Neutral Citation No: [2024] NICh 13 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* **HOR12216** *ICOS No:* **19/7075** *Delivered:* **13/12/2024**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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CHANCERY DIVISION

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BETWEEN:

ROBERT BUNTING

Plaintiff

and

EAMON BLANEY

First Defendant

and

CARMEL BLANEY

Second Defendant

19/9691
19/9696
20/078504

EXCEL-A-RATE BUSINESS SERVICES LTD

Plaintiff

and

EAMON BLANEY

First Defendant

and

CARMEL BLANEY

Second Defendant

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Mr Alistair Fletcher (instructed by Mills Selig, Solicitors) for the Plaintiff
Ms Maria Mulholland (instructed by Diamond Heron, Solicitors)
for Excel-A-Rate Business Services Ltd
Mr Eamon Blaney, an undischarged bankrupt, was unrepresented
Mrs Carmel Blaney appeared as a Litigant in Person

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HORNER LJ

Introduction

[1] On 23 January 2019 Robert Bunting ("RB") issued proceedings against Eamon Blaney ("EB") seeking delivering up of 35 Ardenlee Avenue, Belfast, ("the Premises"). The Premises comprised unregistered land and the Registry of Deeds records EB as being the sole legal owner. RB alleged that EB had borrowed money from him and various of his Associates ("the Associates") in 2016 to finance the Quartisan Restaurant ("Quartisan") which carried on business at Waring Street, Cathedral Quarter, Belfast. Quartisan was owned by Ardcarmon Ltd ("the Company") in which both EB and Carmel Blaney ("CB"), the wife of EB, were directors. EB, however, was the sole shareholder. The total sums borrowed comprised a loan of £90,000 lent by RB himself in June 2016; a second loan of £20,000 may have been lent by RB himself in August 2016; a further loan of £100,000 was lent by RB and the Associates; and finally, £36,000 was lent by RB personally pursuant to a loan agreement dated 16 July 2017. That would mean that the total sum borrowed from RB and the Associates was some £246,000 or thereabouts. However, there is some uncertainty about this as the affidavit evidence is somewhat unclear. There is no doubt that well over £200,000 was lent by RB and the Associates.

[2] There were also various sums of money due to a number of companies controlled by David Ballan ("DB"), which went under the title of Excel-A-Rate ("EAR"). These sums were guaranteed by EB and CB and secured by a mortgage dated 14 December 2017 on the Premises.

[3] It is important to emphasise that this judgment is not concerned with what are the total amounts, if any, due to RB and/or EAR including what rates of interest should be charged in respect of the sums found to be outstanding to different creditors and/or secured on the premises. These are matters for another day. Absent agreement among the parties, accounts and enquiries can be taken, if so required. Judgment on these issues will follow after a further short hearing.

Background facts

The Bunting security

[4] In October 2016 the Company entered into various loan agreements ("the loans") to provide the necessary finance to run Quartisan. These loans were secured by a mortgage/charge on the Premises ("the RB Mortgage") dated 21 October 2016 in favour of RB and his Associates.

[5] CB was made a notice party by Order of the Master, consequent upon her application to be added as a party. This followed upon the Master's Order of 13 June 2019 when he had ordered delivery up of the Premises because of a failure

on the part of EB to repay the loans secured by the RB mortgage. On 11 March 2019 RB's solicitor in an affidavit had claimed that:

(a) The amount of the original loans was £235,010 or thereabouts;

(b) Substantial interest had accrued due in the intervening period - the terms of the loan provide for an initial rate of interest of 8% for the first year when the money was to be repaid and thereafter the interest rate increased annually by a further 3% ie 11% between October 2017 and October 2018 and 14% between October 2018 and October 2019 etc.

[6] As I have recorded the Associates had contributed to the monies which formed part of the loans and RB was appointed the security trustee in respect of their interests pursuant to a security trust deed dated 21 October 2016. The Premises were charged by way of the RB mortgage to repay the money lent together with all the interest, fees, costs and expenses incurred by RB and the Associates.

[7] The Company was unable to pay the money lent by RB and the Associates. On 27 November 2018 Mills Selig, RB's solicitors, wrote requesting payment of the outstanding monies due on foot of the loans which at that stage was £284,568.87. By 1 March 2019, when an affidavit was sworn by Mr Richard Craig, a solicitor in the firm of Mills Selig, the amount that had accrued due was just over £300,000, namely £300,641.

The EAR security

[8] Excel-A-Rate Business Services Ltd is one of a number of companies owned and controlled by DB and his family which, as previously stated, I intend to refer to collectively as "EAR." EB had borrowed money from EAR secured on various items of equipment such as the furniture in the Quartisan Restaurant. Money raised on foot of these "finance agreements" seemed designed to provide working capital for the restaurant. These agreements attracted high rates of interest and were guaranteed by CB and EB. EAR issued an originating summons dated 31 January 2019 seeking delivery up of the Premises pursuant to the mortgage dated 14 December 2017 and made between EAR of the one part and EB and CB of the other part. On the same date EAR issued a writ of summons against EB and CB claiming just over £24,000 together with interest being monies due on foot of three guarantee accounts, CA001167, CA001122 and CA001137. On 11 November 2020 EAR issued a further writ of summons against CB alone endorsed with a statement of claim seeking various amounts due on foot of various agreements owed by the Company and which had been guaranteed by CB. EB was not a party to these proceedings. He had been made bankrupt on 20 January 2020. The total sum due on 11 November 2020 was stated to be just over £163,000 and included a claim for damages for non-return of equipment. The total amount due by the Company, it was claimed, had been guaranteed jointly and severally by CB (and EB) and, accordingly, was due by both CB and EB. Interest continued to accrue due at a

substantial rate of interest. As I have recorded any accounts and enquiries can be taken and judgment for the final amounts will follow after a further short hearing.

The issues

[9] The issues for the decision of this court are as follows:

(i) Does CB have a beneficial interest in the Premises?

(ii) If CB does have a beneficial interest in the Premises, what is the size of that interest?

(iii) If CB does have a beneficial interest in the Premises does this rank in priority to the interests of:

  (a) RB; and/or

  (b) EAR in the Premises?

(iv) If CB does have a beneficial interest in the Premises is RB and/or EAR entitled, given the nature of that interest, to have the Premises sold in lieu of partition?

[10] It is only proper that I should thank counsel for their contributions on what are complex and complicated facts and circumstances, and which raise difficult legal issues. It is unfortunate that both CB and EB were not legally represented as this case raised some complicated legal issues which would certainly have benefited from legal arguments being advanced by counsel retained on their behalf. As a consequence, I have had to spend considerable time myself looking at potential defences which might have been raised on the facts so as to ensure that EB, and particularly CB, suffered no prejudice for want of legal representation. It has necessarily been a painstaking and lengthy process.

[11] Before looking at the evidence and in particular the testimonies of EB and CB it is important to emphasise that this is not a case where a husband and wife are locked in battle over who owns the family home and what their respective shares, if any, should be. Rather, this is a dispute in which it is in the interests of both CB and EB to make the case that CB has a beneficial interest in the Premises of such an extent that it will provide her with a defence to defeat the claims of the creditors, RB and EAR, for the possession and sale of the Premises, or at the very least, to delay them in their determination to satisfy the debts due to them. As Lord Scott said in *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at para 142:

> "But, in most of the cases with which the House is now concerned, the husband is supporting his wife in her attempt to prevent the bank from enforcing its security.

> They stand together in attempting to save the family home."

[12] In such a situation the husband is right behind the wife in her efforts to show that she has a beneficial interest "sufficient to prevent the bank from enforcing its security." As Fox LJ said in *Midland Bank v Dobson* [1986] 1 FLR 171 at 174D:

> "There is a real fear that self-serving and possibly collusive fabrication may enable an insolvent proprietor to shield his home from creditors."

