

Neutral Citation No: [2022] NIFam 37

Ref: COL11987

ICOS No: 14/019562

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

Delivered: 01/12/2022

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

FAMILY DIVISION

MATRIMONIAL OFFICE

BETWEEN:

FIONA McSHERRY

Petitioner

and

MARK McSHERRY

Respondent

and

TONY McSHERRY and MARIAN McSHERRY

Third Parties

**Linda Robinson (instructed by the Elliott Trainor Partnership Solicitors)
for the Petitioner**

Cathy Hughes (instructed by Rafferty & Co Solicitors) for the Respondent

Lisa Moran (instructed by Tara Walsh Solicitors) for the Third Parties

COLTON J

Introduction

[1] The issue to be determined in this case arises from an ongoing acrimonious dispute between the parties subsequent to the breakup of the marriage between the petitioner and the respondent.

[2] For many years there has been an ongoing dispute in relation to the financial settlement between the petitioner and the respondent.

[3] In the course of the dispute an issue was referred to the Queen's Bench Division (as it was then) in relation to what the third parties described as a loan to the respondent and the petitioner.

[4] In that action the third parties were the plaintiffs, and the petitioner and respondent were the first and second defendants.

[5] The issue in that case related to a claim brought by the third parties to the effect that they had lent the petitioner and the respondent the sum of £165,000 for the purposes of the purchase of a property known as 133 Carney Hall, Newry, which became the matrimonial home for the petitioner and the respondent.

[6] The Queen's Bench Division was asked to determine that dispute in the expectation that this would assist in the resolution of the financial dispute between the petitioner and the respondent in relation to the division of the matrimonial assets after the end of their marriage.

[7] The court heard evidence from the parties in that action and gave a written judgment on 2 December 2019.

[8] Regrettably the parties have not been able to resolve their ongoing issues in the matrimonial court and the matter has been referred back to this court on a discrete issue.

[9] This judgment therefore needs to be read in conjunction with the judgment delivered on 2 December 2019.

[10] To recap, in the civil action the third parties provided the petitioner and respondent the purchase price for Carney Hall which was £265,000. It is to be noted that the third parties are the parents of the respondent.

[11] It was not in dispute that £100,000 of the £265,000 was a gift from the third parties to the petitioner and the respondent.

[12] It was the third parties' case that the balance of £165,000 was advanced by way of a loan to the petitioner and the respondent. This was accepted by the respondent. The petitioner denied that she had any liability in respect of this loan. In essence her case was that she had nothing to do with the loan, she was never consulted on it and was not a party to it.

[13] Of particular relevance for this issue is a property at 27 Sandy Street, Newry ("Sandy Street"). The petitioner and respondent were married on 9 May 2003. Prior to the marriage the respondent owned the property at Sandy Street which was held in his sole name and subject to a mortgage in favour of the Woolwich Building Society. It was a reasonably small mid-terrace house. The petitioner and respondent lived

there for a period after their marriage before the purchase of Carney Hall in March 2007.

[14] In the civil action it was the third parties' case that the balance of the £165,000 was to be repaid from the anticipated sale of Sandy Street. Unfortunately for the reasons set out in the judgment the sale of Sandy Street never proceeded and its current value is well below £165,000.

[15] In the civil action it was the third parties' case that because of the pressure to purchase Carney Hall they agreed to provide the £165,000 to ensure its purchase on the understanding that they would be reimbursed through the sale of Sandy Street, which on the basis of the asking price and the market in Newry at that time would have adequately provided sufficient funds for repayment.

[16] After a full hearing the court concluded that from the third parties' perspective Tony McSherry was providing a loan of £165,000 for the benefit of the petitioner and the respondent which was to be repaid from the sale of the Sandy Street property.

[17] The court also concluded that the petitioner was not consulted about or involved in this arrangement. It was between the father and the son. The court accepted her evidence that she had no direct involvement with the conveyance and was not privy to the arrangements in relation to the provision of the £165,000.

