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THE HIGH COURT
MATRIMONIAL

1983 No. 20 C.A.

O'D

.v.

O'D

Judgment of Mr. Justice Murphy delivered the 18th day of November, 1983

This is an Appeal from the decision of the Learned President of the Circuit Court given on the 18th July, 1983.

The Plaintiff and the Defendant were married on the 16th March, 1978 and there was one child of the marriage, namely R who was born on the 14th October, 1980.

The matrimonial home was situated at

and it is common case that the Plaintiff and the Defendant are each beneficially entitled to a moiety of the said premises.

Since July 1982 - following an application by the Defendant for a Barring Order which was unsuccessful - the Plaintiff has left the matrimonial home and not returned thereto.

The Plaintiff is in some financial difficulty as he lost the executive position which he previously held due to the liquidation of his employer. He has recently started a new enterprise in conjunction with two

other persons and whilst it is not yet established how successful or otherwise this business will be he has been drawing a sum of £137 per week by way of emoluments. In fact this fugure may be misleading as, due to the fact that the Plaintiff had been out of work for some time, he is subject to little or no tax on that income at the present time. Currently he is paying to his wife maintenance at the rate of £55 per week. £40 per week to his father in repayment of a loan to finance the new enterprise and there is due to the Building Society, who advanced money in connection with the purchase of the premises in Portmarnock, a weekly payment of £52. The payments to the Building Society are not currently being met. Obviously some adjustments can be made in the present arrangement. It would seem that the Plaintiff's father might be prepared to postpone the repayment of the loan made by him and perhaps the Building Society loan could be spread over a longer period with a consequent reduction in the amount of the weekly payments. However whatever arrangements may be made it is clear that the present income of the Plaintiff is inadequate to meet a reasonable claim for maintenance: the repayment of the mortgage and the repayment of the family loan as well as keeping the Defendant and himself in the basic necessities of life. Perhaps surprisingly the Defendant is confident that the Plaintiff will in fact

succeed in his present venture and that further monies will become available as a result. Obviously it would be impossible to rely on such a forecast as a basis on which to make a present decision. Indeed one would have to bear in mind the possibility that a more pessimistic view would be justified.

However the foregoing matters are not really in question at the present time except as a background to the Plaintiff's claim that the matrimonial home should be sold and its true value - there was evidence to the effect that it is worth some £43,000 - obtained and out of that sum the Building Society Mortgage repaid and the balance invested in a more modest home for the benefit of the wife during her life and the child at least during its dependency. As the Defendant is not agreeable to that course the Plaintiff instituted these proceedings claiming a sale of the family home in lieu of partition pursuant to the Partition Act 1868 to 1876. The learned President did not order a sale of the premises nor did he dispense with the consent of the Defendant in the event of a sale taking place. Instead he made an order of partition and adjourned the balance of the proceedings with liberty to re-enter.

In the Appeal it was argued on behalf of the Plaintiff that as a joint tenant he was entitled as of right to a decree for partition or that in

any event it was a suit where, in the words of section 4 of the Partition Act 1868 "a decree for partition might have been made". That being so, the argument ran, as the Plaintiff was himself entitled to an interest in the property to the extent of one moiety that again he was entitled as of right to the sale of the property unless the Court saw good reason to the contrary. In support of those propositions the cases cited in Carton's Real Property Statutes second edition at page 745 were relied upon. These included Pitt .v. Jones 5 APP 661; Drinkwater .v. Ratcliffe 20 EQ. 530; Pemberton .v. Barnes 6 CH. 693 re Whitwell 19 L.R.I.R. 45 and re Langdale I.R. 5 EQ. 572.

This line of argument raises at once the nature and origins of the right to partition itself. There is no doubt that joint tenants and tenants in common did not have the right at common law to compel a partition. The position appears to have been otherwise in relation to co-parceners "as their co-ownership was cast on them by the act of the law, and not by their own agreement, it was thought right that the perverseness of one should not prevent the other from obtaining a more beneficial method of enjoying the property" (see Williams Real Property 23rd Edition page 243). The right of the joint tenant to compel partition was conferred by a statute in 1542 entitled "an Act for joint tenants"

(33 Henry VIII C. 10). It may be significant to note that the final section to that Act contains a proviso which, translated into contemporary english reads as follows:-

"No such partition, nor severance hereafter to be made by a force of this Act, be nor shall be prejudicial or hurtful to any person or persons their heirs or successors, other than such which be parties or privy unto the said partition, their executors or assigns".