[13] However, there is little doubt that such a fear needs to be treated seriously. I conclude, having carefully considered all the evidence, that both EB and CB combined together to try as best they could to make a case that would confound their creditors and prevent the Premises being sold. The dictum in the case of *Midland Bank v Dobson* [1986] 1 FLR 171 at 174D makes good sense and deserves close attention in these types of case:

> "…assertions made by a husband and wife as to a common intention formed 30 years ago regarding joint ownership, of which there is no contemporary evidence and which happens to accommodate their current need to defeat the claims of a creditor, must be received by the court with caution."

Witnesses

[14] Before dealing with the four central issues identified above, it is important that I make clear my conclusions about the main witnesses who gave evidence before me and whom I had the opportunity to see and hear answer some searching questions. The credibility of all of the witnesses, and I stress all the witnesses, played an important role in the conclusions which I have reached. Much of the evidence was contested and there was little agreement among the parties even as to the background facts.

[15] After careful observation of the witnesses giving evidence, I concluded that most of them did their best to try and give a truthful account of what had happened. I appreciate that the events with which we are concerned occurred some years ago and that witnesses can become confused with the passage of time. Memories are fallible and events can take on a different perspective when viewed with hindsight. I recognise, for example, that it was in RB's interest to recover as much capital and accrued interest as possible. However, he struck me as straightforward, and I had no reason to conclude that he was "gilding the lily." He was "a dear old friend" of EB and he had pursued his claim, I thought, more in sorrow than in anger. Further, I did not feel that DB of EAR or the witnesses who gave evidence on EAR's behalf, including Claire Collinge, Ken Finlay and Mrs Finlay, were trying to mislead the

court. However, there were witnesses who I had expected to be called. For example, I would have expected to hear from those recipients of the sums of money making up the disputed amount of approximately £47,100 or thereabouts, relied on by the Blaneys as being part of the purchase price for the Premises, so that I could confirm that the payments were either direct or indirect contributions towards that purchase price of the Premises. At the very least affidavits could have been filed on their behalf. Where appropriate, I will draw such adverse inferences as may be justified by the non-appearance of witnesses I would have expected to give evidence.

[16] EB, understandably, felt directly responsible for the financial problems which now beset him and his wife and their family. After all, the restaurant was his pet project into which he had invested some of the considerable proceeds he had received from the sale of his successful pharmacy business. Its failure has left the Blaneys in a parlous financial position. EB seemed to say what he thought was required to save the Premises and escape from a set of circumstances which were very much of his own making.

[17] I found CB to be resourceful, determined and capable. I do not consider her to be a dishonest person, but her testimony was, at times, unreliable and inconsistent. She was clearly under a great deal of pressure to try and save the Premises, the family home. She was not a witness upon whom the court could place any degree of confidence on issues which placed the Premises at risk. However, I must stress that she was a loyal and dutiful wife, hardworking and a good and caring mother to their children. Not only did she run a business, but she was also a homemaker, and I do not doubt that EB was hugely dependent upon her. However, she has remained fiercely determined not to have to leave the Premises.

[18] It is in this context that I highlight a number of different and inconsistent versions given by CB on what was a very material issue, namely how and what amount, it is alleged she contributed to the purchase of the Premises. CB claimed, for example, that there was an agreement for her to pay over the full net proceeds from the sale of her house at Wynchurch Park, which she sold, and which had realised some £65,000. She also claimed that the arrangement was that she would match the deposit paid by EB in respect of the purchase of the Premises, some £45,000. She also claimed to have paid £47,100 in random cheques as her contribution, and which for the most part she could not explain adequately. Finally, she claimed that she had paid £50,000 in total to EB as her share. These inconsistent and contradictory accounts served only to undermine her credibility and reliability.

[19] Further her claim to have paid EB's share of his contribution towards his mother's house at Knockbreda, namely £18,000, was contradicted by the arithmetic, never mind the synchronicity of the payments relied upon. Again, I considered, having had the opportunity to see her give her testimony, that I was not being told the unvarnished truth. This problem about CB's lack of credibility in respect of her claims to have made both direct and indirect contributions to the purchase of the Premises is that, having concluded that she had given misleading versions of events,

on which I was unable to rely on certain key issues, it was necessary for me to exercise caution before accepting any part of her testimony and to look, where possible, for other reliable evidence which supported it: eg see *Fairclough Homes Ltd v Summers* [2012] UKSC 26 at [52]. There were of course occasions when there was no corroborating evidence available through no one's fault, and in those circumstances I simply had to trust my instincts in deciding what was, and was not, true.

[20] CB was insistent that her finances and those of EB were kept strictly separate. I can understand, given EB's bankruptcy, that such a claim might be of benefit to both of them. However, it did make it more difficult when she also chose to claim, for example, that the purchase of the mobile home at Bettystown provided evidence of a common intention, that is that it was to be beneficially owned by them both even though, I find, EB had made no contribution to its purchase price. If this were so, and CB was not the sole beneficial owner, then EB's beneficial interest should have been declared to EB's trustee in bankruptcy so it could be realised and used to satisfy the many debts due to his creditors. However, it was not at all clear to me whether, in fact, EB's alleged share of the mobile home formed any part of the assets of EB which the trustee in bankruptcy was able to use beneficially to satisfy the debts of his creditors. Indeed, the evidence I received was consistent with CB buying a holiday home for the family to use and her remaining its sole beneficial and legal owner having paid the full purchase price.

[21] EB also specifically stated at 4.1.1.3 of the mortgage deed that he was the sole beneficial owner of the Premises. This is a telling point against him when it comes to consider who did actually own the Premises, which were at all times in his name only. In the earliest affidavit sworn by EB, he is silent about CB's alleged beneficial interest in the Premises. I would have expected EB, at the earliest opportunity, to make the case that there was a common intention that they both owned the Premises beneficially. No satisfactory explanation has been offered for this telling omission from the initial affidavit or, more importantly, how he came to tell the mortgagee that he was the sole legal and beneficial owner of the Premises, when on the case he is now making, his wife had always had a share in the beneficial ownership. EB either lied to the mortgagee or to the court.

[22] I must also draw attention to the behaviour of CB and EB when it became clear that they could no longer escape from the consequences of their insolvency. They stripped, or allowed the restaurant premises to be stripped, of all the equipment which they had offered to EAR as security for their indebtedness. This was not only deeply disappointing, but it also pointed to a willingness on their part to carry out unlawful acts which law abiding couples would not be prepared to countenance even though it might have suited their circumstances. Another example of this cavalier attitude towards the law was EB's failure to co-operate with his trustee in bankruptcy in the preparation of his statement of affairs. All these matters, together with the inconsistent histories offered, pointed to a couple who were prepared to say what they considered was needed to save their family home, even if this meant giving unreliable, self-serving testimony. These were matters to

which the court had to take into account in assessing the weight to be given to their testimonies when they were unsupported by other reliable, independent evidence.

[23] I have set out the background in some detail, because context is everything. The Blaneys are, I am sure decent people, but they were desperate to save their home and in their desperation they undoubtedly said and did things that they would most certainly not have said if they did not consider the Premises to be at risk. Both EB and CB displayed a visceral desire to remain in the Premises and, accordingly, their testimonies deserved the closest of scrutiny.

The issues

Does CB have a beneficial interest in the Premises?

[24] The central issue is whether CB has any beneficial interest in the Premises at all. If EB, before going bankrupt, was the sole legal and beneficial owner of the Premises, as he claimed to the mortgagee, CB has no entitlement to any interest in the Premises or to the proceeds of any sale of those Premises. She will be nothing more than a hapless bystander when the Premises are sold to raise funds to pay off the secured creditors, RB and EAR. If CB is to succeed, then she will need first of all to establish that she has earned a beneficial share in the ownership of the premises. This is usually accomplished in such situation as this by proving that she is a beneficiary under a common intention constructive trust. This was described in *McKenzie v McKenzie* [2003] EWHC 601 Ch at [70] as a trust which:

> "arises out of, and is equity's way, of giving effect to the common intentions of the parties."

