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Judgment: approved by the Court for handing down (subject to editorial corrections) | *Delivered:* **03/08/12**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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2010 No 11442

BETWEEN:

BANK OF SCOTLAND PLC

Plaintiff`;

And

TERENCE BROGAN

First Defendant;

And

MARY BROGAN

Second Defendant.

_____

DEENY J

[1] The plaintiff herein is the successor in title, it is agreed, of the Halifax Building Society. The defendants are husband and wife although unhappily separated as a result of the events leading to these proceedings. Mr William Gowdy appeared for the plaintiff. Mr Brogan appeared only as a witness called by his wife. He had at an earlier stage of the proceedings two firms of solicitors acting for him in sequence and two counsel but they came off record. Judgment was entered against him on 8 December 2011. Mr Michael O'Brien appeared for the second defendant. I have had the assistance of helpful written and oral submissions from both counsel.

[2] I propose to set out the underlying facts of this matter in chronological order before dealing with the law and my conclusions. The first defendant is one of eleven children of the late Arthur Brogan of Curraghinalt, Drumlea, Omagh, County

Tyrone who was the registered owner of Folio 14385 County Tyrone. On 21 October 1988 that Folio was transferred to his son, the first defendant, consisting of farmland and a house near Omagh, County Tyrone ("the house"). The transfer was for natural love and affection. Mr Arthur Brogan died shortly afterwards.

[3] Mr Terence Brogan wished and felt obliged to pay some monies to his brothers who had not inherited the family farm and to discharge some bills. On foot of that he proposed to take out a mortgage in favour of the National and Provincial Building Society in the amount of £15,050. He was unsure exactly why but a new Folio was opened, No 8540 of County Tyrone, consisting only of the farmhouse and immediate curtilage (but not the surrounding farmland) the subject of these proceedings. On 2 April 1990 a charge in favour of the National and Provincial Building Society was registered. A small portion of this, in the region of £2,000, apparently remains outstanding but counsel for the plaintiff said they were not seeking to exercise rights of subrogation in relation to that because of its modest scale.

[4] The two defendants are from the same parish but only met in or about October 1989. They formed a relationship not long afterwards, it is clear, because in the autumn of 1991 Mary Bradley, as she was then, found she was pregnant. They were engaged at or about Christmas 1991 but did not get married until July 1997. Their first child was born in May 1992.

[5] The first defendant continued to live at home with his mother and two of his brothers. His mother had been unwell from her 40s, suffering from diabetes and later vertigo. While they were engaged the defendants, as I find having heard their evidence, discussed where they would live. Mrs Brogan, as she became, was desirous of building a new house but Mr Brogan was reluctant to leave his aged and unwell mother. In the end it was agreed that they would get married and move into the house which had always been Terence Brogan's home and now became their home. But to make it "passing middling" in Mr Brogan's phrase the house would be improved. It had no proper kitchen and a kitchen would be put in and other works would be carried out including the provision of a bedroom on the ground floor with en suite bathroom and kitchenette for Mrs Brogan senior. I shall have to return to this topic.

[6] The defendants then lived in the home. Mr Brogan farmed the lands and took some further land on conacre. They went on to have three more children. Their income was very modest and by the year 2000, at the latest, they became entitled to tax credits of varying amounts but for some years as much as £10,000 per annum. In addition child benefit was paid. Mrs Brogan senior died in 2002.

[7] Money remained short for this family especially when the fourth child was born. In 2004 or possibly the end of 2003 Mr Brogan therefore began working in Dublin during the week as a labourer for which he was paid some £250 to £300 per

