2023. It is the interpretation of those terms of settlement (hereafter the “Terms”) that I am concerned with in this judgment, specifically paragraph 2 of the Terms. In short, the

applicant contends that the Terms mean that the properties are held as tenants in common, whereas the respondent argues that the parties continue to hold them as joint tenants, as was the case prior to the divorce. For the reasons I set out below, I am satisfied that the correct construction of the Terms is that the properties are held by the parties as tenants in common.

### **Interpretation of a settlement agreement**

3. The law is very well settled in respect of the correct approach to interpreting a settlement agreement. Settlement agreements are to be treated as a contract between the parties and the same principles of interpretation apply as those applicable to any contract. In *Jackie Green Construction Limited v IBRC* [2019] IESC 2 the Court was required to interpret a settlement agreement. Clarke J. emphasised that the law relating to the interpretation of settlement agreements does not differ from the law relating to the interpretation of any other type of contract. The task of the court is to decide what the intention of the parties was having regard to the language used in the contract itself and the surrounding circumstances. He observed that the detailed rules for the proper approach to the construction of contractual documents all derive in substance from the approach which might be encapsulated in the phrase “*text in context*”. He referred to an earlier judgment in *Lanigan v Barry* [2016] IESC 46 where he had identified the text in context approach as requiring the court to consider the text used in the context of the circumstances in which the document concerned was produced, including the nature of the document itself.

4. In *Jackie Green*, he observed at paragraph 5.5 as follows: -

*“The more formal the document the less one would expect to find errors or looseness of language. Contractual documents entered into after careful negotiations between experienced lawyers on behalf of the parties may be seen*

*to operate in a different context to for example the informal rules of a small association.”*

5. In *Point Village v Dunnes Stores* [2021] IEHC 628, Barniville J was required to interpret the terms of a contract. He referred to the leading judgment in the decision of the Supreme Court in *Law Society of Ireland v MIBI* [2017] IESC 31 where O'Donnell J observed that the meaning of the relevant provision of an agreement is to be determined from a consideration of the agreement as a whole, whose interpretation not only relies on those features supportive of the interpretation but also must plausibly interpret the entire agreement and in particular those provisions which appear to point to a contrary conclusion. The court must consider not just the words used but also the specific context, the broader context, the background law, any prior agreements, the other terms of the agreement, other provisions drafted at the same time and forming part of the same transaction and what might be described as the logic commercial or otherwise of the agreement.

6. In *Brushfield v Arachas Corporate Brokers* [2021] IEHC 263 McDonald J observed *inter alia*:

*“(a) The process of interpretation of a written contract is entirely objective. For that reason, the law excludes from consideration the previous negotiations of the parties and their subjective intention or understanding of the terms agreed;*  
*(b) Instead, the court is required to interpret the written contract by reference to the meaning which the contract would convey to a reasonable person having all the background knowledge which would have been reasonably available to the parties at the time of conclusion of the contract;*

(c) *The court, therefore, looks not solely at the words used in the contract but also the relevant context (both factual and legal) at the time the contract was put in place;*

(d) *For this purpose, the context includes anything which was reasonably available to the parties at the time the contract was concluded. While the negotiations between the parties and their evidence as to their subjective intention are not admissible, the context includes any objective background facts or provisions of law which would affect the way in which the language of the document would have been understood by a reasonable person;*

7. A submission was made by the solicitor for the respondent that the “*text in context*” approach did not apply in family law cases, in particular ones involving the family home, given the constitutional protection of the family. Given the radical departure from well-established principles that such an approach would constitute, the ground would have to be laid carefully for such a contention. However, no authority was advanced for this proposition. Having regard to the case law cited above, and the absence of any carve out for settlement agreements arrived at in the context of family law proceedings in those judgments, I can find no basis for this argument. I will proceed therefore on the basis that the established approach to the construction of settlement agreements applies in the context of family law in the same way as it does in any other context.
8. Although written submissions were not provided, both parties submitted various authorities, including textbook extracts, in respect of the meaning of those words. Counsel for the applicant relied upon the entry in Halsbury’s Laws, (5th ed. 2022) vol 87, paragraph 216, entitled “*Creation of tenancy in common by grant or devise*”. That extract observes that at common law, there may be a grant or devise of the