With only minor amendments the Act of Henry VIII governed the law relating to partition until the passing of the 1868 Act. Prior to that Act there was no jurisdiction vested in the Courts to direct a sale of the property held in common and the only remedy was one of partition.

Authority can be found for the proposition that - during that period at any rate - a decree for partition in a suit instituted and entertained under the Courts equitable jurisdiction was regarded as a matter of right upon proof of title (see 2 Comyns Digest (fifth edition) page 762). In this context it is pertinent to note that in the case of Turner .v. Morgan 8 VES 143 that Lord Eldon did partition a single house notwithstanding the very considerable inconvenience that this caused to the parties. In that case the Court enforced the award of the Commission of Perambulation notwithstanding the fact that exception was taken by the Defendant on the

ground that the Commission had allotted to the Plaintiff the whole stack of chimneys, all the fireplaces, the only staircase in the house and all the conveniences in the yard. Certainly this is precedent and authority for the proposition that a single dwelling can be and has been partitioned. In addition the argument made in that case by Counsel on behalf of the Plaintiff included a reference to a case of Benson in which another house was partitioned "by actually building up a wall in the middle".

However the existence of these precedents does not establish conclusively that the order is of right or that the Court is without discretion in the matter. In the Irish case of North v. Guinan Beatty's Chancery Cases 342 the partition of a house in College Green, Dublin held under a lease was refused as the landlord might have obtained an injunction to restrain the parties from executing the partition by any act amounting to waste It seems to me that that decision represents both good law and good sense. In general principle the Court would not ordinarily make an order which would be futile. Clearly it is inappropriate to make an order directed to parties to proceedings when its execution depends upon the co-operation of parties not bound by the order.

Reference may also be found to a somewhat esoteric exception to the rule tha house may be partitioned in Coke on Littleton 31 B/32A (cited in Turner & Mangan) w

it is pointed out that a castle cannot be partitioned as it may be necessary for the defence of the realm. That particular exception involves a recognition of the principle that partition could not be granted where this conflicted with the public good. Translated into contemporary and more mundane circumstances it would seem to follow that partition of the dwellinghouse should not be directed if, for example, this were to prejudice the proper planning of the area in which the building was located. That the granting of a decree of partition is not an absolute right of the parties or a mere formality of the Courts is made clear by the practice of the Courts as indicated in relation to the High Court in Seton on Decrees but more particularly of the Circuit Court in Babington's County Courts practice and Carlton's book in the same topic. In the form provided in Babington for the primary order in a partition suit (see page 655) enquiries are directed as to the estate and shares of the parties; the existence of any agreement prohibiting sub-division; the availability of any necessary consent of the landlo the existence of any charge in favour of the Commissioners of Public Works or the Land Commission and confirmation that all parties interested are before the Court before appointing a surveyor to prepare a map of the proposed division. This procedure seems to me to confirm that the making

of the actual order of partition does and always did require the Court to be satisfied by evidence made available to it or to an officer of the Court that it was a proper case in which to make the particular order sought.

As no evidence was produced before the Court - and no inquiries sought or directed - I believe it would be inappropriate to make an absolute order for partition and on that ground alone I would set aside the order of the learned Circuit Court Judge.

However the matter is even more complex than that. The Plaintiff had relied on the 1542 Act as conferring on the Court the jurisdiction to decree partition. In fact that Act was repealed by the Statute Law Revision (pre Union Irish Statutes) Act 1962. That this change was not adverted to is not surprising as the error appears to have arisen some considerable time ago and has been perpetuated since. Claims for the partition of the matrimonial home are common indeed and in many if not most of such claims in the High Court the matter is entitled in various Acts including expressly the 1542 Statute.