week, considerably more than he earned out of his farm. In the subsequent years there was a building and property buying boom in Ireland both north and south but particularly in the south where wages were higher. Others encouraged Mr Brogan to strike out on his own account. I accept his evidence that he sought to borrow money from the Ulster Bank in Gortin, County Tyrone, where he and his wife had a joint account from at least the year 2000, but to their credit they declined to lend it to him on the basis that he had no or insufficient experience to be a builder/developer. He was then referred by another friend, for want of a better word, to the Bank of Ireland in Derry who lent him money to buy a building site and a small farm. His plan was to build a house on the site and sell it at a profit. The Bank of Ireland, however, was unwilling to lend him the money to build the house having lent the money for the site. An official therein referred him to a mortgage broker in the City of Derry. It was he who arranged a mortgage with the Halifax Building Society in Yorkshire. This mortgage was in the sum of £153,000. Mr Brogan misled the Halifax in completing the forms for his application. He says at the behest of the mortgage adviser in Derry he did not admit to being married; he did not disclose that there was another adult living in the house with him i.e. his wife and he did not disclose that he had got married since he had bought the property. These are matters that I must take into account against him in assessing his credibility as a witness in due course. The Halifax then redeemed the earlier mortgage held by Abbey National plc as successor to National and Provincial Building Society. They executed a charge in favour of the plaintiff which was registered on Folio 8540 – County Tyrone on 14 September 2007. (Counsel for the second defendant points out that the first defendant did say that he was married when applying for life insurance in respect of the sum borrowed, which document was furnished to the plaintiff).

[8] Sadly for Mr Brogan this proved to be the very height of the property market in Ireland. He did build his house in County Monaghan, but by the time he had completed it property values had fallen sharply and he has never been able to sell it.

[9] He had an interest only loan from the Halifax. Mrs Helen Tillitison gave evidence on behalf of the plaintiff. Mr Brogan made payments under the loan, albeit only by way of interest, until 1 March 2009. He made a further regular monthly payment on 1 May 2009 but since then has only made two payments of £8.10 in September 2009 and £250 on 1 March 2011, although in fairness to Halifax when the introductory offer which he had ended the interest on the loan fell sharply but nevertheless payments were not made. He currently, on 3 May 2012, owed £184,579.01. The Halifax did not send an employee at the time of the mortgage to interview the first Defendant or inspect the property.

[10] It is the case that the mothers of the two defendants had to be content merely with a right to reside for life in their farm or husbands' homes after their deaths. That would have been extremely common, I consider, in the past. But it cannot be disputed that times are changing. I have had to advert to this in several decisions of this court such as Mulholland v Kane [2009] NI Ch 9. There is an illustration of

changing times in this case itself in that Mrs Brogan bore a child by Mr Brogan without marrying him and then married him some five years later. That would not I believe have happened often in her community a decade or two previously. The status of women has risen, quite rightly, in rural Ulster as elsewhere in recent years. It does not seem to me that the possibility that a right to reside for life might have been her only entitlement can be of great weight here.

[11] On the first day of the trial of this matter on May 3rd 2012 Mr O'Brien of counsel applied to amend the second defendant's defence and counterclaim. He was reluctant to criticise the two previous counsel who had acted for Mrs Brogan (she has always had the same solicitors) but in effect he was saying that he had only recently been instructed and at a consultation with his client had ascertained matters which he thought were of assistance to her but which were not yet pleaded. Mr Gowdy rightly accepted that late amendment was possible within the discretion of the judge and that he could deal with it without adjournment but was critical of the lateness of the amendment here and the vagueness of the pleading. I then required Mr O'Brien to particularise his pleading and when this was done gave him leave to amend, in accordance with the authorities in the Supreme Court Practice, 1999.

[12] He called both defendants to the witness box and three shorter witnesses with whom I will deal in due course. With regard to Mrs Brogan herself I find that she was in actual occupation of these premises from 1997 to date. Mr Gowdy wisely chose not to challenge that. Her evidence and that of her husband was that he did not consult her about taking out the mortgage which the Bank of Scotland now holds. The Bank being unpaid brought proceedings against Mr Brogan by writ of summons in the Chancery Division of the High Court on 28 January 2010. Initially they did not join Mrs Brogan. She swore in evidence, and I find, that she did not know of this later mortgage in the sum of £153,000 on her home and only learnt of it belatedly from the Halifax trying to contact her husband about the debt. Her defence and counterclaim is in effect that she has a beneficial interest in the lands which is prior to the charge. Given that she was in actual occupation of the house it is not in dispute that her interest would have priority over the charge of 2007. Nevertheless the plaintiff would seek an order for sale of the premises, in order to recoup as much as possible of the monies loaned, provided the interest of the second defendant did not exceed one moiety or 50% of the house, pursuant to the Partition Act of 1868.