lands in undivided shares. It is observed that, even without expressly giving the land in moieties, “*it was sufficient to use words signifying that the grantees were to take equally between them or to them and their respective heirs*”. As to what words suffice to create a tenancy in common, the entry in Halsbury’s Laws (5th ed. 2021, vol 102, paragraph 397, on wills and intestacy, identifies the words “*equal shares*” or “*respectively*”.

9. The applicant also relied on JCW Wylie, *Wylie on Irish Land Law* 6<sup>th</sup> ed. Bloomsbury Professional 2020, paragraph 8.04 where Wylie observes that the central principle of a joint tenancy is that when one joint tenant dies, his or her undivided share in the land passes to the surviving joint tenants. Contrary to this, the basic principle of a tenancy in common is that each tenant in common holds an undivided share in the property. Unlike a joint tenant, a tenant in common from the beginning of his or her co-ownership has a quite distinct and separate interest or share in the property. He or she is regarded as co-owner only because the property has not yet been divided up into the respective shares. Until this is done, it is not possible to say which tenant in common owns which part of the property. There is no right of survivorship existing in the other tenants in common, as a tenant in common has a distinct share in the property from the date of the commencement of same. In summary, “*...tenants in common own 50% each of the property where there are two of them. Joint tenants on the other hand both own 100% of the property.*”
10. Wylie observes at paragraph 8.19 that it became the settled rule that any words used in the conveyance indicating that the grantees were intended to take distinct shares in the property had the effect of creating a tenancy in common instead of a joint tenancy. He observes that the following expressions have been held to be words of

severance “*in equal shares*” “*equally*” “*share and share alike*” “*to be divided between*” “*between*” and “*respectively*”.

11. The respondent’s solicitor relied upon Chapter 13, titled “Severance of Joint Tenancies” of Heather Conway, *Co-Ownership of Land, Partition Actions and Remedies*, 2nd Ed., Bloomsbury Professional 2012, in arguing that s.30 of the Land and Conveyancing Law Reform Act 2009 meant that it was not possible in the circumstances of the settlement agreement for a severance to have taken place. Section 30(1) provides as follows:

*“From the commencement of this part, any – (a) conveyance or contract for conveyance, of land held in a joint tenancy, or (b) acquisition of another interest in such land, by a joint tenant without the consent referred to in sub. 2 is void both at law and in equity unless such consent is dispensed with under s.31(2)(e).”*

12. Notably, s.30(4) provides as follows:

*“Nothing in this section affects the jurisdiction of the court to find that all the joint tenants by mutual agreement or by their conduct have severed the joint tenancy in equity”.*

13. The wording of s.30(1) makes it clear that it is intended to apply to a situation quite different to that in the instant case *i.e.*, where there is an attempt by a joint tenant to unilaterally sever a joint tenancy. Formerly, the law permitted such a unilateral severance, but s.30(1) makes it clear that severance is now dependent on the existence of consent from the other joint tenants. That has no application to the present circumstances where what is at issue is the correct construction of an agreement between the parties. On the other hand, in relation to whether there has

been severance by consent, Conway at paragraph observes that each case must be determined on its own facts (paragraph 13.09).

14. The solicitor for the respondent also relied upon Neil Maddox, *The Land and Conveyancing Law Reform Acts: A Commentary* 2nd ed. Round Hall Press 2021. In relation to severance, Maddox observes at paragraph 7-05 that there may be severance by mutual agreement and that the agreement need not be an enforceable contract: “*its purpose is to show the common intention of the parties to treat the tenancy as severed*”.

