FAMILY LAW DECLARATIONS - REVIEWABLE DISPOSTIONS

A. Reviewable Dispositions

The Judgement of the then President of the High Court, Mr Justice Morris, in Tesco Ireland Limited - v - Patrick J (otherwise P.J.) McGrath and Thomas McGrath (unreported High Court 1998/526 Sp) ("Tesco"), delivered on the 14th June 1999 is a useful vehicle for a consideration of the implications of the statutory provisions relating to reviewable dispositions. We are all doubtlessly familiar with the problems caused to conveyancers by the stringent interpretation of the *in camera* rule in this Judgment. This paper considers the aspects of this Judgment relating to reviewable dispositions. The Judgement of the President ("the Judgement") arose from proceedings in relation to a contract whereby the Plaintiff as Purchaser agreed to purchase certain land from the Defendants. The Purchaser raised the following requisition on title (from the then current Requisitions on Title):-

> "26.2 Confirm that this is not a "disposition (as defined by the 1989 Act or the 1995 Act) for the purpose of defeating a claim for "financial relief" (as defined in Section 29 of the 1989 Act) or "relief" (as defined by Section 35 of the 1995 Act)."

(The current edition of the Law Society's Requisitions on Title contains the following corresponding requisition:-

> "26.2 Confirm that this is not a "disposition" (as defined by the 1989 Act, the 1995 Act or the 1996 Act) for the purposes of defeating a claim for "financial relief" (as defined in Section 29 of the 1989 Act) or "relief" (as defined in Section 35 of the 1995 Act and Section 37 of the 1996 Act)".)

The Defendants replied in the following terms:-

" Purchaser will accept the Vendor's Solicitor's certificate that the provisions of this legislation do not affect the property for sale".

The Judgement stated that it was of paramount importance to the Plaintiff to acquire the status of a *bona fide* purchaser for value without notice of an intention to defeat a claim for financial relief, or ensure that the sale was not a "reviewable disposition". The importance of this status arises from the definition of "reviewable disposition".

The statutory concept of the "**reviewable disposition**" was introduced by Section 29 of the Judicial Separation and Family Law Reform Act 1989 ("the 1989 Act"), but, as that Section was repealed by the Family Law Act 1995 ("the 1995 Act"), and was substantially similar to Section 35 of the 1995 Act, it is not necessary to consider that Section in any detail here, although it would have effect in relation to any dispositions taking effect prior to the

commencement date of the 1995 Act, which was the 1st August, 1996. The statutory concept of the "reviewable disposition" was continued and applied in Section 37 of the Family Law (Divorce) Act, 1996 ("the 1996 Act").

In both the 1995 and 1996 Acts, a "**disposition**" means "any disposition of property howsoever made other than a disposition made by will or codicil".

"Relief" is defined in Section 35 (1) of the 1995 Act (and Section 37 (1) of the 1996 Act), and could be summarised as the financial or other material benefits conferred by a long list of orders under various pieces of family law legislation, including periodical payments and lump sum orders; property adjustment orders; financial compensation orders; pension adjustment orders; orders for the provision of a spouse out of the estate of the other spouse; variation orders; relief orders; and certain orders under the Guardianship of Infants Act 1964 and the Family Law (Maintenance of Spouses and Children) Act 1976.

"**Reviewable disposition**" is defined in both Sections as meaning, "in relation to proceedings for the grant of relief brought by a spouse, … a disposition made by the other spouse concerned or any other person but does not include such a disposition made for valuable consideration (other than marriage) to a person who, at the time of the disposition acted in good faith and without notice of an intention on the part of the respondent to defeat the claim for relief."

The Judgement continued that correspondence ensued between the solicitors for the parties, in the course of which the Purchaser's Solicitors were informed that "unhappy differences had arisen between the first named Defendant and his wife". The Vendors offered a statutory declaration (presumably of the Vendors alone, although this is not specifically stated in the Judgement), in the following form:-

> "No proceedings of any kind have been instituted or threatened and no Application or Order of any kind has been made in relation to the property under any of the provisions of… (the 1989 Act) or… (the 1995 Act) or… (the 1996 Act)… and the assurance of the property to the… parties mentioned in paragraph 7 hereof is not a disposal for the purpose of defeating a claim for relief…".

The Purchaser was not prepared to close on the basis of this statutory declaration and asked for "sight of the proceedings, pleadings and any Order made in the proceedings". The Defendants (Vendors) declined to comply with this request as they took the view that since family law proceedings were heard *in camera* it was not within their capacity to disclose this information to the Purchaser.