[13] The second defendant's amended pleading at paragraph 19(b) and at paragraph 25(b) of the defence and counterclaim respectively was to this effect:-

> "It was agreed that the defendants and their daughter would live in the first-named defendant's home, the subject premises, where the first-named defendant's elderly mother still lived and the defendants reached an understanding that the premises would belong to

> both of them. There was no discussion as to the respective quantities of their interests in the premises."

Her evidence in chief as to what the parties intended was to the effect that they agreed, because of her mother in law's health, to live in the house. She said that it would be "for us, it would be our house. He more than once said that what is mine is yours and what is yours is mine." In cross examination she acknowledged that both her mother and her mother- in- law were not on the titles of their respective homes although both had a right of residence for their lives. In cross examination she also said that it was agreed that the house "would belong to each of us, it would be ours; that's what we discussed". Counsel pointed out to her that the amendment to her defence made a distinction between the agreement to move into the house and reaching an understanding that the premises would belong to both of them but I formed the impression that the later phrase was unlikely to be of her coinage and that nothing turned on this.

[14] I generally found the second defendant to be a truthful witness and demonstrably so in some respects but I felt that Mr Gowdy's cross examination here tested an important part of her evidence. Terence Brogan was also called. Again I thought that he was a candid witness. Indeed he expressed himself strongly on more than one occasion about what a mess he had made of things. But I have to bear in mind his strong interest in trying to do the best for his wife and children, he having put them in this predicament. Furthermore I do bear in mind his failure to be candid and frank with the lender in this case, whether or not he was encouraged to do that by a mortgage adviser. I therefore have to view his evidence with a degree of caution. Although cross examined he did not give support to the view that his wife was only entitled to a right of residence for her life. That in itself might be an interesting enough outcome. His case was that, for the reasons I will set out in a moment, he had said to her more than once that what is yours is mine and what is mine is yours. He thought that once you were married you took it as half and half.

[15] It is perhaps convenient to complete my review of his evidence at this point. He was fortified in his view that she was in reality a co-owner of the premises by virtue of three factors:-

(i) the contribution she made to the improvement of the house at the time of the marriage;
(ii) the care she devoted to his mother; and
(iii) the work she did around the farm.

[16] It was his evidence and that of the second defendant that she paid for three separate contractors or workmen to do work on or for the house. Patrick Wilson was called. He is a joiner trading as Kildress Joinery. In 1997 and 1998 he said that he

had made a staircase, doors, skirting, moulding, flooring and door handles for Mrs Brogan for the house. He fitted some of the floors on site. He thought the cost was roughly £5,000 to £6,000 but he had no records after 6 years. It was she that paid him. When challenged as to how he could remember this 14 years later with no records he said he did remember it as it was mahogany moulding, architraves, skirting, etc which was the fashion of the time. He was confident that he was dealing with Mary Bradley which might put this before the date of her marriage. He has been trading for nearly 30 years employing eight or nine people and is registered for VAT. I was inclined to believe his evidence.

[17] Malachy Keenan gave evidence. He was a salesman for Kildress Plumbing Suppliers and he supplied the fittings for a main bathroom for the house, cookers for the kitchen and other kitchen implements, plumbing and an en suite bathroom for a downstairs bedroom or the fittings therefor. He thought this was in 1996/1997 and the cost was £6,000 or £6,500. He was clear that Mrs Brogan paid him for this and he recalled her two visits. He knew her because he had visited friends of his wife who lived near her. This seems to me not inconsistent with her account that she had seen a kitchen that he had put in for a neighbour. He had no records either but was confident that it was Mary Bradley's cheque. Terence Brogan referred to him as Des Keenan but I do not find this inconsistent with a truthful account.

