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

Delivered: 02/12/2019

2015 No 15822

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

TONY McSHERRY and MARIAN McSHERRY

Plaintiffs;

and

MARK McSHERRY

First Defendant;

and

FIONA McSHERRY

Second Defendant.

COLTON J

Background

- [1] The plaintiffs are a married couple, now both retired, aged in their mid-60s.
- [2] They have three children, two daughters and a son Mark who is the first-named defendant.
- [3] The defendants married on 9 May 2003 and have two children.
- [4] The first-named defendant (Mark) is now aged 43 and the second-named defendant (Fiona) is now aged 52.
- [5] Prior to the defendants' marriage, the first-named defendant owned a property at 27 Sandy Street, Newry ("Sandy Street") which was held in his sole name and subject to mortgage in favour of the Woolwich Building Society. Sandy Street was a reasonably small mid-terrace house. The defendants lived there after their marriage.

[6] At the time of the marriage the first-named defendant was employed in his father's business, a snooker hall in Newry named "The Cue Club". It appears that the father was in a good way of going and sometime in 2006 he received an offer for the business which he accepted. The business was sold for £1.5m.

[7] At this time the defendants were considering moving to a larger property having regard to their growing family. Conscious of the impact that the sale of the business would have on Mark and aware of the fact that he was seeking to purchase a larger property the plaintiffs agreed to make £100,000 available as a gift to Mark when he and Fiona had found a suitable property.

[8] At some stage after the sale of the business Mark did find alternative employment with Ulsterbus.

[9] On 14 March 2007 the defendants viewed a property at 133 Carney Hall, Newry ("Carney Hall"). This was a substantial property in a new development. The purchase price was £256,000.

[10] There is a dispute about the precise circumstances, but the defendants agreed to purchase Carney Hall. There was intense activity after the viewing as the vendor required a quick sale. It will be recalled that this was at the time when the "property boom" was at its height.

[11] It is not in dispute that the plaintiffs provided the monies for the purchase of Carney Hall and associated costs. The total amount was £265,000.

[12] The defendants were registered as joint owners of Carney Hall on 19 June 2007. The property was mortgage free.

[13] There is no dispute that £100,000 of this £265,000 was a gift from the plaintiffs to the defendants.

[14] It is the plaintiffs' case that the balance of £165,000 was advanced by way of a loan to both defendants and is due for repayment. This is accepted by the first named defendant, but not by the second named defendant.

[15] Going back to the purchase of the house it is the plaintiffs' case that as far as they were aware the defendants intended to finance the purchase of Carney Hall by a combination of the £100,000 gift and the proceeds from the anticipated sale of Sandy Street.

[16] Sandy Street was in fact put on the market via Shooter Estate Agents on 26 March 2007 at an asking price of £210,000.

[17] The plaintiffs say that because of the pressure to purchase Carney Hall they agreed to provide the £165,000 to ensure its purchase on the understanding that they

would be refunded through the sale of Sandy Street, which on the basis of the asking price and the market in Newry at that time would have adequately provided sufficient funds for repayment.

[18] The defendants did take up occupation of Carney Hall after the sale but difficulties arose in relation to the sale of Sandy Street with various proposed sales breaking down. As is the case with Carney Hall there is a dispute about the exact status of the ownership of Sandy Street but it remains unsold.

[19] A series of unfortunate and undoubtedly unanticipated events have given rise to these proceedings. The defendants' marriage has broken down amidst great acrimony. They separated in and around 2012.

[20] In 2010 the plaintiffs' own financial situation had declined. They had invested the monies received from the sale of the business heavily in the property market which had been badly affected by the subsequent property crash.

[21] Subsequent to the separation between Mark and Fiona, Fiona initiated ancillary relief proceedings in the course of which she has made a claim for property adjustment in relation to Carney Hall and Sandy Street.

[22] The plaintiffs contend that the debt owed to them would have to be factored into the matrimonial financial settlement.

[23] In the absence of agreement as to the existence or repayment of the loan the plaintiffs issued a formal demand to each defendant for repayment of the money on 9 February 2015. A writ was issued on 16 February 2015 seeking repayment of the alleged loan and they were also joined as parties to the ancillary relief claim, then before Newry County Court. Proceedings at Newry Court were adjourned on an ongoing basis to allow for progress in the writ action. The ancillary relief proceedings were later transferred to the High Court Master so that both proceedings would be in the High Court.

[24] On the authority of **Burton v Burton & Anor** [1986] 3 FLR 419 the Matrimonial Court has taken the view that it could not determine the claim between the parties in the writ and this was a matter which would need to be determined by the Queen's Bench Division.