[18] In the civil action the arrangement in relation to Sandy Street also became contentious. When the sale fell through it appears that in effect the management of the property was taken over by Tony McSherry on behalf of the third parties. He has let out the property for various periods in the interim. He has carried out repairs and maintenance to the property at his own expense. There has been no formal transfer of the property from the respondent to his parents. However, it is clear that he has completely disengaged from any involvement in the property and from his perspective the beneficial owners of the property are indeed his parents namely the third parties in this action.

[19] At paragraph [59] of the judgment the court found:

“A particular controversy was the evidence from the second defendant (the petitioner) to the effect that her understanding was that it was agreed by Mark McSherry (the respondent) that the property had in fact been sold to his parents. She made the case that in September 2008 Tony McSherry (third party) came to her and told her that he had bought Sandy Street for £180,000 and now owes her the balance of the deal. She confronted her husband with this information and says he did not deny it but rather said it was none of her business. Shortly after those discussions the plaintiffs (the third parties) told her and her husband

that Tony McSherry now owns Sandy Street, it was to be rented out but that the plaintiffs would keep it for the benefit of the defendants and their children. I conclude that the property has not been sold on any formal basis but as I have already observed I find as a fact that the first defendant (the respondent) has in effect abandoned his interest in this property in favour of his father. I accept the second defendant's (the petitioner) evidence on this issue. This does not of course mean that there has been any actual sale, but I accept that this was indeed her understanding."

[20] Importantly the court determined as follows:

"[67] In light of the findings I have made I consider that the plaintiffs are entitled to judgment against the first defendant Mark McSherry. I consider that there was a legally binding agreement between those parties to the effect that he was receiving a loan. However, I also conclude that it was a term of the agreement between them that that loan was to be repaid from the proceeds of the sale of Sandy Street. In those circumstances I find that the plaintiffs are entitled to judgment against the first defendant. The judgment shall be satisfied by the value of the first defendant's interest in Sandy Street, however realised, but shall not be more than £165,000. ...

[68] I further find that there is no legally enforceable agreement between the plaintiffs (the third parties) and the second defendant (the petitioner) and the action against her is therefore dismissed.

[69] It remains for the defendants to settle the financial issues arising from their separation which will have implications for the plaintiffs. With good will it seems to me that there are clear paths to a resolution of the dispute. If nothing else such a resolution is essential in the best interests of the children who sadly are potential victims of this acrimonious family dispute. That is for another court."

[21] Unfortunately the hopes expressed in the final paragraph of the judgment have not been realised.

The Issue

[22] The issue in this case relates to whether or not the petitioner as she asserts in the matrimonial proceedings is in a position to argue that she has an equitable interest in the property at Sandy Street. The petitioner asserts that this issue was not settled in the previous Queen's Bench proceedings.

[23] Thus, the petitioner argues that she has a potential interest in Sandy Street and this is a matter which should be taken into account in the final disposal of the matrimonial assets between the petitioner and the respondent.

[24] As in the civil action the McSherrys, that is the respondent and third parties, are in agreement in opposition to that of Fiona McSherry the petitioner.

[25] The respondent and third parties rely heavily on the evidence given in the civil action supported by the pleadings submitted on behalf of the petitioner. From that evidence and from the pleadings it is clear that the petitioner's evidence in the case was that as between the McSherrys Mark considered that the £165,000, which he admitted he owed, could be satisfied by the sale of Sandy Street. He subsequently abandoned any interest in the property, albeit that no formal steps were taken to transfer the property to his parents.

[26] In particular reliance is placed on the following pleadings in the defence filed on behalf of the respondent, Fiona McSherry:

“(a) Para 17 - In or about September 2008, this defendant (Fiona McSherry) was informed by the first plaintiff (Tony McSherry) that on foot of an agreement entered into between the first plaintiff and the first defendant that the first plaintiff had bought Sandy Street for £180,000. ... The first defendant went on to state that it was he alone who owed his father £165,000 and that since he had agreed to sell his father Sandy Street for £180,000 his father consequently owed him £15,000 difference. In light of this from that point on this defendant held the view that the first plaintiff or both plaintiffs were the owners of the Sandy Street property. The second named defendant did not turn her mind to whether they were the legal or beneficial owners, from her point of view, they were the owners. Whilst this defendant was excluded from the decisions reached on these matters, on the basis of what the first plaintiff and first defendant had told her, as far as she was concerned, her husband and parents-in-law had come to an agreement in full satisfaction of any funds that had been advanced at the time of purchasing Carney Hall ...