[18] The third supplier was Charlie Hegarty who was a self employed kitchen manufacturer. He fitted the kitchen and a utility room. He did work on the site. He thought the cost was £6,000 to £7,000 of which half was paid to him in cash before he started and half, he thought, in cheque, after he had finished. He had no dealings with Terence Brogan. He didn't know the second defendant who had rung him up at the time and asked him for a quote. He had been contacted by her two weeks ago asking whether he had any receipts, which he did not have and was subsequently asked to come to court about a week before the trial. Mrs Brogan's evidence was consistent with that of these three men.

[19] Where did the money come from? She recounted how she had been in a motor car driving along a road between two other vehicles as a teenager when a flare went up and the security forces opened fire. She was not hit by this fire but subsequently recovered £17,000 in compensation for what I take to be nervous shock. Furthermore her late father, who was also a farmer, had died when she was a teenager, leaving her £5,000 which she got when she was 21. She was born in 1966.

It seems not unreasonable that she would have had most of this money still and that she would have been in a position to pay that. I find that these works broadly were done but in the absence of receipts and given the great length of time I feel I must take the evidence as to amount to some degree cum grano salis.

[20] She was cross examined on this and other topics, including an L.P.S. form, by Mr Gowdy. In particular he put to her her affidavit of 21 June 2010. This was when she was seeking to avoid an order for sale being made against her husband with regard to the house. In paragraph 1 of that affidavit we find the following sentence:-

> "A small extension was added to the house in with (sic) Mrs Brogan lived."

She was challenged as to why she did not disclose in that affidavit if it was true that she had made these substantial contributions to the extension and substantial improvement of the house. She said she did not realise that was relevant. The affidavit was taken from her by a solicitor but not one that she knew before. She was reluctant to discuss these personal matters. She was distressed at the time and close to a nervous breakdown because she was devastated to have learnt that her husband had borrowed this money on their home and that she might now lose it. This was the home in which she lived with her four children. I am sympathetic to those points. They receive some textural assistance from the affidavit itself. There was a further misprint in the paragraph as well as the one to which I draw attention above. The final sentence recorded that she had four children and gave their ages. But two of the ages are wrong by a year each, a mistake that few mothers would make. When I asked her in the witness box the dates of birth of her four children she was able to give them forthwith. She had earlier correctly given their ages to counsel. This was despite the stress of being in the witness box in the High Court. I conclude that either the affidavit was drafted in haste or carelessly or that the lady was under greater stress at that time than she was when giving evidence in this case and that in either event it did not undermine her credibility.

[21] I return to the evidence of Terence Brogan. He confirmed all these matters but in response, largely to questions from the court, he acknowledged that the extension in which the little apartment for his mother was created was built by his cousin, Martin Keenan, who was a bricklayer. He laboured to him as he had done on some occasions in the past. A couple of other relatives helped out in that regard also. Mr Gowdy therefore relies on this as offsetting to some degree the contribution made by the wife. I accept the validity of that but his candour in describing that does make all the more credible the other aspect of his evidence that he had nothing to do with paying Messrs Wilson, Keenan and Hegarty for the material they supplied and the work which they did.

[22] I accept his evidence that he did not have the money himself to improve the house to the standards sought by his young wife. That is borne out by his own need for a mortgage, the use of his own labour and that of family to do the brickwork and the payment of tax credits soon afterwards.

[23] I will have to consider below what I am to infer from that evidence and the next items that can be dealt with more expeditiously.

[24] It seems clear that Mrs Brogan did work about the home. There was some indication from an official document later prepared that she worked about 16 hours a week. One would have no difficulty in accepting that in respect of some periods e.g. lambing time on the farm which lasts about 2 months she said and also the period when her husband started to live away from home working in Dublin i.e. after 2004. She said she worked from 7.00 in the morning to 11 at night "rearing the wee ones" and working on the farm. The rearing of children of course is an intrinsic part of the role of wife and mother which she had adopted, particularly in rural Northern Ireland. I will have to turn to the legal significance of that but it is unlikely to point to ownership of property on the authorities. Working on the farm may contribute to that. I also accept her evidence that she cared for her sick mother- in- law until her death in 2002.