[25] Despite encouragement it has not been possible for the parties to come to a settlement of either these proceedings or the matrimonial proceedings.

[26] The matter therefore proceeded to a contested hearing in the course of which the court heard evidence from Tony McSherry, Mark McSherry and Fiona McSherry. The court also heard oral evidence from Ms Arlene Elliott and Mr Gerard Trainor, solicitors in the Elliott Trainor Partnership (ETP) who were involved in the

conveyance of Carney Hall. In addition oral evidence was received from Mr Daly, the first-named plaintiff's accountant and Mr Storrie his Financial Advisor.

[27] The court also had access to affidavits sworn in the matrimonial proceedings, contemporaneous files from the ETP and from Shooter Estate Agents.

[28] I am obliged to counsel in this matter for their assistance in the presentation of the case and for their written submissions. Ms Lisa Moran appeared for the plaintiffs. Ms Cathy Hughes appeared for the first defendant. Mr Roger Dowd appeared for the second defendant.

[29] There was a clear conflict in the evidence as to the precise circumstances in which Carney Hall was purchased and the circumstances in which the payment of £165,000 by the plaintiffs was arranged.

[30] Ultimately the court has to determine, on the evidence presented, whether there was a promise by the plaintiffs to pay the £165,000 to the defendants and a corresponding promise by the defendants to repay the £165,000. The court must determine whether there was an intention to create legal relations.

[31] In essence therefore the court has to determine on an objective basis whether there was an intention to create legal relations between the parties and if so, what if any, agreement was actually made at the time.

[32] In relation to the purchase of Carney Hall some matters are objectively clear. The defendants viewed the property on 14 March. There was a time pressure and urgency to complete on Carney Hall. On 16 March 2007 Shooter Property Services sent a memorandum of agreed sale to the vendors at Carney Hall at the agreed price. The purchaser is described as "Mr Mark McSherry, 27 Sandy Street, Newry BT34 1EN". Thereafter things moved quickly. ETP were instructed in relation to the conveyance. A contract was signed by the first named defendant on 12 April 2007. The defendants moved in to Carney Hall in July 2007. In the meantime on 26 March 2007 Shooter Property Services confirmed instructions from the defendants to act on their behalf in the sale of Sandy Street at an asking price of offers over £210,000.

[33] Returning to the purchase of Carney Hall, the first defendant's evidence was that he and his wife were keen to purchase Carney Hall. They were aware of the time pressure in relation to the sale and having returned from viewing the premises Mark rang his father who was in Portugal to discuss how he might finance the purchase. His evidence was that his father agreed to pay the outstanding balance of £165,000 and that this could be repaid from the sale of Sandy Street. He actually returned from Portugal and as will become clear was involved in the completion of the conveyance. Both the first named plaintiff and the first defendant presented a scenario whereby the second defendant was fully involved and engaged in the arrangements and indeed enthusiastic about them. The second defendant presented an entirely different picture. She said that while she liked the house she had some

reservations about it, particularly as it was close to the plaintiffs' home. She had a concern about the controlling influence, in particular of Tony McSherry, over her husband. She said that she was not a party to the discussions about the loan. She was not present when Mark made the phone call to Portugal. The first she became aware of the arrangement was on the following day. She said that the first defendant returned home and told her that he had agreed to purchase the property. She took issue with this and claims that she was subject to violence and verbal abuse from her husband, in effect telling her it was none of her business.

[34] In short the second defendant says that all of the arrangements were made between the father and the son. She was not consulted or asked to agree anything. She was told what was happening.

[35] Assessing the credibility of the witnesses on this issue was not easy. I bear in mind that much has happened to the parties since the purchase of the property. With the passage of time memories fade and motives change. The perspectives of the parties are undoubtedly influenced by their current situation. The truth is that when this house was purchased none of them would have anticipated the events that have happened and did not focus on the precise implications of what was happening. In these circumstances it can be difficult to truly determine what the real intentions of the parties were. In the course of the hearing all the parties pointed to potential inconsistencies between the evidence given by the witnesses and previous averments in affidavits sworn in the matrimonial proceedings.

[36] In assessing the evidence of the parties (and I note I did not hear any evidence from Marian McSherry) I am particularly influenced by the contemporaneous documentation that exists.