(b) Para 18 – At the request of the plaintiffs this defendant handed over any keys she had for Sandy Street. At no stage did the first defendant dispute the fact that he had sold his father Sandy Street. This defendant alleged that the plaintiff and the first defendant entered into the Sandy Street agreement thereby satisfying the alleged debt, if any ever existed.

(c) Para 19 – All rent or other return of monetary value in respect of Sandy Street was received for on behalf of the plaintiffs. The plaintiffs have admitted same in paragraph 12 of their reply to the defendants request for particulars. The plaintiffs are the landlords of the property. Further one or other of them is the true owner of the property (albeit that one or both are holders of the beneficial interest or other interest be that legal or equitable on the property).”

[27] Thus, it is argued by the respondent and the third parties that the petitioner accepted that beneficial ownership of the Sandy Street property rested with the third parties.

[28] Despite this concession, which it is argued was important in the conclusion of the civil action, the petitioner now seeks to claim a 50% beneficial interest in the Sandy Street property.

[29] The understandable concern of the respondent and the third parties is in fact, as Ms Moran put it, that the petitioner is now seeking to “ride two horses.” On the one hand in the action she relies on the fact that Mark McSherry agreed to transfer Sandy Street to his parents in satisfaction of the loan as a means of defeating the claim. Now she asserts that she is entitled to an interest in the Sandy Street property as a matrimonial asset.

[30] In these circumstances the respondent and third parties invite the court to confirm in this judgment that the effect of the previous judgment is that the third parties are the owners of Sandy Street, and that the petitioner has no claim on the property.

Conclusion

[31] It is important to identify accurately the decision the court was asked to make in the civil action. What was at issue was whether the petitioner was liable for a loan of £165,000 which it was admitted was used to purchase the matrimonial home. As will be clear from the passages of the judgment already quoted the court accepted that as far as the respondent and third parties were concerned this loan was to be repaid from the proceeds of Sandy Street. It is also clear that the petitioner was aware that

this was the view of the respondent and the third parties. However, nowhere in the judgment did the court conclude that she agreed to this or that as a matter of law she had agreed to waive any interest she might have had in Sandy Street.

[32] For this reason the court was careful in its judgment to say that the admitted debt between the respondent and the third parties was to be satisfied “by the value of the first defendant’s interest in Sandy Street.” The court did not say nor was it obliged to say what that interest was.

[33] The court therefore concludes that Ms Robinson is correct in her submission that the property, and more notably the petitioner’s wife’s potential interest therein, is not excluded from division in the matrimonial case by virtue of the judgment in the civil action.

[34] It will obviously be a matter for the matrimonial court to determine the ultimate distribution of the matrimonial assets in this case. All the civil court has determined is that the petitioner was not indebted to the third parties in respect of the loan in dispute in that action. Furthermore, it determined that whatever interest the respondent had in Sandy Street is the means by which he is obliged to repay the loan from the third parties to which he was a party. I repeat that the court did not determine what interest, if any, the petitioner had in that property.

[35] All of that said, I do consider that there is much merit in the complaints made by the respondent/third parties in the overall context of the distribution of the matrimonial assets in this case. Nothing in this judgment should be interpreted as indicating that it is accepted the petitioner has a 50% or any interest in the property at Sandy Street. Neither did the court make any finding nor was it obliged to, in relation to rents received by the third parties subsequent to the agreement between them and the respondent concerning Sandy Street. It cannot be denied that the petitioner benefited from the loan provided by the third parties to the respondent. All the court has determined is that she does not owe any money to the third parties. The money that the respondent owes to the third parties can be satisfied by his interest in Sandy Street.

[36] In short it is open to the petitioner to argue that she has an interest in Sandy Street and nothing in the previous judgment precludes her from making such an argument.