### **Terms of Settlement**

15. The Terms provide at paragraph 1 for a decree of divorce dissolving the marriage of the parties solemnised on 12 April 1969. Paragraph 2 provides as follows: “*An order pursuant to s.15(1)(b) of the Family Law (Divorce) Act 1996 directing that the parties are each entitled to a 50% interest in the following real properties:*

*i. The family home at [Property A].*

*ii. [Property B].*

*iii. [Property C].*

*iv. [Property D].*

*v. [Property E].*

*vi. All antique furniture, paintings and ornaments to include those on list appended. In the event of a failure to agree a division the parties will*

*select by turn. vii. All bank accounts held by the parties either solely or*

*jointly held. viii. Any other assets or investments including [Share Portfolio A]*

16. Paragraph 4 of the Terms provide for a declaration that the parties are each entitled to 50% of the shareholding in [Company A] and subsidiaries, [Subsidiary Company B] and [Subsidiary Company C] which have several property holdings.

17. Paragraphs 5 and 6 provide as follows:

*“5. The parties’ accountants to carry out a reconciliation of all real assets to include cash and investments and substantial dispositions by either party within a period of four weeks from the date of this agreement and to that end the disclosure period in respect of both parties’ assets to be extended as and from 01 July 2016 to date.*

*6. The parties shall meet within six weeks of the date of this agreement to agree a shareholder’s agreement with respect to the aforesaid companies and to agree the distribution of the assets aforementioned”.*

18. Paragraph 7 of the Terms provides: -

*“7. Mutual orders pursuant to s.18(10) of the 1996 Act.”*

19. Paragraph 9 of the Terms provides: -

*“9. Mutual exclusion orders pursuant to s.15 of the 1996 Act”.*

20. Finally, paragraph 12 provides: -

*“12. The parties acknowledge that these terms constitute proper provision and acknowledge the finality thereof subject to the reconciliation exercises provided for herein”.*

21. At paragraph 3 the parties agreed, *inter alia*, that they were to retain their respective pensions but were to equalise the incomes derived from their respective State pensions, the respondent’s ARF and the applicant’s annuity during their lifetimes.



**Affidavit Evidence**

22. In his affidavit of 29 April 2024 grounding the motion, it is averred by Mr. Dullea that the Terms were agreed in circumstances where both of the parties had poor health and advanced age, the applicant husband having been born on 02 September 1932 and the respondent wife on 22 March 1945. The parties were married on 12 April 1969, raised seven children, and operated the family business. Mr. Dullea avers that the division of the parties' assets on a 50/50 basis was in recognition of their equal efforts in raising their family and running their family business. He goes on to say as follows:

*“It was readily understood by the parties and their counsel that the 50/50 division of the real property severed the parties' joint tenancy in the properties and converted their tenancy into a tenancy in common.”*

23. Mr. Dullea identified that difficulties have arisen in relation to the enforcement of the terms against the respondent. He avers that, following the Terms being agreed, he wished to proceed to reregister any properties held by the applicant and respondent as tenants in common in equal shares as per the Order, since prior to the Order the properties were held on a joint tenancy basis. To this end, he spoke to the respondent's solicitor, Mr. Paul McMahon, by telephone in or about 02 February 2024. During the conversation, it is averred that Mr. McMahon stated that the Order did not say that the Terms provide for the severance of the joint tenancy. Mr. Dullea therefore wrote on 07 February 2023 and 19 February 2023 requesting that this issue be clarified and, after some further correspondence, on 25 April 2024 Mr. McMahon replied saying that the agreement and order did not sever the joint tenancies. It was in those circumstances that the motion was issued.