[25] In *Pettitt v Pettitt* [1970] AC 777 the House of Lords had to consider a claim, following a divorce, made by a husband. He claimed that he was beneficially entitled to a share in the former matrimonial home of which the wife was the sole legal owner. The basis of his claim was that he had done decoration work and made improvements to the home which had increased its value. The House of Lords determined that it was not possible to infer a common intention from the evidence that the husband was to have any beneficial proprietary interest in the property. Lord Reid stated the position at 794B:

> "As regards contributions the traditional view is that, in the absence of evidence to the contrary effect, a contributor to the purchase price will acquire a beneficial interest in the property; but as regards improvements made by a person who is not the legal owner, after the property has been acquired, that person will not, in the absence of agreement, acquire any interest in the property …"

[26] He was unhappy with such an outcome and expressed his view that such an outcome was entirely unsatisfactory: see 794E. He did go on to say at 795A:

> "… I think it is now widely recognised that it is proper for the courts in appropriate cases to develop *or* adapt existing rules of the common law to meet new conditions."

However, Lord Reid did stress that it was not the role of the courts "to encroach on the province of Parliament." (795B)

[27] Lord Hodson pointed to the difficulty in resolving these types of disputes. He said at 806F:

> "They [the parties] do not as a rule enter into contracts with one another so long as they are living together on good terms. It would be very odd if they did."

He noted that the President of the Probate, Divorce and Admiralty had said in an extra judicial address:

> "The cock can feather the nest because he does not have to spend most of his time sitting on it." (See 811D)

[28] Lord Hodson then went on to say:

> "I do not myself see how one can correct the imbalance which may be found to exist in property rights as between husband and wife without legislation."

[29] He might also have added that new legislation was also required to regulate the rights between a creditor on the one part and the husband and wife on the other part, as here, when the house had been offered as security for his/her or their indebtedness. Certainly, Lord Hodson was not prepared to contemplate any basis upon which a spouse who was making improvements to the property could earn a beneficial interest in it from those works which were being carried out. He also observed at 810F that "the conception of a normal married couple spending long winter evenings hammering out agreements about their possessions seems grotesque": (see 810F).

[30] Lord Upjohn was adamant that if there was to be a change in the law then this was something "that must be done by Parliament": see 817G.

[31] Lord Diplock wanted to impute a common intention as to their proprietary rights which "as fair and reasonable men and women they presumably would have

formed had they given their minds to it at the time of the relevant acquisition or improvement of a family asset …": see 824H.

[32] It is clear from the law report that there were a number of different views in the House of Lords, but the result was twofold. Firstly, there was an inability to find a common intention that the husband's work would earn him any beneficial proprietary interest in the matrimonial home. Secondly, there was also a recognition that a parliamentary enactment was likely to achieve a fairer and more balanced outcome than judicial intervention: see, for example, 817G.

[33] In *Gissing v Gissing* [1971] AC 886 the House of Lords had to return to this vexed subject when it rejected a wife's claim for a share of the beneficial ownership of the matrimonial home based on, inter alia, the payments she had made for laying the lawn, some furnishings and for her own clothes and those of her son. This was against a background where, it was claimed, the husband had told her when he left her, that the house was hers. She then sought her beneficial share after the marriage had ended in divorce. The House of Lords rejected the wife's claim for any beneficial interest in the property, but in doing so conceived "a particular type of constructive trust (which) has been used by the courts to resolve disputes relating to the rights of parties in relation to a home where they have lived together in a marital or quasi-marital relationship": see 17.121 of *Hayton McFarlane & Mitchell on Equity and Trusts* (15th Edition). The trust is known as the common intention constructive trust.

[34] In *Gissing v Gissing* Lord Reid maintained the views that he had expressed in *Pettitt* and set out the unfairness of not giving the wife a beneficial share despite her contributions to the family's finances. He gave an example of how a more sophisticated wife could work the facts to her benefit. In short, he pointed out both the obvious unfairness in making a difference between direct and indirect contributions and then concluded "that in many cases it would be unworkable": see 896H. His conclusion was that the issue of whether the wife had a beneficial interest "cannot surely depend on who signs which cheques": see 897A.

[35] Lord Reid thought the law was not in a "very creditable state" when the "candid and honest wife would agree that the matter was never discussed that her husband never indicated any intention to give her a share, and that she never thought about it." But on the other hand, "a more sophisticated wife who had been told what the law was would probably be able to produce some vague evidence which would enable a sympathetic judge to do justice by finding in her favour. That would not be a very creditable state in which to leave the law."

[36] Lord Pearson said tellingly at 902G:

> "The arrangements which they make are likely to be lacking in the precision and finality which an agreement would be expected to have."

[37] Lord Diplock stepped back from what he had said in *Pettitt* because it was out of line with the other judgments. He said that it might be possible to infer the parties' common intention from their conduct. He said at 906B-C:

> "… the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party."

[38] However, Lord Diplock at 909H-910A emphasised that a wife merely contributing out of her own earnings or private income to other expenses of the household did not permit the inference of a common intention:

> "For such conduct is no less consistent with the common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate…"

[39] Lord Diplock went on to find that it was not possible to infer a common intention because there was:

> "… no suggestion that the wife's efforts or her earnings made it possible for her husband to raise the initial loan or the mortgage or that her relieving her husband from the expense of buying clothes for herself and for their son was undertaken in order to enable him the better to meet the mortgage instalments or to repay the loan. The picture presented by the evidence is one of a husband and wife retaining their separate proprietary interests in property whether real or personal purchased with their separate savings and is inconsistent with any common intention at the time of the purchase of the matrimonial home that the wife who neither then nor thereafter contributed anything to its purchase price or assumed any liability for it, should nevertheless be entitled to a beneficial interest in it." [Pages 910H-911B]

[40] In *Gissing* Lord Diplock had assumed that the parties seeking to acquire an interest in the property would have helped in someway to achieve the acquisition of that property. The courts have moved on from requiring that a party, who was not on the title, had to behave in some way that would assist in the acquisition of the property by "contributing to the purchase price or to the deposit or the mortgage instalments when it is purchased upon mortgage or to make some other material sacrifice by way of contribution to or economy in the general family expenditure": see page 905F. The courts no longer require that the common intention must be that the partner, not on the title, would acquire an interest in the property in exchange for some quid pro quo. Instead, it will be enough if that partner has "acted to his or her detriment or significantly altered his or her position in reliance on the agreement": see Lord Bridge in *Lloyds Bank Plc v Rosset* [1991] 1 AC 107 at 132 and *Hayton McFarlane & Mitchell on Equity and Trusts* (15th Edition) at 17-184.

[41] Accordingly, the position now is that to establish "a change of position" a direct financial contribution is not necessarily required, and reliance can be placed by all manner of conduct, eg in *Eves v Eves* [1975] 1 WLR 1338, the wife's reliance was demonstrated, inter alia, by the heavy manual labour carried out with the assistance of a sledgehammer. The courts have had to adopt a broad approach to this factual issue of detrimental reliance "lest it be too easy for a claim to be defeated by the allegation that the wife's actions were motivated not by a belief as to her beneficial interest in the property, but rather by, for example, her love and affection of the defendant or for any of their children": see *Hayton McFarlane & Mitchell on Equity and Trusts* (15th Edition at 17-185).