Why precisely the 1542 Act was repealed in Ireland is not clear. How and why the Partition Action disappeared in England is explained by Overend J. in Hill .v. Maunsell-Eyre 1944 I.R. 499 at 505 and elsewhere. Counsel in the present case were unable to offer any explanation for the

repeal in this jurisdiction of the enabling statute. In the circumstances Counsel for the Plaintiff/Appellant was driven to argue that the jurisdiction t decree partition - as opposed to a sale in lieu of partition - is now exercisable in accordance with the principles which the authorities show as having been established by the decided cases in respect of the practice of the Courts of Chancery. Whilst it is clear that a separate equitable jurisdictior arose (see Mundy.v.Mundy 2 Ves Jnr. 122) I confess to having some hesitation in accepting that principles which evolved as to the manner in which a statutory jurisdiction might be exercised could survive the repeal of that statute. However, assuming rather than accepting, that the jurisdiction of the Courts exists it is of necessity part of the inherent equitable jurisdiction and as such it would seem to me necessarily subject in its exercise to the proper discretion of the Court. In my view the granting of an order of partition on the basis of the evidence available would be wholly inappropriate.

In fact the partition of the family home is not what the Plaintiff/ Appellant seeks. That was the order granted by the learned President of the Circuit Court and it was from that order that the Plaintiff/Appellant now appeals. What he seeks is an order for sale in lieu of partition. Such an order will not be made where the Court sees good reason to the contrar What constitutes good reason for the purposes of that section has been conside

in a number of decided cases of some antiquity. A number of these cases are reviewed by Munroe J. in Whitwells Estate 19 L.R.IR. 45. Monroe J. himself appears to have been satisfied that it would be inappropriate to order a sale if it was likely to prove abortive or if it would have involved the parties in accepting a significant sacrifice.

In my view what constitutes good reason at the present time would properly have regard to the rights of the parties under the Family Home Protection Act 1976. Needless to say the old authorities had never considered this problem or anything remotely akin to it. Apart from the fact that the rights conferred by the Family Home Protection Act 1976 in this respect were novel it must be remembered that the Partition Acts preceded the Married Womens Property Act 1882 so that over the centuries and in particular in pursuance of the 1542 Act a partition would have been effected by a husband on behalf and in the right of his wife.

It was argued that the 1976 Act did not repeal the Partition Acts or any of them. It was contended, therefore, that if a proper case for a partititon was made out and an appropriate order granted that this dispensed with the necessity for procuring the consent of a spouse under that Act. In my view that argument is not well founded. There is no reason to suppose that an order for partititon or sale in lieu thereof was intended to

overreach the provisions of the Family Home Protection Act. Even if an order were made under the 1868 Act it must be recognised that this would not constitute a parliamentary conveyance and would not of itself correct imperfections in title. It would only be the fact that the spouses themselves joined in the conveyance that would overcome the need to procure their consent and it seems to me unthinkable that the Court would direct a conveyance to be made under the 1868 Act without having regard to the right of a spouse to withhold his or her consent and indeed the express duty imposed on the Court not to dispense with consent without taking into account all the relevant circumstances including in particular those specified in sub-section 2 of Section 4 of the 1976 Act.

Counsel on behalf of the Plaintiff/Appellant recognised that this argument entailed acceptance of the proposition that a spouse who had no beneficial interest in the Family Home enjoyed the statutory veto on the sale thereof where another spouse who had a beneficial interest, however miniscule, could have his or her statutory veto overborne by a sale directed under the Partition Acts. In my view a Court would be justified in concluding in the circumstances of present times, under our Constitution and of the rights conferred by the Family Home Protection Act that the loss of the statutory veto represented good reasons within the meaning of Section 4 of the

Partition Act 1868. This interpretation of the relevant legislation is greatly facilitated by the fact that a contrary conclusion would lead to a result which is unjust to the point of absurdity.

In these circumstances I refuse the Appellant/Plaintiff's claim to an order for sale in lieu of partition and I am satisfied that in the circumstances of the case - even if jurisdiction to order partition subsists - that an order would not properly be made in the present case. Accordingly I would set aside so much of the order of the learned President as decreed partition.

James D Mc[illegible]