THE SUPREME COURT

2003/246

McGuinness J.
McCracken J.
Kearns J.

IN THE MATTER OF THE JUDICIAL SEPARATION AND FAMILY LAW REFORM ACT 1989

IN THE MATTER OF THE FAMILY LAW ACT 1995

IN THE MATTER OF THE DOMESTIC VIOLENCE ACT 1996

IN THE MATTER OF THE GUARDIANSHIP OF INFANTS ACT 1964

AND IN THE MATTER OF M.F. AND E.F. (INFANTS)

BETWEEN:

C.F.

APPLICANT

and

J.D.F.

RESPONDENT

Judgment of Mrs Justice McGuinness delivered the 12th day of July 2005

In these family law proceedings there are two appeals before the court, the first being an appeal by the respondent J.D.F. against the judgment and order of the High Court (O'Sullivan J.) made and delivered on the 16th day of May 2002 and the second an appeal by the applicant C.F. against a subsequent order made by the same judge in the High Court on the 14th day of November 2002. Since both appeals arise from the same original family law proceedings in which the applicant sought a decree of judicial separation together with wide ranging ancillary orders the appeals were heard together. As is frequently the case in

such proceedings both parties accept that their marriage has irretrievably broken down and there is no appeal against the actual decree of judicial separation. The appeals arise from ancillary matters, details of which will become clear later in this judgment.

THE FACTUAL BACKGROUND

The factual background as found by the learned trial judge is set out in his original draft judgment and his revised written judgment of the 16th May 2002. In summary the facts are as follows. The applicant C.F. *("the wife")* was born on the 1st December 1957. The respondent J.D.F. *("the husband")* was born on the 30th January 1953. The parties were married in a civil ceremony on the 15th November 1989, having previously participated in a religious ceremony of marriage on the 19th October 1988. There are two children of the marriage, both daughters, M. born 13th November 1992, now twelve years of age, and E. born 28th January 1995, now ten years of age.

The wife had been previously married on the 8th August 1980. This marriage was short lived and a church annulment was granted after approximately eighteen months. The parties obtained a decree absolute of divorce in England on the 27th March 1989; this was accepted as being valid in this jurisdiction.

The husband and wife were involved in a relationship from in or about 1985. The husband worked as a trader in the Bank of Nova Scotia in Dublin. The wife operated a business as a beautician. This business operated mainly in a provincial city but had two branches in Dublin.

At the beginning of the relationship the wife owned a house in the provincial city where she had her business. She sold this house in 1985 and divided the proceeds between investment in her business and a contribution towards the acquisition of the family home in the Donnybrook area of Dublin. The husband also contributed to the acquisition and the refurbishment of this property, in part by means of a bank loan.

The husband came from a farming background in the County Wicklow area. The wife had an interest in horses, as had the husband. In 1989 the husband bought a farmhouse from his aunt. This farmhouse was situated in close proximity to a considerable farm owned by the husband's father. The farmhouse was situated on half an acre, but had no other land attached to it. It is held in the husband's sole name.

In 1992 the husband and wife moved to reside in this property in Wicklow, where their two children were born. The wife's businesses went through a somewhat troubled period and were sold – it appears at some small loss, or at least with no profit – between 1992 and 1994. The family home in Donnybrook was sold in 1996 for the sum of £160,000.

In 1998 the husband's employment at the bank was terminated and he received

a settlement from his employers. In or about this time he embarked on the establishment of a stud farm business at the family home in Wicklow. He invested money in developing stables and other facilities for this business. Considerable financial evidence was given during the lengthy trial in the High Court regarding this business, and indeed regarding all other aspects of the parties' financial history, but for the purposes of deciding the issues on this appeal there is no need to consider the details of this evidence. The learned trial judge accepted on the evidence that by 2002 the stud farm business was making a profit.

Since there was no land attached to the parties' family home in Wicklow, the husband operated the stud farm on 22 acres of land adjacent to the family home which was part of the farm owned by his father, Mr J.F. senior. Although the husband used this land for the purposes of his stud farm, the land remained in the ownership of his father. The husband from time to time assisted his father on his farm, and it appears that the father, though now elderly, also at times assisted his son. The learned trial judge held that they had a close relationship.

After the wife sold her businesses she was no longer employed outside the home. With the aid of a housekeeper she cared for the home and children. She frequently rode out horses for a neighbouring farmer, had an active social life and was involved in charities. The learned trial judge held that her contribution to the stud farm business was minimal.

There were difficulties in the marriage from in or about 1995. These worsened in 1997-8. In April 2000 the wife issued the present proceedings. She left the family home in October 2000. Since then she has lived in rented accommodation in County Kildare. The children lived in the main with the wife, but continued to attend the local school which is near the family home. The wife has a relationship, which the learned trial judge held was not sexual, with another man.