[25] Part of her evidence was as to the receipt of tax credits. Indeed this was part of the case initially made on her behalf that she was contributing to the mortgage payments on the original mortgage of about £200 a month, interest and repayments, and doing so out of family tax credits. It does not seem to me that that is something that assists her. As the tax credit documents make clear this money is to go to the whole family because the income of the breadwinner or breadwinners is modest and below a level fixed by statute or regulations made under statute. I do not think it is "her money" which earns her an interest in property. It may well be wise that such tax credits are paid to the woman of the house to make sure they go where they are needed but that is a different matter from saying that she receives them not as a trustee for the family but somehow as her own money. The same would be true of the child benefits which she received.

The law

[26] The first named defendant who took out the mortgage with the plaintiff is the registered owner of the land. I have found that the second named defendant Mary Brogan was in actual occupation of the premises at all material times. If she establishes that she had a beneficial interest in the property prior to the mortgage of the plaintiff her beneficial interest will have priority over the interest of the plaintiff obtained through the first defendant. See Land Registration Act (Northern Ireland) 1970 Section 11, Section 38, Section 69 and Schedule 5. The onus is on the second defendant to prove that she has such a beneficial interest in the premises. See Jones v Kernott [2011] UKSC 53; [2012] 1 All ER 1265, paragraph 17 et alia. "This is not a task to be lightly embarked upon" said Baroness Hale of Richmond in Stack v Dowden [2007] UKHL 17; [2007] 2 AC 432, at paragraph 68 a view with which I respectfully agree.

[27] At paragraph 35 of Stack, op.cit. Lord Walker cited with approval the summary of the relevant law by Chadwick LJ in Oxley v Hiscock [2005] Fam. 211:

> "But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have – and even in a case where the evidence is that there was no discussion on that point – the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And, in that context, 'the whole course of dealing between them in relation to the property' includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, the insurance and housekeeping) which have to be met if they are to live in the property as their home."

Lord Walker comments as follows at paragraph 36:

> "That summary was directed at cases where there is a single legal owner. In relation to such cases the summary, with its wide reference to 'the whole course of dealing between them in relation to the property', is in my opinion a correct statement of the law, subject to the qualifications in paragraph 61 following of Lady Hale's opinion. I would only add that Chadwick LJ did not refer to contributions in kind in the form of manual labour on improvements, possibly because that was not an issue in that case. For reasons already mentioned, I would include contributions in kind by way of manual labour, provided they are significant."

[28] I do not propose to set out Lady Hale's judgment on that point although of course it is worthy of careful attention and I follow it. The courts have tended to prefer the route of finding a constructive trust here in order to do justice rather than proprietary estoppel, about which I have written elsewhere or resulting trust although the latter is sometimes applicable.

[29] The Supreme Court had occasion to return to the topic, albeit not in a single owner case, in Jones v Kernott [2011] UKSC 53; [2011] 2 WLR 1121; [2012] 1 AER 1265. There is a live debate in the latter judgment as to whether a court can impute or attribute to two parties an intention that beneficial ownership should differ from the legal ownership where that cannot be inferred. While this is a topic of great

interest I have neither the leisure nor, on the facts of this case, the duty to add my tuppence worth to the debate. As I will set out shortly I do find here that there was an intention that the ownership of the property be shared from the date of the marriage at least but no discussion as to what the shares should be. I have considered carefully the joint judgment of Lord Walker and Baroness Hale with which the other members of the court agreed. Indeed Lord Kerr and Lord Walker might have gone further. For convenience I quote from the Conclusion of Lord Walker and Lady Hale at paragraphs 51 and 52:

> "[51] In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.
>
> (1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.
>
> (2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.
>
> (3) Their common intention is to be deduced objectively from their conduct: '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' (Lord Diplock in *Gissing v Gissing* [1970] 2 All ER 780 at 790, [1971] AC 886 at 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden* [2007] 2 All ER 929 at para [69], [2007] 2 AC 432.
>
> (4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by

direct evidence or by inference what their actual intention was as to the shares in which they would own the property, 'the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property': Chadwick LJ in *Oxley v Hiscock* [2004] 3 All ER 703 at [69], [2005] Fam 211. In our judgment, 'the whole course of dealing … in relation to the property' should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).