24. At paragraph 15 Mr. Dullea avers that both the parties via their solicitors, senior counsel, and junior counsel consented to the terms of settlement and no objection was raised by the respondent about the severance of the joint tenancy, Mr. Dullea expresses his belief that the respondent has only done so at this point to further delay and frustrate the prosecution of these proceedings.
25. On 20 June 2024, a replying affidavit was sworn by the respondent. At paragraph 5, the respondent indicated that the family home in which she had resided for almost 50 years and the other real properties have been held by the applicant and herself with a 50% interest as joint tenants with right of survivorship. Referring to the Terms, at paragraph 9 of her affidavit she referred to the fact that paragraph 2 states that the parties are entitled to “*a 50% interest*” in the real properties, which is exactly the wording as adopted in the applicant’s affidavit of means of 02 July 2021. There, he swears to having a 50% interest in the real properties, thereby confirming the same position. On the respondent’s analysis, this demonstrates that there was to be no change in the position after the settlement.
26. The respondent avers at paragraph 11 that paragraph 2 of the Terms established and confirmed the existing 50% interest in the family home and the listed real properties, with the clear understanding that the division and distribution of the listed properties was to be agreed by the parties in subsequent negotiations and, specifically, did not change the co-ownership type from joint tenants into tenants in common. She avers that the applicant has only taken this motion to gain some leverage in subsequent negotiations and the motion has a lot to do with gaining control of the family home. She avers that there was no discussion regarding severance of joint tenancy and loss of survivorship on 11 January 2023.

27. Certain of the averments constitute legal argument and would have been more appropriately made in legal submissions. In short, she identifies that the terms of settlement were made pursuant to s.15(1)(b) of the Family Law (Divorce) Act 1996 (the “1996 Act”) which provides for orders under s.36 of the Family Law Act 1995 (the “1995 Act”). She observes no property adjustment orders were made. She argues that s.36 relates to the determination of questions relating to existing title of married couples to property and does not provide for a change or adjustment in the preexisting property holding position such as the conversion of joint tenancies into tenants in common. She avers that she consented to the terms of settlement on the understanding that the division of assets would be the subject of subsequent negotiations in circumstances where the applicant wished to have an immediate divorce and was granted an early hearing due to ill health. She sets out the reasons as to why she would not have agreed to forfeit her right of survivorship.
28. First, she says that there was absolutely no agreement on same in the Terms. She avers there was no discussion on the day regarding severing the joint tenancies and converting the ownership type into tenants in common. She says that she would never have agreed to convert the properties to be held as tenants in common without an Order agreeing on the division and distribution of all the properties. She points out that, if the properties listed in paragraph 2, including her home, are converted to being owned as tenants in common, and the applicant dies, she risks various situations, including the risk of third parties i.e., the applicant’s beneficiaries, being foisted upon her in her own home. She refers to difficulties with her children and the likelihood of further litigation ensuing regarding ownership of the assets. She refers to the possibility of her husband seeking a sale of the family home. She identifies that there are negative tax consequences of the properties being converted

to a tenancy in common and she indicates that if the properties are held by the parties as tenants in common, they will have to go through probate in the event of death, which is a very lengthy process and could leave her for years in limbo and with lack of certainty. She says that if the effects of a change to holding as tenants in common were discussed on 11 January 2023, she would not have signed the Terms of settlement, and would have waited until a full division/distribution of the assets was achieved.

29. The respondent criticises the applicant for delay post 03 January 2023, and similar criticism is made of the respondent by the applicant. However, since my only task is to interpret the Terms using established principles of interpretation, and those principles do not include the conduct of the parties post conclusion of the Terms, I will abstain from any consideration of the question of post settlement delay or the motives of either party for either raising, or not raising, this disputed issue until early February 2024.

30. Legal submissions are made at paragraph 24 of the respondent's affidavit to the effect that, had it been intended that there would have been severance, then express or implied words of severance would have been excluded in paragraph 2 to include terms such as "*distinct share*", "*no right of survivorship*", "*property adjustment order*", "*undivided shares*", and "*separate and distinct*". It is argued at paragraph 25 that in a joint tenancy, two co-owners both have a 50% interest in the property and that the mere reference to a "*50% interest*" is not sufficient to convert the joint tenancy into a tenancy in common. She contends that where the joint tenancy to be severed, it would have to be done pursuant to a property adjustment order and expressly set out in the Terms. She concludes by asking the court to refuse the Order in terms of the applicant's notice of motion.