[42] It will be noted that detrimental reliance did not feature expressly in either case of *Stack v Dowden* [2007] UKHL 17 or *Jones v Kernott* [2011] UKSC 53, when the House of Lords and the Supreme Court respectively came to consider a party's possible beneficial interest under a common intention constructive trust. The reason for this is that those actions which were relied upon "to support the inference of common intention, such as direct financial contribution to the cost of the acquisition also provide evidence of reliance on that intention": see *Hayton McFarlane & Mitchell* at 17-186. The same is true in the instant case where CB relies on, inter alia, the purchase of the mobile home for the family, her contribution to the household expenses and outgoings and the indirect assistance she provided so ensuring the mortgage instalments were met. Having heard CB, I do not doubt that she carried out these various tasks, expecting by doing so, that she would become a joint owner of the Premises, in accordance with the parties' common intention. In doing so, she acted to her detriment.

[43] However, it is now essential to return to the central authority in Northern Ireland on this issue. The decisions of the House of Lords in *Pettitt* and *Gissing* were then considered and analysed in Northern Ireland in *McFarlane v McFarlane* [1972] NI 59 by the Northern Ireland Court of Appeal. In that case the court had to consider whether the wife had acquired a beneficial interest in the

matrimonial home. The main judgment was given by the Lord Chief Justice, Baron MacDermott. He said at page 74:

> "It seems that, where one spouse claims a beneficial interest in property a legal title to which is vested in the other, the claimant must show that he or she has made a pecuniary contribution to the purchase. The contribution may be direct, whether it is made in one payment or by instalments and whether it is made before purchase or afterwards (for example by helping to pay off an overdraft or building society instalments) or partly before and partly afterwards. In such a case the legal owner will be a trustee to the extent of the contributions for the contributing spouse, whose beneficial interests in the property will be proportionate to his or her contribution … The contribution may be indirect and in practice this will almost often happen where the husband is the legal owner and the wife has an income, whether from employment, from her own business or from other sources, or works in the husband's business and in one or another eases the husband's financial position and thereby indirectly augments the fund out of which the husband buys the property. In such a case the wife acquires a beneficial interest if, and only if, there is an agreement or arrangement between the spouses that she is to have such an interest."

[44] Lord MacDermott also said at pages 69-70:

> "I think it may be postulated with reasonable certainty that in most cases what either spouse contributes thereto – in work or services or in bearing the costs of household or other expenses – will not be contributed with any thought of building up a beneficial interest in one form of property or another. Such activities are, I believe, more often than not, all part of a joint and unselfish adventure; and while that remains a true state of affairs I see no ground on which a court of equity should say to one spouse that he or she has gained by such indirect contributions and must as a matter of fair-dealing share that gain beneficially with the contributor."

[45] Lord MacDermott went on to say:

> "At this point the indirect contribution has become, by virtue of the arrangement or undertaking between the

> spouses, as much the basis of a resulting trust as a direct contribution money to the cost of acquiring a particular property."

[46] He then continued at page 70 as follows:

> "If the indirect contributions of a spouse for family purposes were to be put on equality with direct contributions in order to ascertain the resulting beneficial proprietary interests, it would amount, in the absence of any agreement or arrangement between the spouses, to an application of the now discredited doctrine of family assets.

[47] He then highlighted at page 71:

> "… that the indirect contributions of a spouse must, if they are to earn or generate a beneficial interest in the fund built up or the property acquired, be the subject of some agreement or arrangement between the spouses sufficient to show a mutual intention that the indirect contributions will benefit the contributor in this way."

[48] Lowry J gave a concurring judgment. He said at page 78:

> "Lest it be argued that such a result is unfair to wives, one may consider the position of the virtuous wife who **looketh well to the ways of her household, and eateth not the bread of idleness,** but who in most cases neither pursues a career nor helps directly in her husband's business. Her price may be far above rubies, but such a wife has nothing to gain from the family assets doctrine. Yet who could deny her merits or even her probable financial value to her husband from a business standpoint? Where community of ownership between spouses is not the law, it seems unfair to give to some wives but not to others property rights beyond those of other people in similar circumstances."

[49] The logic of this comment seems to suppose that because the housewife who is not in paid employment does not acquire an interest in the matrimonial home, it would be unfair to give an interest to the working wife. Another way, of course, of looking at it would be that it is unfair to both the wife labouring at home not to give her an interest and also unfair to deny an interest to the wife who is in paid employment and contributing to the costs of running the home.

[50] However, MacDermott LCJ was clear when considering both judgments of the House of Lords in *Pettitt* and *Gissing* when he said at page 69:

> "The conclusion I have reached on this important and difficult question is that there is a relevant distinction between the two kinds of contribution and that the indirect contribution, if it is to earn a beneficial interest in the property acquired, must be the subject of agreement or arrangement between the spouses. Here I do not refer to a contractual relationship solely but would include any understanding between the spouses which shows a mutual intention that the indirect contributions of one or the other will go to create a beneficial proprietary interest in the contributor. Such, in my opinion, is the nature of the qualification mentioned in what I have described as the second proposition. I do not think that it has, as yet, been ruled upon by the House of Lords."

[51] Lord MacDermott LCJ continued at page 71 when he stated:

> "… the indirect contributions of a spouse must, if they are to earn or generate a beneficial interest in the fund built up or the property acquired, be the subject of some agreement or arrangement between the spouses sufficient to show a mutual intention that the indirect contributions will benefit the contributor in this way."

[52] It is also important to highlight the comment of Lowry LJ at page 76 when he agreed with the submission that:

> "Indirect contributions which are unrelated to the acquisition of the property cannot found an equitable interest in it."

[53] But as Lord Reid had said earlier in *Gissing v Gissing* at 896H:

> "How can anyone tell she has made a direct or only an indirect contribution to paying for the house? It cannot surely depend on who signs which cheques."

[54] Careful consideration should be given to what Lord Walker said in *Stack v Dowden* [2007] 2 AC 432 some 35 years later, at para [34] when he returned to this subject:

> "In those cases (it is to be hoped, a diminishing number) in which such examination is required the court should,

> in my opinion, take a broad view of what contributions are to be taken into account. In *Gissing v Gissing* [1971] AC 886, 909G, Lord Diplock referred to an adjustment of expenditure "**referable to the acquisition of the house"**. 'Referable' is a word of wide and uncertain meaning. It would not assist the development of law to go back to the sort of difficulties that arose in connection with the doctrine of part performance, where the act of part performance relied on had to be "**uniquely referable" to a contract of the sort alleged …**"

[55] In 1991, the House of Lords had again considered this common intention constructive trust. In *Lloyds Bank plc v Rosset* [1991] 1 AC 107, Lord Bridge gave the sole judgment of the House of Lords. He said at 132H-133B:

> "In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such agreement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. **But, as I read the authorities, it is at least extremely doubtful whether anything less will do.**" [Emphasis added]

[56] This approach of Lord Bridge (and the House of Lords) had been criticised by a number of commentators for "the denial of women's rights to participate in family assets accumulated during relationships of even substantial duration. The failure of these claims was not based, at least overtly, on any perceptions that it was inequitable to acknowledge a shared beneficial ownership of the family home. The decisions rested on the fact that the conventional law of trusts is deeply unsympathetic to the dynamics of family living": see Gray & Gray on *Elements of Land Law* (5th ed) at 876. The authors go on to say at 7.3.28:

> "The fundamental historic problem inherent in the English law of constructive trusts has been the doctrinaire insistence that trust entitlement be premised on a common intention or conscious bargain endorsing at least some sharing of equitable ownership between the

> relevant parties. This requirement of demonstrable bargain exerted a stranglehold over the development of any rational law of family or domestic property. In modern times the stubborn adherence to the element of intention as the authentic route of beneficial ownership came to seem inherently flawed. In many circumstances the search for such intention was unrealistic and highly artificial, the courts effectively demanding that beneficial entitlement be established on the basis of intentions which are rarely articulated or contemplated in the daily round of domestic life. The stark outcome, as exemplified in several landmark decisions of the House of Lords, was the denial of women's rights to participate in family assets accumulated during relationships of even substantial duration. The failure of these claims was not based, at least overtly, on any perception that it was **inequitable** to acknowledge a shared beneficial ownership of the family home. The decisions rested on the fact that the conventional law of trusts is deeply unsympathetic to the dynamics of family living. The structural principles of property law often sit badly beside the social phenomena which they attempt to regulate … The result in English law has been the frequent withholding of beneficial entitlement, purely and simply on the ground that the relevant participants had failed to advert in any precise or legalistic way to the property consequences of their relationship."