[52] This case is not concerned with a family home which is put into the name of one party only. The starting point is different. 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. If the evidence shows a common intention to share beneficial ownership but does not show what shares were intended, the court will have to proceed as at [51](4) and (5), above."

Conclusions

[30] Applying therefore the appropriate legal tests and in particular what is said at paragraph 51(4) and (5) of Jones v Kernott I find as follows.

[31] Firstly, I find that the two defendants did have an intention or understanding that Mrs Brogan had an interest in the property. It is true that Mr Brogan's description of saying that what was hers was his and his hers was put forward in a light-hearted tone and in the context of obtaining cash from her before going out for an evening. But he did not deny that this had been said a number of times. It is true that she did not claim there was an express "agreement" but the words were, I find, used between them. I believe they were truthful in this. It would have been

untruthful of them to have claimed some greater degree of discussion which did not take place. Standing alone such a comment, even between a married couple, might well fall short of being enough to displace the exclusive legal title to the property of the first defendant. But it does not stand alone here.

[32] In Paul v Constance [1977] 1 WLR 527 the Court of Appeal (Cairns, Scarman and Bridge L.JJ.) had to consider whether a trust had been created with regard to winnings from bingo. I note that they held that the deceased's words "the money is as much yours as mine" often repeated by him constituted a clear declaration of trust for the benefit of himself and the plaintiff and that therefore the judge at first instance was right in awarding the plaintiff a half share of the fund. See the judgment of Scarman LJ at pages 530 and 531. This case was not cited by the second defendant's counsel. I am confident that the two defendants were wholly unaware of it as a precedent supportive of the words that they say were used between them.

[33] The second and very important factor here is that the wife did make a contribution directly to the property in question. I am satisfied, on the balance of probabilities, that she did have a sum of about £18,000 which she put to the improvement of the property. I do not find that she, her husband and their three witnesses perjured themselves in giving their evidence which, in effect, would be the alternative conclusion. I had the opportunity of assessing the demeanour of all the witnesses at close quarters and I believe they were describing actual events. We know that the extension was built. We know that Mr Brogan had had to borrow money only a few years before. We know that his income was very modest. If Mrs Brogan did not pay for this work who did? Mr Brogan's admission to my own question that the brickwork for the extension by way of a granny flat to the house was done by his cousin and himself only bore out my impression that he was telling me the truth. It is clearly an important factor that the second defendant was on her own evidence in a position to and did make a substantial contribution to the value of the house. Once renovated and extended in this way it was worth about £65,000 in the persuasive opinion, albeit retrospective, of Mr Robert Pollock FRICS, a surveyor practising in this county. Her contribution therefore would be approaching one third.

[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 in 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 property was to be jointly owned. Mr Brogan's evidence was that he thought property was owned half and half after marriage. I appreciate that there have been calls in England and Wales to merge the test that might be applied whether the parties are or not married. That seems to have been resisted in Jones v Kernott. In any event I do not accept that social conditions here are necessarily the same as in England and that therefore we should

not slavishly follow a view that might seem appropriate in some parts of that jurisdiction.

[35] I make it clear that I accept the view of the authorities and the rationale of saying that a wife who performs the duties of a devoted wife and mother does not thereby automatically obtain an interest in the property in which they were living if it is in the name of her husband. It is true to say that in the event of their being divorced the courts have wide powers to make adjustments of property to do justice according to the current view of the law. There is the risk of a paradox by which an unfaithful wife divorcing her husband does better than the faithful wife who remains with him. But for the purposes of today it is sufficient to say that I consider that a relevant consideration supportive of the second defendant is that she and the first defendant indicated a high degree of commitment to one another by entering into a ceremony of marriage (religious in this case) recognised by law.