## Interpretation of the Terms

### *Paragraph 2*

31. A necessary starting point is the words of the disputed clause. Paragraph 2 employs the following form of words: “*the parties are each entitled to a 50% interest*” in the identified properties.
32. In my view, various words are used here that indicate an intention to sever the joint tenancy and hold the properties as tenants in common. First the words “*each entitled*” are used, denoting in my view a distinct and individual interest in the identified properties on the part of the applicant and respondent. The reference to “*a 50% interest*” indicates that each of the parties have been given a separate and identifiable share of the properties. The cumulative effect of these two sets of words suggests to me that what is envisaged is that the interest in the identified real properties is divided, whereby each party has been given an entitlement to a distinct interest, with each of them holding a separate 50% interest. The reference to 50% is very significant given that it represents an identified share in the property for each party, as opposed to a joint holding of the entirety of each of the properties, as would be the case in a joint tenancy. Equally, the textbook analysis above confirms that the reference to “*each*” is a well-known denominator of a tenancy in common, being a word of division.
33. Although the caselaw on interpretation of contracts warns against an overreliance on the wording of a provision alone, the words at paragraph 2 are in my view words of severance, and strongly suggests that the starting point here must be that the properties were intended to be held as tenants in common following the conclusion of the Terms.

34. The next port of call is the remainder of paragraph 2. There is a reference to the furniture, paintings and ornaments and it is agreed that, in the event of a failure to agree a division, the parties must select by turn. This motion is only concerned with the real properties in paragraph 2 (vi): but the words the subject of dispute cover all the properties in paragraph 2. For that reason, it is legitimate to consider the contested words in the context of the entirety of the property covered by them. There is no distinction between property covered by category (vi) and the remaining real property referred to in paragraph 2. The wording of (vi) makes it entirely clear that the furniture, paintings and ornaments are not being held jointly by both parties since, if this was the case, there would be no need to either agree a division or select by turn.

35. The solicitor for the respondent sought to suggest that the goods at paragraph 2 (vi) were not “*real properties*” within the meaning of paragraph 2, given that they were chattels. He further argued that if they were real properties, they belonged to a special category and were not governed by the words at the start of paragraph 2. But I can see no justification for carving out the goods governed by (vi), as paragraph 2 makes no distinction between any of the categories of property identified therein. Nor do I agree that they cannot be covered by the term “*real properties*” since the parties so obviously intended that they be covered by paragraph 2, listing them alongside all the other assets so identified. Therefore, the existence of (vi) tends to suggest that paragraph 2 intended that all the goods referred to therein were to be held as tenants in common, since the goods at category (vi) are so clearly held on that basis, and no special or different words are used for category (vi).

*Other Terms of the Settlement Agreement*

36. I turn now to consider the other provisions in the agreement. Paragraph 4 of the Terms appears to support the interpretation of paragraph 2 identified above. It refers to a declaration that the parties are “*each entitled to 50%*” of the shareholding of various companies. That is almost the same wording as that employed at paragraph 2 – “*each entitled to a 50% interest*”. The respondent frankly concedes that there is a 50/50 split of the shareholdings rather than a joint holding of same. It is improbable that such similar words would bear radically different meanings. Had the parties intended the properties at paragraph 2 to be held jointly, it is difficult to understand why they would not have used different language to that used at paragraph 4, where the agreed intention is to divide the shareholdings into distinct shares.

37. Turning to paragraph 6 of the Terms, it includes an agreement that the parties shall meet within six weeks to agree a shareholder’s agreement with respect to the companies and agree the distribution of the assets. It was submitted by the solicitor for the respondent that the question as to how the properties were to be divided, if at all, was a question that had not been resolved in the Terms, given the desire on the part of the applicant to have a divorce as quickly as possible, and that paragraph 6 meant that both the division and the distribution of the assets identified in the Terms was yet to happen. He argued that this tends towards the interpretation that the properties had not been the subject of an agreement to hold them as tenants in common but rather to maintain the status quo i.e., that the properties should remain held by the parties as joint tenants. On the other hand, counsel for the applicant submitted that paragraph 6 was concerned with how the assets should be distributed but that the decision as to their division had been resolved by the Terms.