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The Vendors then invoked general condition 18 of the Law Society General Conditions of Sale 1995 Edition which provides

> "If the Purchaser shall make and insist on any Objection or Requisition as to the title… or any other matter relating or incidental to the sale which the Vendor shall, on grounds of unreasonable delay or expense or other reasonable ground be unable or unwilling to remove or comply with, the Vendor shall be at liberty… by giving to the Purchaser… not less than five working days notice to rescind the sale. In that case unless the Objection or Requisition in question shall in the meantime have been withdrawn, the sale shall be rescinded at the expiration of such notice".

The Plaintiff (Purchaser) then issued a Vendor and Purchaser Summons, out of the hearing of which the Judgement arose.

The President was asked to determine five issues.

THE FIRST was whether the statutory declaration containing the paragraph mentioned above was

"adequate to ensure that in relying on same the Plaintiff will be the person acting in good faith without notice of any intention on the part of the first named Defendant to dispute any claim for relief under the Family Law Act 1995 and to satisfy the Plaintiff that the assurance of the property… is not a reviewable disposition…"

It was submitted by Counsel on behalf of the Defendants/Vendors that on the authority of Reynolds - v - Waters (1982) ILRM 335, once a purchaser has made all "proper enquiries" in relation to possible family law claims affecting the property, and when the purchaser has been informed of facts, which if verified by statutory declaration would establish those facts, no such difficulty arises, and if neither the purchaser nor his solicitor has any reason to doubt the accuracy or the veracity of the statements in the proposed statutory declaration, it is not reasonable for the purchaser's solicitors to insist on corroboration of the vendor's declaration and that good title has been shown.

Counsel on behalf of the Plaintiff/Purchaser submitted that these circumstances did not exist in the present case and that the position in which the Purchaser finds itself in the present case is that of the original purchaser in Somers - v - W. (1979) IR 94.

The Judgement continued that if a purchaser is to be protected from the possibility of a transaction being set aside as being a "reviewable disposition", then the purchaser must establish that the disposition was made for valuable consideration and that at the time he acted in good faith and without notice of any intention on the part of the Respondent (Vendor) to defeat the claim for relief.

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In Somers - v - W. Mr Justice Henchy stated that

"The question of whether a purchaser has acted in good faith necessarily depends on the extent of his knowledge of the relevant circumstances. In earlier times the tendency was to judge a purchaser solely by the facts that had earlier come to his knowledge. In the course of time it came to be held… that it would be unconscionable for a purchaser to take his stand on the facts that had come to his notice to the exclusion of those which ordinary prudence… could have called to his attention".

"He would not be allowed to say:- "I acted in good faith, in ignorance of those facts, of which I learned only after I took the conveyance if those facts were such as a reasonable man in the circumstances would have brought within his knowledge"". In assessing whether the first purchaser in Somers - v - W. acted in good faith Mr Justice Henchy adopted the procedure of examining "what was the extent of the Plaintiff's actual knowledge".

In the present case the Purchaser became aware of unhappy matrimonial differences when his Solicitors were informed of this fact by the first named Defendant's Solicitors, after the contracts were signed, but before closing. From an amended form of the Statutory Declaration mentioned above, it was apparent that proceedings under the 1989 Act were in existence between the first named Vendor and his wife. Next, the Purchaser's Solicitors were informed that an interim maintenance order had been made. It was therefore clear that claims under the family law legislation were being actively pursued by the first named Vendor's wife and the Purchaser would have been aware that under the provisions of Section 35 of the 1995 Act there was a realistic danger that the Court would presume, unless the contrary was shown, that the disposition was for the purpose of defeating this matrimonial claim. Mr Justice Morris then posed the same question as did Mr Justice Henchy in Somers - v - W.:-

"in the circumstances should the Plaintiff, as Purchaser, be fixed with constructive notice of… the existence of the Defendant's claim?".

He had "no doubt whatever that the answer must be in the affirmative". He was satisfied that the circumstances envisaged by Mr Justice Costello in Reynolds - v - Waters did not exist in the present case and "that if the Purchaser was to rely upon the statutory declaration offered it could not establish that it acted in good faith and without notice on the part of the Vendor to defeat the potential claim". The President therefore answered the first question in the negative.

Thus far, we can learn from the Judge the importance of making "proper enquiries" in

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relation to possible family law claims, and having made the "proper enquiries" the importance of taking great care correctly to interpret the replies, particularly having regard to the contents of Section 35 (5) of the 1995 Act, and Section 37 (2) of the 1996 Act.

These Subsections provide that the court, on the application of a person who has instituted proceedings that have not been determined for the grant of relief, may:-

1. If it is satisfied that the other spouse concerned or any other person, with the intention of defeating the claim for relief, proposes to make any disposition of… any property, make such order as it thinks fit for the purpose of restraining that other spouse or other person from so doing or otherwise for protecting the claim; or
2. If it is satisfied that that other spouse or other person has, with that intention, made a reviewable disposition and that, if the disposition were set aside, relief, or different relief, would be granted to the applicant, make an order setting aside the disposition.