[36] The fourth factor to be taken into account is that Mrs Brogan did help on the farm. Again I am not to be taken as holding that every farmer's wife who helps on the farm as well as the other duties of a wife and mother can thereby claim a proprietary interest in the property registered in her husband's name alone. But it does seem to me a relevant factor that her manual labour, to use the phrase of Lord Walker in Stack v Dowden, was put to assisting the economic life of the family. It is of particular importance here in the light of the fifth factor i.e. that her husband for several years worked in the south to earn wages throwing even more work on to her shoulders. She was left thereby with greater responsibility. I believe her when she says that she worked from 7.00 am in the morning to 11.00 o'clock at night in connection with her family and on the farm.

[37] A further factor which seems relevant to me is that for about five years she cared for her ailing mother-in-law. Again this is no doubt something that many daughters-in-law and some sons-in-law do and it is not to be taken as a matter of course to lead to any proprietary interests. But in the context of this case, and as Baroness Hale has said "context is everything", I consider it a relevant factor supporting the second defendant's claim to have an interest in the property and indeed supportive of the extent of that claim.

[38] For completeness I am not including as a factor with regard to finding that her husband held part of the property in trust for her that she cared for the four children of the marriage. It is clear that is something very commonly done by mothers rather than fathers. But it is nevertheless in my view relevant as indicating the very considerable extra effort she must have put in in helping on the farm and with her mother-in-law in addition to bringing up four young children.

[39] I pause there to say therefore that I have no difficulty with the judgment of Sir John Chadwick in James v Thomas [2007] EWCA Civ. 1212 relied on by Mr Gowdy. The facts of that case are very different. The lady there was not married

to the legal owner, they had no children, there was no mother-in-law to be nursed and there was no equivalent of the father going off to work in Dublin leaving everything in the charge of the mother.

[40] I am satisfied that I can safely infer from the facts of this case that there was an intention at least from the marriage and probably from the work done on the house that the two defendants would both have a beneficial interest in the property. It is then my duty to turn to fairly assess the quantification of Mrs Brogan's interest in the light of the whole course of dealing between them.

[41] It seems to me that this may well be an illustration of Lord Hoffman's observations in Stack, from which Baroness Hale did not dissent, that one could have an "ambulatory" constructive trust. If one quizzed these two people immediately before the work was done one might well have got a different answer as to what they believed their respective shares were than after the marriage. Even if Mr Brogan did not concede after the marriage that they were equal owners, which he might well have done, he is likely to have conceded that if quizzed years later when she had cared for his mother, helped on the farm, reared the children and held the fort while he worked in Dublin. The dealings between the parties, the whole course of which I should take into account, have several further points of interest. The fact that he did not tell her about the mortgage loan seems to me wholly consistent with her co-ownership of the property. He was trenchantly apologetic for the mess he had made of things and it seems clear that he believed that she would have prevented him mortgaging the property if he had come to her with the proposal. Furthermore when the whole sorry situation was exposed she put him out of the house. He went without demur. That seems to me consistent with a view that she had the right to do so, in part because it was her house at least as much as his.

[42] While the direct contribution is a little less than a third this lady can clearly call in aid substantial other factors as set out above. When one adds in the work on the farm, the absence of the husband and the care for the mother-in-law, all on top of the normal duties of a wife and mother of four coping on a modest income I am satisfied that the fair and proper quantification of her interest in the light of the whole course of dealing between them is that of a half of the property. I so find.

What order should be made?

[43] The second defendant sought certain reliefs in her counterclaim. She is entitled to a declaration that the first named defendant holds the lands as constructive trustee in part for the second defendant. I will hear counsel on the particular wording of the declaration including the date from which it should run. However I make it clear that whatever the date is it is well before 2007, when the plaintiff's mortgage was taken out. The second defendant is also entitled to a declaration that her beneficial interest in the lands ranks in priority to the plaintiff's

charge as she was in actual occupation of the property at the time of the latter charge. As I found above her interest in the land is that of one half or one moiety in the property. Counsel for the second defendant should prepare a draft order. Plaintiff's counsel helpfully did provide two draft orders in the second of which he envisages the possibility, quite rightly, of the court finding that Mrs Brogan had a beneficial interest in the property. He submits that provided his client continues to have one moiety in the property, as I have found, it is entitled to an order for possession and sale pursuant to the Partition Act of 1868, Sections 3 and 4.