38. If there were no words of severance in paragraph 2, one could argue that the reference to agreeing the distribution of the assets might mean that the parties were intending to agree the division of the assets after the conclusion of the Terms, *i.e.*, one might interpret the word “*distribution*” as being a synonym for “*division*”. However, the words of severance are sufficiently clear such as to rebut any such interpretation. Moreover, there is an alternative interpretation of paragraph 6 that accords perfectly with the words in paragraph 2 connoting a tenancy in common *i.e.*, that the properties are required to be distributed according to the 50% divisible shareholding that each of the parties hold in same.
39. The solicitor for the respondent made an alternative argument to support his claim that the division of the assets had not yet been agreed. As identified above, paragraph 2 (vi), which addresses antique furniture, paintings, and ornaments, provides that in the event of a failure to agree a division the parties will select by turn. The solicitor for the respondent argued that this reference to agreeing a division meant that there was a requirement to agree a division in relation to all the real property identified at paragraph 2, including the disputed properties. I find it hard to see why that should be so. The reference is clearly applicable only to the furniture, paintings and ornaments captured at (vi). I accept that absolute consistency of language throughout the Terms dictates that (vi) should have provided for what would happen in the event of the failure to agree the *distribution* of the furniture etc. rather than the *division* of the furniture.
40. But that lack of consistency of language cannot undermine the core point here: the clause that deals with the allocation of the assets refers not to their division but their distribution and, read in the context of the Terms as a whole, suggests that the parties have agreed the basis upon which to hold their properties post-divorce but have



postponed agreeing the consequences of that approach insofar as each individual asset is concerned.

41. Paragraph 7 of the Terms provides for mutual orders pursuant to s.18(10) of the 1996 Act. Section 18(10) provides as follows:

*“On granting a decree of divorce or at any time thereafter, the court, on application to it in that behalf by either of the spouses concerned, may, during the lifetime of the other spouse or, as the case may be, the spouse concerned, if it considers it just to do so, make an order that either or both spouses shall not, on the death of either of them, be entitled to apply for an order under this section”.*

42. In substance, it disapplies the otherwise applicable provisions on succession.

Counsel for the applicant argued that, if the interpretation of paragraph 2 was as contended by the respondent, there would be little point in including a s.18(10) clause since the majority of the assets *i.e.*, the property at paragraph 2, would in any case be held jointly, the right of survivorship would apply and therefore there would be effectively nothing to be impacted by s.18(10), thus rendering its inclusion unnecessary. On the applicant's case, the inclusion of a s.18(10) clause made his interpretation more likely, as the holding of the property as tenants in common meant there was a great deal more property that required shielding. That is true insofar as it goes, but nonetheless there is other property covered by the Terms, in particular the shareholdings in [Company A] and [Subsidiary Company A] and [Subsidiary Company B]. That property might also require shielding by the s.18(10) clause. Accordingly, paragraph 7 does not appear to assist in the interpretation of paragraph 2.

43. Paragraph 9 refers to mutual exclusion orders pursuant to s.15 of the 1996 Act. Again, I take the view that that clause is not suggestive of a given interpretation of paragraph 2. The purpose of the provision is, as I understand it, simply to delineate the respective households of the separating parties. I therefore place no reliance on this clause as an aid to interpretation.
44. Finally, reliance was placed on paragraph 12 by counsel for the applicant. Paragraph 12 acknowledges that the Terms constitute proper provision and acknowledge the finality thereof subject to the reconciliation exercises provided for therein. That seems to me to point in the direction of the Terms being interpreted as providing for finality in relation to the division of the assets of the parties. It signifies that both parties understood that this was not simply a bare agreement for a divorce with the substantive division to be left to another day but was rather an agreement designed to allocate the parties' existing assets in a way that was certain and provided for each of them appropriately.
45. I draw support for that construction from the reference to "*finality subject to the reconciliation exercises*". I have already interpreted paragraph 6 as not meaning that the decision as to the division of assets remains extant. The reference to the "*reconciliation exercises*" in my view is supportive of that interpretation. If the substantive division of assets remained outstanding, it is hard to see how that could be described as a reconciliation exercise.