Where relief has been granted by the court and the court is satisfied that the other spouse concerned or another person has, with the intention aforesaid, made a reviewable disposition, it may make an order setting aside the disposition.

Accordingly, a reviewable disposition can be restrained prior to taking effect, or can be set aside both prior to and after the granting of relief.

Furthermore, the Sections go on to provide that where an application has been made to restrain or set aside a reviewable disposition prior to the determination of the proceedings (not in respect of a reviewable disposition made after the granting of relief!), with respect to a disposition that took place less than three years before the date of the application, or with respect to a disposition or other dealing with property that the other spouse concerned or any other person proposes to make, and the court is satisfied that the disposition would or has had the consequence of defeating the applicant's claim for relief, it shall be presumed, unless the contrary is shown, that the other spouse, or other person, disposed of the property, or proposed to do so, with the intention of defeating the applicant's claim for relief.

It can be seen therefore, that a reviewable disposition can, without limit as to time, but, of course, since the coming into effect of the said Acts, be set aside, with proof of intention to defeat the claim for relief, and that intention is presumed if the application is made within three years of the making of the reviewable disposition.

THE SECOND question posed by Counsel in Tesco was whether the Defendants should furnish to the Plaintiff copies of any "claims, pleadings and orders" made in the family law

proceedings. The Vendors took the stance that they were not free to furnish the Purchaser copies of "claims, pleadings and orders" made in the family law proceedings as these documents are covered by the *in camera* rule. In this, Mr Justice Morris held that he had "no doubt that they are correct". He referred to 3 of the 12 conclusions set out in the judgement of Mr Justice Barr in Eastern Health Board –V- Fitness to Practice Committee of the Medical Council and Others [1998] 3 IR 399.

The Judgement of Morris P. went on to state

"It is therefore clear that circumstances may arise in which the interests of justice or a crucial public interest may justify the publication of matters arising at an *in camera* hearing. Mr Justice Barr instances the prosecution of a witness in such proceedings for perjury. However I am unable to identify anything in the present case which would indicate to me that it is in the interests of justice or that it is crucial in the public interest that the matrimonial proceedings in this case be made public". He therefore decided that he was "in no doubt that the answer to question number 2 should be in the negative".

The answer to this question should now been seen in the light of Section 40 of the Civil Liability and Courts Act, 2004. Section 40 applies to what are called "**relevant enactments**" which include the Family Home Protection Act, 1976, the Family Law Act, 1995 and the Family Law (Divorce) Act, 1996. Sub-Section (4) reads as follows:-

> " (4) Nothing contained in a relevant enactment shall operate to prohibit a party to proceedings to which the enactment relates from supplying copies of, or extracts from, orders made in the proceedings to such persons and in accordance with such conditions (if any) as may be prescribed by Order of the Minister".

This provision, therefore, allows "a party to proceedings" to supply " copies of, or extracts from, orders made in the proceedings" to prescribed persons. This sub-section does not apply to pleadings, but only to "orders". Furthermore it only facilitates "a party to proceedings" from supplying the copies or extracts. The question might reasonably be asked as to what happens when the parties are dead, but the order needs to be accessed.

THE THIRD question asked whether, alternatively, should the first named Defendant or his Solicitor state in a statutory declaration that no claims in any proceedings brought by the first named Defendant's wife against him could affect the title to the property sold by the contract, if the first named Defendant can truthfully make such a declaration. The Judgement answered this question by saying that it did not arise because

"even if the first named Defendant were in a position to state in a statutory declaration that

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no claim in any proceedings brought by the first named Defendant's wife could affect the property, I do not believe that the Purchaser could rely upon it. To that extent the answer should be in the negative".

This very question has been posed several times by practitioners to the Conveyancing Committee, in circumstances where the vendor, for example, was separated (without any deed or Order) and had issued divorce proceedings against his wife. He had contracted to sell a residence which he had purchased after the *de facto* separation. He offered precisely the declaration contemplated in the third question. The practitioner felt that it was sufficient for her client to furnish a declaration that the property had never been the family home of the vendor and his estranged spouse. Conveyancers must convince themselves that it is not only the Act of 1976 which is important, but also the Acts of 1995 and 1996.

QUESTIONS 4 AND 5 dealt with whether the Defendants were entitled to rescind the contract pursuant to General Condition 18, and whether the contract had been validly rescinded by them. The President answered these questions in the affirmative.