[37] I consider that the written records from ETP solicitors are of assistance in assessing what took place and what was the intention of the parties. The first relevant note is a handwritten attendance from Ms Arlene Elliott of 16 March 2007. It is Mark McSherry, the first defendant, who attends. The note records:

*"Has the money - Tony McSherry (retired) father is lending the money to client.
Client will then sell his house - believes he will get £210,000. Will pay off dad.
Wife - Fiona; in joint names.
... Wants sale without depending on her client selling."
(My underlining)*

[38] On 20 March 2007 ETP write to both defendants in relation to the sale seeking relevant documentation for money laundering purposes, identification and utility bills.

[39] Two relevant documents were created on 2 April 2007. Firstly, Ms Elliott of ETP writes to both defendants in the following terms:

"We understand that it is your intention to borrow money from Mr McSherry Senior and we would be obliged if you would request him to contact Margaret Elliott at the office in order to confirm his instructions ..."

[40] On the same date there is an internal memo from Arlene Elliott of ETP to Margaret Elliott to the effect:

"Mark's father, Tony McSherry who is retired and a client of this office is apparently going to lend you client the money to complete pending sale of his own house I have requested that Tony McSherry contact you in order to confirm his instructions and I am assuming that he will seek a mortgage over the property. Will you speak to him when he calls?"

[41] Clearly, as was confirmed in her evidence, Ms Elliott was concerned to ensure the propriety of her instructions from Mark McSherry about the source of the funding for the purchase and also to ensure that Tony McSherry was properly advised and protected in relation to the provision of the funds. This appears to be followed up by an undated handwritten memo to the effect:

"Tony has instructed Finn Sherry to do survey. Survey apparently completed but report not yet out. Tony lending monies to son to buy house - son has present house on market. House which he is buying to complete 27/04/07. Does dad want mortgage? Can you contact the dad?"

[42] Again it is clear that ETP is concerned to ensure proper instructions from Mark McSherry and to confirm Tony McSherry's intentions in relation to a mortgage.

[43] On 17 April 2017 ETP formally write to Tony McSherry asking him to attend with Margaret Elliott. It appears the first named plaintiff did in fact attend on 18 April 2007 where he was seen by Gerard Trainor another partner in ETP from whom the court heard evidence. His note of 27 April records as follows:

"Has funds from sale of snooker business from two years ago. Got £1.5m. Will sort out with Mark repayment of the money. Francie Reynolds - business Ulster Bank - paying £258680.00."

Does not want a mortgage on the property. Knows that he has no security. Only son."

[44] In the interim on 12 April 2007 the contract for sale was signed by the first named defendant - "*on behalf of Fiona McSherry*".

[45] On 25 April 2007 there is a solicitor's cash statement showing £258,680 paid by Tony McSherry.

[46] SDLT forms are signed by both defendants and the return made on 27 April 2007.

[47] Having considered the evidence of Tony, Mark and Fiona McSherry on the issue of the purchase of Carney Hall and having regard to the contemporaneous documentation I have come to the conclusion that as far as Tony McSherry was concerned he was providing a loan of £165,000 for the benefit of Mark and Fiona McSherry which was to be repaid from the sale of the Sandy Street property.

[48] I have also concluded that Fiona McSherry is correct in her evidence when she says that she was not consulted or involved in this arrangement. It was between the father and the son. It seems to me this is supported from the written contemporaneous documentation from ETP. Tony McSherry was the driving force and he was dealing with his son throughout. I found Fiona's account entirely credible. I have no doubt that Tony McSherry meant well and believed he was acting in the best interests of his family and his grandchildren. I formed the impression that he was a strong willed, dominant man, successful in business who made decisions for his son. It was he who proposed to his son that he would provide the finance for the house when they spoke on the phone on 14 March. He returned from Portugal and was heavily involved in the conveyance. He arranged a survey of the premises and made payment to ETP. My views on this issue are confirmed by the evidence in relation to Sandy Street and subsequent events to which I will refer shortly.

[49] I do not think for one minute that he felt there would be any problem about recovering the £165,000 because he was confident of the value of Sandy Street. I do not consider that any thought was given to the consequences of the failure of Sandy Street to sell for the anticipated price. Regrettably this misjudgement was apparently repeated in other subsequent financial investments which have damaged the plaintiff's financial position. It is a matter of great regret that he did not arrange for security and that he was so adamant in his instructions to ETP, which could have avoided many of the difficulties that have arisen in this case.

[50] I accept Fiona McSherry's evidence that she had no direct involvement with the conveyance and was not privy to the correspondence from ETP. It is correct that there is a photocopy of the second defendant's driving licence in a file held by ETP. She alleged that she gave it to Mark to take to the solicitor's office. In her evidence

Ms Elliott advised that it was the office policy of a physical verification of the client and relevant identification for money laundering requirements. She had no recollection of doing it herself, but it may have been done by a secretary or clerk in the office.