***Overall context of the agreement***

46. Turning now to the points raised by the respondent in her affidavit, she strongly argues that she would not have agreed to an Order in the terms proposed by the applicant because they are not advantageous to her. I have outlined above the affidavit evidence she has provided identifying the disadvantages to her. I deal with

her subjective understanding of the Terms below. However, when looking at the matter in context, I am entitled to consider whether, viewed objectively, the parties were more likely to agree terms as interpreted by the applicant or as interpreted by the respondent. Interpreting a term so that it is distinctly disadvantageous to one party makes it less likely that this is the correct interpretation, particularly where that party has been legally advised.

47. Here, although there are certainly some disadvantages for both parties in holding the properties as tenants in common, as identified by the respondent i.e., tax, probate, necessity for distribution of the properties, there are also significant advantages in the context of a divorce. Most fundamentally, holding the properties as tenants in common separates the parties' financial interests and severs the financial interdependence that is a hallmark of joint tenancy. It ensures that both parties are free to dispose of their share of the real property in whatever way they wish, thus allowing them to distribute and benefit from their share of the properties, as opposed to being obliged to hold them jointly for the remainder of their lives with the right of survivorship.

48. Where a couple divorces, there is an obvious logic to their assets being separated and amenable to individual disposal. Indeed, it would be somewhat unusual for parties who were divorcing to continue to hold property as joint tenants since such an arrangement binds them together beyond the death of either of them in relation to that property. In short, the context of the agreement suggests that it is more likely that the properties were intended to be held as tenants in common rather than continuing to be held as joint tenants.

**Subjective understanding of the respondent as to the effect of the agreement**

49. In relation to the distinct question as to what the respondent understood to be the effect of the Terms at the time of the settlement *i.e.*, her subjective understanding of same, she makes the case that she did not understand that the Terms severed the joint tenancy and that, had she understood the position she would not have agreed to the Terms. The applicant drew my attention to the fact that in a different motion brought by him in these proceedings, being a motion in respect of the sale of personal assets of 15 September 2023, the respondent swore an affidavit of 2 November 2023 where she averred at paragraph 8 as follows:

*“... any plain reading of the Terms of Settlement ... confirms that the Applicant and I have not agreed to the sale of assets listed in paragraph 2 of the Terms of Settlement (or any other of our assets). Instead, the Terms of Settlement confirm our respective 50% interest in the specific assets listed at paragraph 2 and the agreement then sets out a pathway to reconciling and distributing those assets and others covered by the Terms and Settlement.”*

He argues this shows the respondent correctly understood the impact of the Terms.

50. As is clear from the decision in *Brushfield*, the law excludes from consideration the parties' subjective intention or understanding of the terms agreed. The respondent's averments in this regard go to her subjective understanding of the Terms. Therefore, I cannot take this into account in considering the correct construction of paragraph 2.

**Statutory Preclusion of Tenants in Common**

51. The respondent contends that s.15(1)(b) of the 1996 Act and s.36 of the 1995 Act precluded the interpretation advanced by the applicant. Section 15(1)(b) of the 1996

Act provides that on granting a decree of divorce or at any time after, the court may make an Order under s.36 of the Act of 1995. Section 36 provides, *inter alia*:

*“(1) Either spouse may apply to the court in a summary manner to determine any question arising between them as to the title to or possession of any property.*

*(2) On application to it under subsection (1), the court may—*

*(a) make such order with respect to the property in dispute (including an order that it be sold or partitioned) and as to the costs consequent upon the application, and*

*(b) direct such inquiries, and give such other directions, in relation to the application, as the court considers proper.”*

52. An argument was made by the solicitor for the respondent that s.36 is a declaratory section only and does not entitle a court to make an Order that would transfer property or impact upon the ownership of a property. He contended that this derived from the fact that the section was the successor to the Married Woman’s Status Act 1957 which did not provide for property transfer orders. In reply, counsel for the applicant did not cavil with the proposition that the Order of 11 January 2023 was indeed a declaratory order in relation to the division of properties, while noting that enforcement of that Order at a later stage was a separate question. He observed that, in this case, the court was making an Order for the division of the property. If necessary, such an Order could be enforced by an Order by petition or sale under other legislative provisions, but no such Order was required at this point in time. In the circumstances, he argued that there was no need for a property adjustment order under s.14 of the 1996 Act.