The above criticisms apply with equal force to the law of trusts in Northern Ireland which is essentially the same as that in England & Wales.

[57] In *Gissing v Gissing* [1971] AC 886 at 909G Lord Diplock had made it clear that in the absence of a direct contribution to the purchase price or evidence that the wife's contribution to other household expenses was referrable to the acquisition of the house, there was no question of the court being required to impose a common intention constructive trust. He said:

> "Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referrable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in the

> matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses to the household."

[58] This is an example of a wife being unable to acquire a beneficial interest despite her contributions because of her failure "to advert in any precise or legalistic way to the property consequences of their relationship." There is also the lack of empathy shown in some judicial statements that beneficial ownership is not altered by the performance of "the ordinary domestic tasks": see *Burns v Burns* [1984] Ch 317 at 331A per Fox LJ. *Gray and Gray in Elements of Land Law*, comment at page 893 at 7.3.57:

> "The strictures imposed by orthodox trust theory were such that a relevant detriment or change of position was seldom established unless the claimant's conduct substantially overstepped boundaries of conventional expectation based on stereotype perceptions of her appropriate gender role. As was once said of a wife's claim to matrimonial home, **before equity will intervene to protect the wife, her contribution must exceed that normally expected of a wife carrying out her normal matrimonial role**: see *Lloyds Bank v Rosset* [1989] Ch 350 at 402F.
>
> This institutional lack of empathy was mirrored in other statements if beneficial ownership is not altered by the performance of **the ordinary domestic tasks or by the fact that the husband likes to occupy his leisure by laying out a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks family dinner or bathes the children.** It is noticeable, however, that such observations reflect a constructive trust law which flourished some 20 or 30 years ago. It is highly probable that these gender based perspectives has ceased to have any prominence in the modern law."

[59] The above dicta from Lord Diplock and Lord Bridge were made approximately 50 years and 30 years ago respectively. It is essential to remember that society's attitude towards women and their treatment has changed over the past half a century. Lord Bridge's comments that the intensive efforts of the wife to decorate the house and keep it in good repair was explicable solely on the basis that she had been "extremely anxious that the new matrimonial home should be ready for occupation before Christmas" and that her efforts did not constitute work "upon which she could not reasonably have been expected to embark unless she was to

have an interest in the house": see 131E of *Lloyds Bank v Rosset*, today appear decidedly outdated in light of both changing attitudes and more recent case law. There has, in fact, been a sea change in the intervening period in respect of the attitude to the work women routinely perform, their duties and their role in society, and that the views expressed by Lord Bridge and others now appear redolent of a different, perhaps, less enlightened age. As we shall see, the law has moved on in accordance with changing social conditions and attitudes.

[60] So, it was against this background that the House of Lords in *Stack v Dowden* [2007] 2 AC 432, had to consider the more unusual position where the woman, Ms Dowden had the house in her sole name and in which the parties lived together as man and wife and had four children. The woman earned more than the man although they each made a contribution to the household expenses. The house sold for three times its purchase price, and another was bought in their joint names. 65% of the purchase price came out of the funds from a building society account in the woman's name. The balance was provided by a mortgage secured on the parties' joint names and two endowment policies, one in joint names and the other in the defendant's. *Stack* paid the instalments due in respect of the endowment policy on the joint names and *Dowden* paid the premiums for the other policy. They had separate bank accounts and made separate savings and investments. At first instance the judge ordered the sale of the property in equal division of the net proceeds of sale. The Court of Appeal allowed *Dowden's* appeal and ordered that the net proceeds of sale be divided 65%-35% in favour of *Dowden. Stack* appealed to the House of Lords, and it affirmed the decision of the Court of Appeal and noted that had the parties kept their finances strictly separate this would have provided a strong indicator that their shares in the property should be equal. Baroness Hale with whom Lords Hoffman, Hope and Walker agreed, made it clear that the conveyance into joint names gave rise to a prima facie beneficial joint tenancy in equity. The burden of proving anything different lay on the person making that claim. (The conveyance into a sole name by the same token gave no other person an equitable right and the onus was then on the other party to prove their entitlement). Baroness Hale emphasised at para [60] that the law had moved on in response to changing "social and economic conditions." Lord Walker at [26] thought that the law had moved on since *Gissing v Gissing* and "the Lordships should move it a little more in the same direction, while bearing in mind that the Law Commission may soon come forward with proposals which if enacted by Parliament, may recast the law in this area."

[61] As I have observed, over 15 years have passed, and Parliament has chosen not to intervene. Baroness Hale quoting from the Law Commission "Sharing Homes: a Discussion Paper (2002) (Law Commission No 278) at para 4.27 said that "a preferable way of expressing" the approach the court should adopt is a holistic one and to look at the whole course of dealing between the partners.

[62] At para [69] Baroness Hale set out an inexhaustive list of factors which included:

(a) Any advice or discussions at the time of the transfer which illuminated the parties' intentions;

(b) The reason why the property was acquired in the parties' joint (or single) names;

(c) The purpose for which the house was acquired;

(d) The nature of their relationship.

(e) Whether they had children for whom they both had responsibility to provide a home;

(f) How the parties arranged their finances both initially and subsequently; and

(g) How the parties discharged the outgoings of the property and other household expenses.

For further discussion and examples of factors which may be taken into account see 24-053 of *Snell's Equity* (34th Edition).

[63] I should also add that these factors outlined above apply both to the search for the common intention re beneficial ownership and also to the quantification of any beneficial shares in the ownership the parties may be found to have in the relevant property per Lords Hoffman, Hope, Walker and Baroness Hale in *Stack v Dowden*.

[64] The judgment in *Stack v Dowden* has come in for some criticism. For example, in *Family Property: the Process of Familialisation of Property Law* (2012) CFLQ 284 Andrew Hayward argued that the House of Lords' decision demonstrated a movement away from the certainty of real property law to a process which he described as "familialisation" which made the law both uncertain and unpredictable. Simon Gardner, another legal commentator, has noted that "the frequent absence of expressly articulated intention means that litigants are often forced to ask the court to 'discover imaginary, express agreements'."

[65] As Hayward said, "Embedded in the decision of the majority in *Stack v Dowden* was a recognition that the domestic, consumer or cohabitation 'context' differed from the 'context' of property acquired by commercial entities." Baroness Hale did concede that each case should turn on its own facts. The result was that the law in respect of common intention constructive trusts, it was argued, was both unpredictable and uncertain, albeit that the result is likely to be fairer than that produced by the "bright line property law test" (so described) set out by Lord Bridge in *Lloyds Bank v Rosset* [1991] 1 AC 107.

[66] The court is only too well aware that while it is enjoined to proceed on the basis of real intentions and not to invent them, there is no empirical evidence, for example, to prove that an implied agreement should necessarily be inferred from the evidence provided of direct financial contribution to the acquisition of the property, but not otherwise, such as evidence of a contribution in kind or by the undertaking of a family role:

> "This rule is most often criticised for its effect of denying non-earning women a share in their partners' property. That criticism is very arguably merited as a matter of policy, but the present point is a narrow one, that there is a conflict between this material and the basic enjoinder to deal only in actual intentions and not invent them. For it seems highly unlikely that the real incidents of common intentions is demarcated along the lines of different forms of activity in this way. An agreement to share the ownership of the home seems no more or less likely between a woman who works outside the home and her partner and between one who works solely in the home and her partner. But, if we are to remain faithful to the facts, as the law demands, the oddity lies not in the non-discovery of an agreement where the woman works solely in the home. There may very well be no agreement truly to be found, and the law prohibits the invention of one. The oddity actually arises in the case of direct financial contribution. There may very well be no agreement truly to be found here either, yet one routinely is discovered – that is to say, invented, in disregard of the prohibition": see *Simon Gardner on "Rethinking Family Property"* 1993 LQR 263 at 264.