B. Family Law Declarations from Non-Owning Spouses.

The answer in the Judgement to the THIRD QUESTION, as to whether the Purchaser could accept a declaration from the Vendor or his Solicitor that no claims in any proceedings brought by the first named Defendant's wife against him could affect the title to the property, the answer being that the Purchaser could not rely on any such declaration, is also important for practitioners. It makes it abundantly clear that if the existence of proceedings is disclosed, the purchaser is not protected by a statutory declaration of the vendor or his solicitor confirming that these proceedings do not affect the property.

The Conveyancing Committee has also given consideration as to whether family law declarations from non-owing spouses should as a matter of prudence be required by a purchaser's solicitor even where no proceedings are in being. Reluctantly the Committee has concluded that they should be. This conclusion is based on best practice. The Conveyancing Committee is conscious of the fact that best practice is not possible or practical in all cases. There will be occasions where a vendor may be able to explain why best practice cannot be implemented and in those circumstances a solicitor must use his or her professional skill and judgement in order to protect the interests of the client; but, where best practice has not been implemented, a solicitor must bear in mind the power of the court under the 1995 and 1996 Acts. In coming to this conclusion, the Committee bore in mind the following:-

1. The purchaser is concerned to know not only whether the property is a `"family

home" within the meaning of that term in the 1976 Act, but also:-

1.1 Whether proceedings have been instituted under the family law legislation and

1.2 Whether the disposition to the purchaser is reviewable under Section 35 or 37 (of the 1995 and 1996 Acts respectively).

It is considered therefore not sufficient for a purchaser simply to be satisfied that the property is not a family home, by reasons, for example, of it being a plot of land, or a commercial property, with no dwelling thereon.

2. It was held is S. - v - S. (1994) 1 IR 407 that a claim in family law proceedings constitutes a registerable *lis pendens*, but that even in the absence of registration a purchaser who had notice of the claim would be bound by the *lis pendens*. Hence the making of a *lis pendens* search will not adequately protect a purchaser.

3. A "disposition" can be "reviewable" even if proceedings have not been issued. Hence even if the vendor can truthfully answer that proceedings have not been issued or threatened, the purchaser is still on risk that the disposition could be reviewable.

4. The Committee also considered the decision by the President in answer to question 3 in the Judgement in Tesco.

C. Dealing with Assets Pending the Outcome of Proceedings.

Practitioners may from time to time be asked by clients to act, for example, in sales or mortgages in the course of family law proceedings. The question will arise as to what form of family law declaration is appropriate. The sole owning spouse may consider that he/she can give a declaration, particularly if there is a deed of waiver in existence. However that spouse cannot declare that there are no proceedings in existence affecting the property, because proceedings under the 1995/1996 Acts can affect any property, unless no financial relief is claimed. Even in such event the person seeking to make the declaration cannot exhibit the proceedings. The Conveyancing Committee is, therefore, of the view that a declaration must, in these cases, by made by both spouses, confirming that the proceedings do not affect the property in question and that the disposition is not reviewable.

If the other spouse will not make a declaration releasing the property from any claim in the proceedings, an application will have to be made to the Court. The following reliefs could

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be claimed:-

1. An order granting the Applicant/Respondent leave to sell/mortgage his/her beneficial interest in the dwellinghouse and premises known as ……, in the County of …..… ("the Premises") to……..freed and released from any claim of the Respondent/Applicant in the above entitled proceedings.

2. A declaration that the Applicant/Respondent is entitled to sell/mortgage the Premises to …….freed and released from any claim of the Respondent/Applicant in the above entitled proceedings to the beneficial interest of the Applicant/Respondent in the Premises.

3. An order pursuant to Section 36 of the Family Law Act 1995 to facilitate the sale of the Premises.

4. If necessary, an order pursuant to Section 4 of the Family Home Protection Act, 1976 dispensing with the consent of the Respondent/Applicant to the sale/mortgage of the Premises.

Judges have, in certain cases, made orders striking the property in question out of the proceedings, in which case, of course, the spouse wishing to alienate the property may truthfully declare that there are no proceedings pending relating to the property in question.

Practical Example

Husband separated for 8 years by Deed of Separation. He is a property investor and buys and sells and mortgages property on a regular basis. His wife files for divorce. All the husband's property transactions come to a standstill because he cannot swear a family law declaration that there are no divorce proceedings in being. The wife won't co-operate. In this case the husband will have to make such an application to the court. It has been decided in LO'M – v – NO'M [2002] 3 IR 237 that the Court will not make a general order, but that each transaction must be the subject of a separate application. However, as the courts have made orders for costs against unreasonable parties, it is expected that one successful application will be enough. In preparing to make any such application to the Court, proper groundwork should be put in place – full details of the proposed transaction should be given to the other side, showing that the claims for relief will not be adversely affected by the proposed disposition.

Published in 2006 on production of the 3rd Edition of the Law Society's Conveyancing Handbook