[51] Fiona McSherry denies ever attending with ETP or being involved in the decisions relating to the conveying process, something I accept.

[52] The issue then is what are the implications of these findings?

[53] As I have indicated it was clear that a key element of the agreement by the plaintiffs to provide the £165,000 for the purchase of Carney Hall was that it would be reimbursed from the sale of Sandy Street.

[54] Regrettably the sale proved problematic.

[55] On 25 July 2007 an offer from Carol Fitzpatrick for the purchase of Sandy Street at £213,000 was accepted with completion due on 5 September 2007. Unfortunately that sale fell through on 31 September 2007.

[56] On 14 April 2008 there was an agreed sale with a Caroline McEvoy for a deposit of £1,000 and further £185,000 within eight weeks. It appears that that sale fell through on 21 April 2008.

[57] The evidence as to what has happened with Sandy Street thereafter has been less than satisfactory. It appears that in effect the management of the property has been taken over by Tony McSherry and he has let out the property for various periods in the interim. The property has proved to be problematic with frequent damage caused by tenants. Tony McSherry's evidence was that he has carried out repairs and maintenance to the property at his own expense. He accepted that the rent was paid to him and his son Mark, albeit, the legal owner has apparently disengaged from any involvement in the property.

[58] There was a complete lack of evidence or accounting in relation to any of the monies allegedly spent by Tony McSherry or the rents received by him.

[59] A particular controversy was the evidence from the second defendant to the effect that her understanding was that it was agreed by Mark McSherry that the property had in fact been sold to his parents. She made the case that in September 2008 Tony McSherry came to her and told her he had bought Sandy Street for £180,000 and now owed her the balance of the deal. She confronted her husband with this information and says he did not deny it but rather said it was none of her business. Shortly after those discussions the plaintiffs told her and her husband that Tony McSherry now owned Sandy Street, that it was to be rented out but that the plaintiffs would keep it for the benefit of the defendants and their children. I conclude that the property has not been sold on any formal basis but as I have

already observed I find as a fact that the first defendant has in effect abandoned his interest in this property in favour of his father. I accept the second defendant's evidence on this issue. This does not of course mean that there has been any actual sale but I accept that this was indeed her understanding.

[60] The plaintiffs have placed great store on the statement of personal assets prepared for them by Daly Park, chartered accountants on 24 September 2008 and a meeting that took place between the parties with George Storrie, a financial advisor.

[61] The statement of personal assets expressly refers to a cash loan in the sum of £165,000. Interestingly this loan is described as "cash loan to son" which confirms the view I have formed about the relationship between the parents and Mark. There is a note attached to the statement which records the following:

"The cash loan to their son, Mark, is redeemable on the disposal of Mark's former principal private residence in Sandy Street, Newry and would command a price in the region of £200,000."

[62] Again this confirms the view I have formed to the effect that this was an agreement between the father and the son to be redeemed by the sale of Sandy Street. Nowhere is there the slightest reference or recognition of the second defendant's interests or position. Nor is there any reference to what would occur in the event of Sandy Street not being sold.

[63] As to the meeting with George Storrie this was a meeting which took place some time in 2010 between the plaintiff, Tony McSherry and the defendants.

[64] At the meeting with Mr Storrie, who is a neighbour of the first named plaintiff with whom he had some previous dealings, one of the proposals put forward by Mr McSherry was to transfer the mortgage from Sandy Street to Carney Hall which would leave Sandy Street mortgage free.

[65] Overall this was a clear attempt by Mr McSherry to deal with his financial difficulties. I formed the view again that this was a meeting driven by Mr McSherry and there was nothing in the second named defendant's conduct at that time which suggested she accepted she had entered into an agreement for a loan of £165,000.

[66] The plaintiffs in this case have not sought equitable relief of any sort. They have brought the claim on the basis of a legally enforceable loan.

[67] In light of the findings I have made I consider that the plaintiffs are entitled to judgment against the first defendant Mark McSherry. I consider that there was a legally binding agreement between those parties to the effect that he was receiving a loan. However, I also conclude that it was a term of the agreement between them that that loan was to be repaid from the proceeds of the sale of Sandy Street. In

those circumstances I find that the plaintiffs are entitled to judgment against the first defendant. The judgment shall be satisfied by the value of the first defendant's interest in Sandy Street, however realised, but shall not be more than £165,000. If necessary the court will make appropriate orders and directions in respect of the satisfaction of this judgment.

[68] I further find that there is no legally enforceable agreement between the plaintiff and the second defendant and the action against her is therefore dismissed.

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