[67] I have looked at all the factors highlighted by Baroness Hale and their relevance to the Premises and their ownership. I find, for example, that the reason why the Premises were put into EB's sole name, was because at the time of acquisition CB had still not sold Wynchurch Park. There was an outstanding mortgage for which she was solely liable, and she could not take on additional secured borrowing. These were premises acquired as a family home to bring up the family and which, I find, were considered by EB and CB to be jointly owned, not just jointly occupied. They were a tightknit family and EB and CB collaborated to bring up their children as best they could in the family home. It is important to emphasise that they were married.

[68] In *Bank of Scotland v Brogan and another* [2012] NICh 21, Deeny J reviewed the relevant authorities in this type of constructive trust case and commented at para [34]:

> "The third point in favour of the second defendant is that she and Mr Brogan were married. They were not married at the time that he received the land and house from his father. They were only married after or at about the time of the work being done on the house. The relevance of the fact of marriage is that it indicates a higher degree of commitment between the parties than merely a decision to live together and, I infer, a greater likelihood that the property was to be jointly owned."

I agree with this statement.

[69] Further, I find that CB's earnings augmented the family resources and, I find, assisted EB in discharging the mortgage repayments. It was CB's contribution that allowed the purchase of a mobile home in which the family holidays were taken. This was a couple who had a joint responsibility for three children, who were all brought up in the family home, and who enjoyed their holidays at Bettystown. When she was not in employment, she was able to devote herself whole heartedly to the care of the children and to the many tasks that running a family home involved and which would otherwise have required the employment of outside paid help. This was very much a joint enterprise in which they were both partners, although, given the scale and nature of the direct financial contributions made by EB, he was and remained the senior partner.

[70] Having had the opportunity to both see and hear the witnesses and, in particular, the Blaneys, give their evidence and look at how they conducted themselves generally and in relation to the Premises, I am satisfied on the balance of probabilities, that they shared a common intention in respect of which CB acted to her detriment such that CB would enjoy a proprietorial interest in the Premises. I, therefore, conclude that the Premises are held by EB (and his Trustee in Bankruptcy) on a common interest constructive trust for both himself (and his creditors) of the one part and CB of the other.

The size of CB's beneficial share in the premises

[71] There was no express agreement upon which the court could rely about what the respective beneficial shares of EB and CB were to have in the Premises. Nor, having carefully reviewed all the relevant evidence and circumstances is it possible to infer a common intention as to how the beneficial ownership was to be apportioned. Indeed, it is recognised that the parties' agreement as to their beneficial shares in the property may be "ambulatory" in the sense that their understanding and the extent of their beneficial interest can change over time: see *Snell's Equity* (34th Edition) at 24-054.

[72] It is also important to emphasise that EB's testimony was far from convincing. As I have recorded, he obviously felt responsible for the family's straitened financial

circumstances which he considered were a direct consequence of his efforts to run Quartisan. He had no experience of running such an operation and yet he pressed on without persuading any of the main lending institutions to support this scheme. This, in itself, should have rung alarm bells. As I have observed, I had the impression that EB was prepared to say anything to try and escape the financial hole he had excavated for both himself and his family.

[73] As I have explained, I was necessarily cautious before accepting the evidence of EB and/or CB, whose interests were so closely aligned. They were both trying to defeat the claims of secured creditors who were trying to repossess the Premises in respect of the debts which were obviously outstanding.

[74] The Supreme Court provided guidance as to how the judge at first instance should go about the task of deciding the respective shares of parties to a common intention constructive trust. In *Jones v Kernott* [2011] UKSC 53 at para [52], Lord Walker and Lady Hale giving the main judgment said:

> "The first issue is whether it was intended that the other party have any beneficial interest in the property at all. If he does, the second issue is what that interest is. There is no presumption of joint beneficial ownership. But their common intention has once again to be deduced objectively from their conduct." [emphasis added]

[75] Baroness Hale of Richmond in *Stack v Dowden* [2007] 2 AC 432 at para [60], said that the importance to be attached to who paid for what in a domestic context may be very different today from what it was many years ago. She said:

> "The law has indeed moved on in 25 years in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

[76] However, the approach of the court at first instance to the ascertainment of any common intention has to be done in two stages with the approach of the court being different at each stage. In *Capehorn v Harris* [2016] 2 FLR 1026 Sales LJ giving the judgment of the Court of Appeal dealt extensively with the approach which the court should adopt at each of these stages at paras [16] and [17]. He said:

> [16] The legal framework was common ground between the parties at trial and again before us on appeal. In relation to assets acquired by unmarried cohabitees or partners, where an asset is owned in law by one person, but another claims to share a beneficial interest in it, a two-stage analysis is called for to determine whether a

> common intention constructive trust arises. First, the person claiming the beneficial interest must show that there was an agreement that he should have a beneficial interest in the property owned by his partner even if there was no agreement as to the precise extent of that interest. Secondly, if such an agreement can be shown to have been made, then, absent agreement on the extent of the interest, the court may impute an intention that the person was to have a fair beneficial share in the asset and may assess the quantum of the fair share in the light of all the circumstances: see *Oxley v Hiscock*, [2005] Fam 211; *Stack v Dowden* [2007] 2 AC 432, ; *Jones v Kernott* [2011] UKSC 53.
>
> [17] There is an important difference between the approach applicable at each stage. At the first stage, an actual agreement has to be found to have been made, which may be inferred from conduct in an appropriate case. At the second stage, the court is entitled to impute an intention that each person is entitled to the share which the court considers fair having regard to the whole course of dealing between them in relation to the property. A court is not entitled to impute an intention to the parties at the first stage in the analysis."
> [emphasis added]

It will be noted that this statement of the law was approved by the Supreme Court in *Jones v Kernott* [2011] UKSC 53 at para [31].

[77] It is simply not possible, on the evidence, to find any express agreement or to infer any common intention as to what the respective shares of EB and CB should be. There is no doubt that EB's direct financial contributions far exceeded any of those made by CB. However, CB did make some telling contributions. In these particular circumstances it is necessary for the court to impute to the parties a common intention as to how the beneficial ownership of the Premises should be shared. In *Stack v Dowden* [2007] 2 AC 432 at [126] Lord Neuberger said:

> "An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend."

[78] The court having carried out that survey of the whole course of dealing between the parties as recommended by the Law Commission and taking into account the various contributions, both direct and indirect made by the parties, it is determined that it should impute an intention that the beneficial ownership should be shared on the basis that EB (and his Trustee in Bankruptcy) own 65% and CB owns 35% of the beneficial ownership of the Premises.

Priority of interests

[79] CB claims that the mortgages in favour of RB and/or EAR were vitiated by undue influence and/or misrepresentation. Accordingly, she claims that her beneficial interest should rank in priority to both of them. She also claims the deed of occupier's consent and postponement dated 6 December 2017 was procured by undue influence and should have no effect.

[80] *Snell's Equity* (34th ed) at 37-024 summarises the situation as follows:

> "Where the surety is induced by the undue influence of the principal debtor to enter into a transaction with another (third) party who has not exercised undue influence – such as a bank which takes a mortgage from the surety without itself having exercised any undue influence – a surety can set aside the transaction against a third party if the third party had actual or constructive notice of the principal debtor's use of undue influence. There is then no defence that the third party did not itself exercise undue influence."