[44] I have considered Mr O'Brien's submissions in contrast. I do not think there can be any argument in the light of various decisions that the court has a power to grant a stay on an order for possession. In a case such as this where, I take it, partition is completely impracticable, as we are dealing with a smallish dwelling house and its immediate curtilage only, the owner of one moiety in the property would normally therefore be entitled to an order for sale. That is what the Partition Act provided. Section 4 of the Act qualified the provision that the court shall direct a sale of the property accordingly by the words "unless it sees good reason to the contrary". This was taken in the past, it would seem, in a narrow reading effectively dealing only with the respective merits of partition or sale. However in Official Receiver v O'Brien [2012] NI Ch 12 I held that the expression "good reason" must now be read in the light of the European Convention of Human Rights pursuant to s.3 of the Human Rights Act 1998. In that case I found that the Official Receiver was not entitled to a sale of the property occupied by Mrs O'Brien as a co-owner holding one half of a property with her husband bankrupt. I held that was because of the combined effect of Article 6 and Article 8 of the European Convention. There was some 22 years delay since the order for bankruptcy. Her Article 8 rights arose from the fact that she was still living in the property after all this time. There is no Article 6 issue here but there is an Article 8 issue which has not been adverted to by counsel on either side. I require counsel to address this at a subsequent hearing. Might it be that the fact that the lady is still living in the house with four children, three of whom are still minors, combined with the way in which the plaintiff's predecessor in title went about lending this money, leads to a situation where it would be disproportionate and unfair to grant an order for sale? It will be recalled that the lender sent no employee to visit the site. They do seem to have sent out a chartered surveyor, whom I shall not name at present, but he clearly states on a document entitled Property Risk Assessment for Mortgage for Halifax Plc that he has viewed the property externally only. Unlike other cases such as Swift Advances Plc v Maguire [2011] NICh 16 the surveyor did not complete a form setting out whether there were other occupants in the house. Either he neglected to do so or Halifax Plc did not ask him to do so, perhaps to save on fees. A simple enquiry at the front door of the house would in all likelihood have elicited that there were other people in occupation of the house in contradiction of Mr Brogan's application form to Halifax. They could then have got her to waive her rights or assent to the mortgage after independent advice, or more likely she would have refused and this whole family misfortune would have been avoided to the mutual benefit of all concerned.

[45] It also occurs to me that even if the plaintiff found itself unable to realise the security for its loan, or to realise it in part as it believes the loan to exceed the current value of the property, it may have a cause of action against the mortgage advisor, if he owed a duty of care or good faith towards the Halifax. I have the sworn evidence of Mr Brogan that it was he who encouraged Mr Brogan to answer the questions in the form wrongly. The Halifax could of course call him against the mortgage advisor. Needless to say, I have not reached any final view about that matter but I have found the first defendant to be generally credible.

[46] Mr O'Brien relies on the decision of Murray J in Tubman v Johnston [1981] NI 52 as authority for the proposition that I should refuse an order for possession and sale here. I incline to the view that all Murray J is saying there is that the plaintiff lender needs to bring an action not against the defendant borrower but against his wife, the co-owner in occupation of the property. However in the course of his judgment Murray J draws attention to the fact that the House of Lords in Williams and Glyn's Bank Limited v Boland [1980] 2 All ER 408 upheld a decision of the Court of Appeal in England refusing an order for possession to the bank which had lent to two husbands without the consent of the wives who were still in occupation of the premises. I want to hear from counsel on the applicability of that landmark decision to the current facts. For all these reasons therefore I will reserve my decision on whether or not an order for sale is appropriate.

[47] For completeness I might observe that the plaintiff, even if it gets an order for sale here with vacant possession of the property, will be attempting to sell this dwelling house in the middle of a farm still owned by Terence Brogan. They will be doing so in a rural area. They will be doing so at a time when little property is changing hands due to economic circumstances. I would hope that the parties would take advantage of now having this judgment and of the time which I shall allow them to consider whether a pragmatic solution to this situation might be found. I would encourage them to do so.