53. In reply, the solicitor for the respondent argued that s.36 could only preserve the existing position in law and could not be used where there was an alteration in how

properties were to be held. Again, no authority was cited for such a wideranging proposition.

54. I cannot accept that interpretation. When one looks at the wording of s.36 it is quite clear that it envisages a wide power for the court and not simply a power to preserve the existing position. Indeed, it is difficult to see why the legislature would enact a section limited to confirming an existing position. More fundamentally, the argument is not supported by the wording of s.36. That makes it clear that the court can make such Order with respect to the property in dispute as the court considers proper. That is a very wide-ranging power and clearly must encompass a power to make an Order in respect of the manner in which the parties hold identified property. I therefore cannot accept the respondent's argument that the reference to s. 15(1)(b) in the Terms precludes the interpretation of paragraph 2 contended for by the applicant.

#### **Relevance of the Applicant's Affidavit of Means**

55. Finally, the respondent placed considerable emphasis on the fact that the way in which the applicant described his assets in his affidavit of means. In fact, there were two affidavits of means by the applicant. In the first affidavit of 2 July 2021, he identified that he had a "50% *beneficial interest*" in four of the five properties in dispute in this motion including the family home. In his second affidavit of 2 July 2022, he referred to a "*legal and beneficial interest*" in the family home and a "*beneficial interest*" in the other three properties. It is true that the reference to a 50% beneficial interest bears some similarity to the description of ownership in paragraph 2, i.e. "*each entitled to a 50% interest*". However, I do not accept that this description is sufficiently significant to result in the interpretation of paragraph 2 contended for by the respondent. First, there are two affidavits of means and only

one of them uses the identified language. Second, the wording is in fact significantly different to that used in paragraph 2 given the absence of the words “*each entitled*”. Third, even if the language was sufficiently similar, that may simply mean that the language used in the affidavit of means did not accurately describe the interest. Indeed, the fact that the language was corrected in the second affidavit of means suggests that a correction of the description was intended. In total, I am not convinced this use of language by the applicant in his first affidavit of means is sufficiently compelling to persuade me to ignore the clear words of severance at paragraph 2, or the context of the agreement. As identified above, that context strongly suggests that the parties intended to hold the parties as tenants in common after they divorced. In my view this argument can only support, at best, an assertion by the respondent that she did not fully understand the terms of the settlement because of the wording in the applicant’s first affidavit of means. That goes to her subjective understanding and as identified above, cannot be used to interpret the Terms.

#### **Order made by Court on 11 January 2023**

56. Finally, I considered the form of Order to see whether there was any assistance to be gleaned from that. The Order identifies that the Consent between the parties scheduled to the Order (being the Terms) are part of the Order and enforceable as such but does not shed any additional light on the issue between the parties.

Nonetheless, there is nothing in the Order that would contradict or undermine the interpretation that I have adopted.

**Conclusion**

57. In the circumstances, I am satisfied that the correct interpretation of the Terms of settlement is that the properties identified at paragraph 2 (i) to (v) of the Terms were intended to be held by the parties as tenants in common and not as joint tenants.
58. Accordingly, I will grant relief in terms of the Notice of Motion *i.e.*, I will make a declaration that each of the parties hold a 50% interest in the properties listed in paragraph 2 of the Terms dated 11 January 2023 as tenants in common having regard to the construction of those Terms.
59. I propose listing the matter for costs and final orders on 30 July at 10.30. No written submissions are required. The parties have liberty to apply in relation to the date but should be aware that I intend to finalise costs orders prior to the end of term so should seek to agree an alternative date amongst themselves prior to the end of term if 30 July is not convenient.