[81] The same, of course, applies should the principal debtor have been guilty of misrepresentation or fraud.

[82] There is no suggestion of actual undue influence here but instead, it is claimed, there is evidence of presumed undue influence. This can occur in two types of case. The first one relates to certain types of relationship and does not apply to the present case. The second one is where one person reposed trust and confidence in another, and the impugned transaction called for an explanation: see *Steeples v Lea* [1998] 1 FLR 138 at 141.

[83] There is no suggestion that RB or EAR had actual knowledge of any wrongdoing on the part of EB which influenced the conduct of CB. In the circumstances, the legal principles which apply are those which were set out by the House of Lords in *Barclays Bank v O'Brien* [1994] 1 AC 180 and *CIBC Mortgages v Pitt* [1994] 1 AC 200 which clarified the law and restated it according to first principles. There was then a further follow-up decision from the House of Lords which not only

clarified certain issues but more importantly advised lenders as to how to defeat future claims of undue influence: see *Royal Bank of Scotland v Etridge* [2002] 2 AC 773.

[84] In his judgment in *Etridge* Lord Nicholls made clear that the second type of presumed undue influence arose where one person reposed trust and confidence in another, and the impugned transaction called for an explanation. This has been described as "a rebuttable evidential presumption which shifts the burden of proof to the person trying to uphold the impugned transaction." See also *Megarry & Wade on the Law of Property* at 24.122. It is also necessary for someone such as CB to demonstrate that it was to her manifest disadvantage: see *Etridge* at [21-31].

[85] There is no doubt that CB was in thrall to EB. On the basis of the evidence before me she looked up to him as someone who had been a successful sportsman, he was a retired GAA star, and he had built up a successful pharmacy business which he had then sold for a seven figure sum. She appeared to have had complete confidence that anything he tried would end in unalloyed success. But this trust and confidence, it turned out was sorely misplaced. EB had no experience in the hospitality sector, he had not carried out even the most elementary of research, there were no projected accounts, and he could have had no idea whether the income of the Quartisan restaurant was going to exceed its costs. Running a restaurant was a massive leap of faith, for someone who had never experienced failure and who thought that success was guaranteed by his force of personality. This huge gamble risked not only his own financial future, but also, unbeknown to CB, the family home. CB, I find, did not know that the mortgage in favour of RB was secured on the Premises. She thought that the security which had been offered related solely to Quartisan. Originally, I was not convinced that CB, who otherwise seemed to be an astute operator, was quite so ignorant. But, in the end, I was satisfied that she had been swept along by the enthusiasm of her husband for this project and, consequently, did not concern herself with the granular detail of the scheme. As a result she rendered herself potentially liable for substantial claims by creditors such as EAR. This was very much to her manifest disadvantage.

[86] The same arguments apply to the deed of postponement which was executed by CB as applied to the guarantees and finance agreements. The creditor will be put on inquiry if "the transaction is not to the financial advantage" of the surety as where the surety subordinates his or her rights in the property to those of the creditor: see *Banco Exterior International v Mann* [1995] 1 All ER 936. Therefore, the deed of postponement will be vitiated by the presumed undue influence of EB for the same reasons which have been adumbrated in respect of the guarantees etc unless RB and EAR can demonstrate that CB freely gave her consent which, they are unable to do.

[87] That fact that CB is the wife of EB, the sole legal owner, in no way absolves RB or EAR from making proper enquiry as to whether she has any existing equitable interest in the Premises. The failure to make such an enquiry means they are each

bound by her equitable interest: see 5-019 of *Megarry & Wade on the Law of Real Property* (10th Edition).

[88] Therefore, RB and ER having had constructive notice of the risk of undue influence, there is no basis for either of them to claim that there was informed consent on the part of CB. The court did not hear from Niall McGuinness, the solicitor who witnessed the deed of postponement. Even if it had, it is highly unlikely that he would have been able to satisfy the court that CB's consent was freely given when he had insufficient access to the key financial documents which would have enabled him to provide adequate advice to CB. It is all too obvious that neither RB nor EAR nor their solicitors followed the detailed guidance given in *Etridge*: see paras 70 and 79 and 24-133 of *Megarry & Wade on Law of Real Property* (10th Edition).

[89] The court is satisfied from CB's evidence that there is no basis for concluding that:

(a) Either RB or EAR and/or EAR took adequate steps to check with the wife that she had been independently advised by a solicitor, acting for her and who had explained to her independently the nature of the documents and the practical implication they would have for her; and

(b) The solicitors advising her had all the relevant financial information they required to enable them to give her the advice she needed including all the documents relating to EB's indebtedness. Indeed, it is clear that such financial information as would have been required to enable effective advice to be offered was absent.

[90] The solicitors should have given to EAR and RB a written confirmation upon which they could rely to satisfy them that CB had been independently advised. There was no such confirmation given contemporaneously, nor was any evidence offered to the court during the hearing.

[91] In the present case CB complained under oath of grossly inadequate engagement and advice. The attendance note of 6 December 2017 in respect of EAR's deed of postponement makes it clear that no figures were ever discussed and that further confirms that Mr McGuiness did not have sufficient financial information to provide any meaningful advice to CB. The attendance note, if considered by EAR, should have caused considerable disquiet. There is no evidence that adequate independent advice was given in respect of RB's mortgage. A court could not conclude, and neither could a lender, that CB had received adequate independent advice. Neither RB nor EAR had taken reasonable steps to ensure that the risks of these financial transactions were brought home to CB. Accordingly, the court is satisfied that the mortgages were procured by undue influence and that certainly in respect of EAR there was a misrepresentation because CB was not informed of the mortgage in favour of RB. I am also satisfied that the deed of

postponement was also vitiated by undue influence for the reasons which I have set out.

Partition or sale or some other order

[92] In this case I have found that CB has a share in the beneficial ownership of the Premises. The legal title is owned by EB and EB's trustee in bankruptcy, but the equitable title is shared 35-65 in favour of EB's trustee. The Partition Acts of 1868 and 1876 introduced a number of procedural changes in relation to the mechanism of partition actions. Following enactment of the 1868 Act, one or more co-owners could compel the sale of the entire co-owned land instead of partition and enjoy a divided share of the proceeds of sale as opposed to a divided share of the property itself. As Professor Conway says in her excellent book on Co-ownership of Land (2nd ed) at 3.50:

> "While the purpose of the Partition Acts may have been merely to substitute the sale for partition in certain circumstances, the remedy of sale quickly replaced partition in the majority of cases, and this remains the position in the vast majority of contemporary partition actions."

[93] Where, as here CB owns a minority interest, the court under Section 4 of the Partition Act 1868 is obliged, unless it sees good reason to the contrary, to direct a sale in lieu of partition if it is asked to do so by EB's secured creditors. As Professor Conway states:

> "Thus, the court's discretion to refuse sale under section 4 is limited and is certainly not as wide as the discretion which it possesses under section 3. … A co-owner cannot prevent sale on the basis that he is unlikely to acquire a reasonably priced equivalent property in the same area or that sale will result in the loss of their home: see *Peck v Peck* [1965] SASR 293.

[94] Section 4 of the 1868 Act provides:

> "In a suit for partition, where if this Act had not been passed a decree for partition might have been made, and 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 the sale of the property and a distribution of the proceeds, instead of a 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."

[95] In *Porter v Lopez* [1877] 7 Ch D 358 at 363, Jessel MR said in respect of the interpretation of "good reason to the contrary":

> "[T]here is an absolute right in the owner of a moiety to require a sale subject to this: unless it sees good reason to the contrary, a court shall direct the sale …
>
> Therefore, [the plaintiff] has an absolute right to sale unless the court sees good reason to the contrary. Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else."

[96] It seems tolerably clear that section 4 has been regarded as giving rise to a strong presumption in favour of a sale. Conway comments at 5.34:

> "Thus, the court's discretion to refuse sale is limited and is certainly not as wide as the discretion which it possesses under section 3."

[97] It was against this background that Madam Justice McBride in *Larmour v Larmour* [2023] NICh 4, had to consider whether the court under the Partition Acts has "a discretion… to refuse to make an order for sale or partition in lieu of sale in respect of jointly owned property and, if so, in what circumstances the court can exercise that discretion to make no order": see para [2].

[98] Madame Justice McBride was satisfied that this also involved consideration of the powers afforded to the court under Article 49 of the Property (Northern Ireland) Order 1997 to impose a stay, or suspension, or conditions on an order for sale made pursuant to the Partition Acts.

[99] Up until the passing of the Property (Northern Ireland) Order 1997 the law in respect of partition suits had been tolerably clear in Northern Ireland. In *Northern Bank v Beattie and another* [1982] NIJB 18, Murray J had determined that a court could not refuse a sale where physical partition was not a practicable solution. The court was faced with a binary choice and was tied to making a sale if partition was not physically feasible. Professor Conway in Co-ownership of Land (2nd Edition) at 7.17 noted that strictly speaking the court did have a discretion to refuse to order a sale even where partition was impracticable. But she goes on to say:

> "However, in light of the prevailing view that partition and sale are alternatives under the Partition Act and that a co-owner is entitled to one or the other, the likelihood of

> the court ordering sale in these circumstances must be considerable."

[100] In *Northern Bank v Adams* (1 February 1986) Master Ellison had found that the court did have a discretion to refuse to order sale and partition on the basis that the court was exercising an equitable jurisdiction and, secondly, that a more liberal interpretation should now be adopted on the basis of recent legislative changes. I do not consider the Master was correct and prefer the reasoning of Murray J subsequently affirmed by Girvan J in *Glass v McManus* [1996] NI 401, *Ulster Bank v Carter* [1999] NI 93, Campbell J in *Fraser Holmes Ltd v Fraser Houses Ltd* [1998] NI 214, and more recently by McBride J in *Larmour v Larmour* [2023] NICh 4 that this was a binary choice for the court.

[101] It was against this background that the court's hands were effectively tied in respect of the order that could be made that Parliament recognised the real risk of an injustice which might result. As a consequence, I conclude, Parliament enacted Article 49 of the Property (Northern Ireland) Order 1997 which provided:

> "49. Without prejudice to Article 309 of the Insolvency (Northern Ireland) Order 1989, where on the request under the Partition Acts of a party interested (or a person treated as such under Article 48) a court makes an order for partition or sale, the court, on making the order or at any time before its enforcement, may also—
>
> (a) impose such stay or suspension; or
>
> (b) impose such conditions,
>
> as, in the circumstances of the case, it thinks fit; and it may revoke or vary any such stay, suspension or conditions."

[102] In *Larmour v Larmour* [2023] NICh 4, McBride J said in respect of this provision the following at paras [82]-[84]:

> "[82] This article permits the court to postpone an order for partition or sale or attach conditions to any such order. In so doing the article operates to reduce potential injustice caused by an immediate order for sale. I consider that this article was implemented to address the potential injustice caused by the Partition Acts. The implementation of Article 49 was only necessary, I consider, because the correct interpretation of sections 3 and 4 of the Partition Acts is that the court cannot refuse to order both sale and partition. If the court had a

> discretion to refuse to order both sale and partition under section 3 and 4 of the Partition Acts, I consider the implementation of article 49 would have been unnecessary.
>
> [83] Whilst there is limited jurisprudence in respect of article 49, I consider that it was introduced to give statutory flexibility in partition actions and can be utilised to achieve a just and equitable result especially where an order for partition or an order for immediate sale would operate harshly, unjustly, or prejudicially to one party.
>
> [84] In exercising it powers under article 49 the court should make an order which is just and fair to all the parties. To achieve this it should take into account all the circumstances of the case, which, non-exhaustively includes consideration of the motivation of the parties; the nature of the interest of each party and the number of parties; the nature of the property; whether the property can be partitioned practicably; the extent of the equity in the property; the impact of delaying sale on the equity; the health needs of each party and the impact the order will have on their health and mental well-being; the disability of any party; each party's housing needs and availability of suitable alternative accommodation; the financial position of each party now and in the future; the nature of the relationship between the parties and whether there is a need in all the circumstances for a clean break or whether orders can be put in place to deal with the incidents of co-ownership including who can reside in the property, who is responsible for maintenance, payments of mortgage etc, the conduct of the parties, the state of the property market and the impact of any order on interested third parties including the mortgagee."

[103] I respectfully agree with this interpretation of Article 49 of the Property (Northern Ireland) Order 1997.

[104] In the circumstances, I have to make an Order which is as just and fair, as possible, to all the parties. I will take into account those factors set out in para [84] of the judgment of Madam Justice McBride and, in particular:

(a) The motivation of the parties;

(b) The nature and interests of each party;

(c) The impracticability of partition;

(d) the extent of the equity of the party as represented by EB's share.

(e) The impact of further delay on that equity;

(f) The rapidly increasing debts due to RB and EAR.

(g) The delay to date and CB's ability to remain in the Premises effectively "rent free" and the opportunity afforded to her to find alternative premises during that time.

(h) The financial position of each party now and in the future.

(i) The state of the property market.

(j) The conduct of the parties.

[105] It is clear that the debt secured on the Premises has been rising inexorably. On the basis of the information provided to the court, it is unlikely that CB's share in the Premises will be sufficient to meet the accruing interest and also to pay off the capital sums due and owing. Further delay is going to make a difficult situation much worse. Even if there is any equity in the premises, it will be dissipated by any further delay. CB has had considerable time to seek out alternative accommodation since the hearing has concluded. While I can understand her reluctance to leave the Premises, remaining in occupation, given the size of the debts secured on the Premises, and the amount of interest which is accruing makes it not viable for CB to continue to remain in occupation of the premises.

[106] I consider that what is just and fair to all the parties concerned, including the creditors, requires the court to make an order for possession and sale and stay it for a period of eight weeks so that CB (and EB) can make the necessary arrangements required for alternative accommodation. I am also conscious that we are coming up to the Christmas holiday period.

Conclusion

[107] Given the evidence adduced before this court, I have reached the following conclusions on the central issues identified at the outset of this judgment in para [9]:

(i) On the basis of the objective consideration of their words and conduct, I deduce a common intention that CB and EB should share in the beneficial ownership of the Premises under a common intention constructive trust.

(ii) In the absence of any agreement, express or inferred, as to the respective shares, I impute that each will be entitled to that share which the court considers fair having regard to the "whole history of dealing between them in relation to the property" and which I assess at 65% to EB (and his trustee in bankruptcy) and 35% to CB.

(iii) On the basis of the evidence adduced before this court, RB and EAR had constructive notice of CB's interest in the Premises and, therefore, took subject to that interest.

(iv) Partition is not a practical solution and given CB's minority equitable interest, I direct that there should be a sale of the Premises in lieu of partition, but that this should be stayed for eight weeks to permit EB and CB to find alternative accommodation.

[108] In the absence of agreement I direct that the matter can be referred back to me (or the Master) for the taking of accounts and inquiries in respect of what sums are due and owing by CB and/or EB to RB and EAR, if these cannot be agreed.

[109] I will also hear the parties on the conclusion of this case on the issue of what should be the appropriate order for costs given my conclusions. This hearing on the issue of costs will take place after all relevant accounts and inquiries have concluded. The court encourages a collaborative approach to this issue, and, in the event of any dispute, the court will take into account any *Calderbank* offers or such like, in reaching its final conclusion as to what is the appropriate order for costs should be.