THE PROCEEDINGS

Since the Special Summons initiating the proceedings does not appear to be included among the pleadings provided to this court it is not entirely clear what precise reliefs were originally sought by the applicant wife. However, these can in the main be inferred from the judgment and order of the learned trial judge. It is clear that throughout the proceedings the wife maintained that the 22 acres on which the stud farm operated formed part of the family home or at least part of the matrimonial assets.

On the 20th March 2001 the wife's solicitors wrote to the solicitor for the husband's father, Mr J.F., stating that it was the wife's case that the father held lands jointly and/or on trust for the husband and in addition that the husband was or was likely to be the beneficiary of lands held in his father's name. The solicitor sought to carry out a valuation of Mr F. senior's lands. They also made reference to bank accounts which they alleged were held jointly by Mr F. senior

and his son and sought discovery concerning these accounts. The letter continued as follows:

"As we are formally notifying you of the claim made by our client in relation to the above mentioned property, you might confirm whether your client seeks an opportunity to make representations with respect to any orders the court might make pursuant to the Family Law Act 1995. Alternatively, you might confirm whether your client is agreeable to being joined as a notice party to these proceedings."

While it is clear on the evidence before the High Court that this letter was received by the solicitors and was shown to Mr F. senior, it appears to have evoked no response. No steps were taken by the wife's solicitors to make the husband's father a notice party to the proceedings.

Mr F. senior was called as a witness by the wife. His examination in chief by senior counsel for the wife, Ms Clissmann, was criticised both by senior counsel for the husband and, at times, by the judge as tending towards cross-examination. Mr F. senior was clearly not particularly anxious to assist the wife's cause. His solicitor, Mr Osborne, was present in the court with him and occasionally intervened in the proceedings to clarify matters, for example in connection with his client's will. During the course of argument before this court Ms Clissmann submitted that the letter sent to Mr F. senior constituted sufficient notice to him and that it was not necessary for him to be made a notice party to the proceedings.

The trial was lengthy, lasting some nine days. A great deal of the evidence turned on the financial resources of the husband, both in this jurisdiction and in the Isle of Man, on the ownership of the farm lands and on the operation of the stud farm. Fortunately, since the central issue of the first appeal turns on a particular point of law, there is no need to survey the detail of this evidence. Suffice it to note that it was clearly established that the 22 acres on which the stud farm operated remained, as it had always been, in the legal ownership of Mr F. senior. (The matter at issue in the second appeal is entirely separate, and will be dealt with later in this judgment.)

The learned trial judge gave judgment on the 16th May 2002. In his order he granted a decree of judicial separation. By way of ancillary relief he further ordered:

> *"1. That the respondent do have the right to occupy for life the family home situate at S. Stud, G., in the County of Wicklow to the exclusion of the applicant;*

2 That the said family home do include the 22 acre site immediately adjoining the residence upon which site the respondent has developed the stables, yard, lunge ring and enclosed fenced area;

3 That the respondent do pay to the applicant a lump sum of €489,000 being the sum of €461,000 representing a fair evaluation of the applicant's interest in the assets (with the exception of the furniture of the house) of the family home and the sum of €28,000 to balance the notional sum available to the respondent in the context of extra costs caused by his lack of co-operation with the requirements of discovery;
4 That the applicant do continue to have the benefit of the children's allowances;
5 That the respondent do until he has paid the aforesaid lump sum continue the existing maintenance and thereafter that he pay to the applicant for maintenance the sum of €2,100 per month being the sum of €500 in respect of the applicant and the sum of €800 in respect of the each of their two children;"

The order went on to provide for the maintenance of two life policies for the benefit of the applicant and the children and for a pension adjustment order. It also provided that the respondent should continue to pay VHI premia for the two children and also their medical and dental bills. The learned judge also ordered that the mutual Succession Act rights of the parties be extinguished. The parties were granted join custody of the two children and the matter of residence and access was set out in a detailed schedule to the order in accordance with a scheme advised by Dr. Gerard Byrne, Consultant Child Psychiatrist.
This, however, was not the end of the matter. During the month of June 2002 the wife formed the intention of moving the children from the school which they had been attending near Dunlavin to a school near her current residence in County Kildare. Without any notice to the husband she went ahead from June onwards making arrangements for this. The new school term began on 2nd September 2002. On 31st August the wife informed the children that they were moving to a new school. On the same day she informed the husband that she had sent him a fax informing him of this. The fax was not in fact sent until the following day, 1st September. The principal of the Dunlavin School was informed on the 30th August that the children would no longer be attending there.
On 7th October 2002 the husband brought a motion seeking orders of attachment and committal against his wife. This motion was heard by O'Sullivan J. on the 14th November 2002. The learned judge found the applicant to be in contempt and ordered that in lieu of imposing a fine on the applicant the lump sum ordered to be paid by the respondent to the applicant pursuant to the order made on the 16th May 2002 be reduced by €25,000 to the sum of €464,000. The learned judge also remitted the matter of the schooling of the children and any questions regarding access to the District Court. This order

was appealed by the applicant by notice of appeal dated the 17th December 2002.
Up to that point the husband had not appealed the order of the 16th May 2002. However, by a motion dated the 1st July 2003 he sought from this court an enlargement of time within which to serve a notice of appeal. This motion was heard on the 11th July 2003. An extension of time was granted on the following terms:

> *"1. That the respondent do pay to the applicant the sum of €250,000 within six weeks of the date hereof on account of the lump sum payment of €464,000 due by him to the applicant – execution for the balance of the said sum to be stayed pending the determination of the appeal herein or until further order.*
> *2. That the respondent shall be at liberty to further mortgage the family home at S. Stud, G, County Wicklow up to a sum of €250,000.*
> *3. The undertaking to the court by the respondent which the court doth note that he will not dispose of the said property without the consent of the applicant pending the determination of the appeal herein or until further order."*

This court was informed that the said sum of €250,000 had in fact been paid to the wife. The husband filed a notice of appeal dated the 31st July 2003. The court was informed during the course of the hearing of the two appeals that in the interim further proceedings concerning financial matters had been heard by the High Court and that a further order made by the High Court is at present under appeal, but no details of these proceedings have been provided.

THE RESPONDENT'S APPEAL

In his notice of appeal the respondent sets out some thirteen grounds of appeal, many of them dealing with matters of detail which arose during the course of the trial in the High Court. Senior counsel for the respondent, Mr Gleeson, however, in making his submissions to this court largely confined himself to two major grounds. The first of these was that the learned trial judge erred in law and in fact in holding and in so providing in his order that the family home included the 22 acre site upon which the stud farm had been developed. The second was that the judge had erred in law in holding in his judgment that, despite the fact that it was not open to him to make a property adjustment order in relation to the 22 acre site, he should take into account the value of that property adjoining the family home as an asset available to the respondent. It was as a result of these two errors of law and fact, Mr Gleeson submitted, that the learned trial judge had valued the family home at £600,000 and ordered an

excessive lump sum to be paid by the husband to the wife.
In order to put these grounds of appeal in context it is necessary to consider some important passages in the judgment of the learned trial judge. The first of these is at pages 5 to 6 of the judgment and is entitled *"Family Home"*. The learned judge states as follows:

> *"The first issue is as to whether the family home should now be regarded as including the 22 acre site immediately adjoining the residence upon which the respondent has developed the stables, yard, lunge ring and enclosed fenced area. As is clear he has spent a considerable amount of time and money in developing these facilities on land in the legal ownership of his father. The evidence in the case has shown that there is a close working relationship between the respondent and his father. The respondent had taken charge of managing bank accounts for his father in the Isle of Man over several years from the early 1980s and it is clear that they trust each other with their sensitive and private affairs. The applicant claims that these 22 acres are now beneficially owned by the respondent. It is submitted that in the light of authorities which include* ***Gillett v Holt and Another*** *[2000] 2 A.E.R. 289,* ***Re Brasham (deceased)*** *[1987] 1 A.E.R. 504,* ***Phoenix Smyth and John Joseph Halpin and Another*** *[1997] 2 I.L.R.M. 39,* ***Inwards and Baker*** *[1965] 1 A.E.R. 446 and* ***Cullen v Cullen*** *[1962] I.R. 268 that I should now hold that these lands are beneficially owned by the respondent. Against this it is submitted that it is not open to me to make a property adjustment order because the property is legally and beneficially invested in the respondent's father who has not been given proper notice of the applicant's claim in respect of this interest. Furthermore it is submitted that crops were growing on the bulk of the 22 acres prior to 1998 and therefore the use of these fields by the respondent for the past four years or so is not sufficiently long to give him any equity therein.*
> *I agree that it is not open to me to make a property adjustment order in relation to the 22 acres. On the other hand, in light of the authorities which I have considered, and the evidence makes it clear that the respondent's father was fully aware of and accepted the respondent's activities in developing these lands as a stud for his own benefit and that of his family, in my opinion the respondent would be in a position to resist any claim by his father to exercise control over these lands. Furthermore I consider it unlikely that the father would take any such steps against the*

> *respondent. Accordingly in my view I should take into account the value of this property adjoining the family home as an asset available to the respondent."*

The second passage occurs at page 12 of the judgment, as follows:

> *"The applicant is in principle entitled to a fair lump sum having regard to the value of the family home which as I have held includes the 22 acres. On the evidence a reasonable assessment of this value is £600,000 which half is represented by €381,000. The applicant has claimed €500,000 plus the cost of purchase at 10% to enable her to purchase an alternative to the family home. In addition she is claiming a lump sum to enable her to discharge her debts including the bank loan. I approach the issue of asset share on the basis that the court should provide not only for the needs of the applicant (where there is provision to do so) but also should assess a fair lump sum to reflect her interest in the family assets (not necessarily 50%) even if this is greater than her specific needs (again, assuming there is sufficient to make such provision)."*

The learned judge went on to consider the law in relation to the distribution of matrimonial assets. Subsequently, however, when calculating the total lump sum to be paid by the husband to the wife, he confirmed the sum of €381,000 as representing her "*share in the family home*" (page 15 of the judgment). To this sum he added €50,000 to represent compensation for the wife's contribution to the family through her care of the home and children plus some monies contributed from a joint account. He then added the sum of €30,000 to meet the wife's expenses in acquiring a new home for herself. He went on to add (at page 15):

> *"To this sum must be further added a sum of €28,000 to balance the notional sum available to the respondent in the context of extra costs."*

The judge then dealt with the other issues set out in his order. In her submissions to this court senior counsel for the applicant wife relied in the first place on the wide discretion given to the court in making both lump sum and periodic maintenance orders in judicial separation proceedings as set out in section 16 of the Family Law Act 1995. The duty of the court was to "*endeavour to ensure that such provision is made for each spouse concerned and for any dependent member of the family concerned as is adequate and reasonable having regard to all the circumstances of the case.*"

Ms Clissmann drew attention to section 16(2)(a) of the Act whereby the court is directed to have regard to the income, earning capacity, property and other financial resources which each of the spouses concerned has or *is likely to have in the foreseeable future* (my emphasis). She pointed out that the learned trial judge in his judgment had specifically considered the provisions of section 16 of the 1995 Act, together with the case law both in this jurisdiction (***J.D. v D.D.*** [1997] 3 I.R. 64) and in England (***White v White*** [2000] 3 W.L.R. 1571). The learned judge had concluded his consideration of the law governing a division of the matrimonial assets by stating (at page 13 of the judgment):

> *"Accordingly I take my cue from the close association between the two jurisdictions acknowledged by the Supreme Court and conclude that in this case also dealing with judicial separation I must, having of course considered all of the statutory guidelines, reach a result which would be consonant with the principle established in* ***M.K. v J.P****. (otherwise* ***S.K****.). With regard to the reference of* ***J.D. v D.D.*** *I note that in that case McGuinness J. said (at page 59):*
>
> > *'On a practical level this marriage was a lengthy partnership of complementary roles and it seems to me that it should result in a reasonably equal division of the accumulated assets.'*
>
> *In the present case since, in my view, the assets and income available to the parties (the income being primarily that of the respondent but also, of course, I take into account the earning power of the applicant herself) do not exceed an amount sufficient to meet the needs of both parties it is necessary only to acknowledge the application of a general principle such as was indicated by McGuinness J. in* ***J.D. v D.D."***

Counsel submitted that in taking this approach the learned judge was entirely correct.

As regards the issue of the 22 acres in the legal ownership of Mr F. senior, Ms Clissmann submitted that the trial judge was correct in taking into account the value of the 22 acre plot of land as an asset available to the husband. The learned judge's conclusion was based on consideration of various authorities, including ***Smyth v Halpin*** [1997] 2 I.L.R.M. 38, ***Cullen v Cullen*** [1962] 1 I.R. 268, ***Gillett v Holt*** [2000] 2 All E.R. 289, ***Re Basham (deceased)*** [1987] 1 All E.R. 405 and ***Inwards v Baker*** [1965] 1 All E.R. 446. The judge had tacitly accepted that the circumstances surrounding the development of this 22 acre site amounted to estoppel by representation, or proprietary estoppel. The husband's father had permitted his son to use the land as if it was his own

throughout the period of the operation of the stud farm. It was submitted that on the basis of the doctrine of proprietary estoppel the respondent's father would be prevented from insisting on his legal rights over the 22 acre site.
Ms Clissmann accepted that in most of the cases of proprietary estoppel there was a representation by words or deeds but she submitted that mere acquiescence or *"conscious silence"* might also suffice. In this context she referred to the case of ***Salvation Army Trustee Company Limited v West Yorkshire Metropolitan County Council*** [1981] 41 P & Cr. 179. Counsel pointed out that the respondent had invested considerable sums of money in improving the facilities of the stud farm and asserted that the evidence before the High Court indicated that the respondent's bank manager believed that Mr F. senior would *"in due course"* transfer the land to his son. The land in issue was neither divided nor disposed of by the learned trial judge in his decision of 16th May 2002, Ms Clissmann argued. The legal title that Mr F. senior enjoyed remained intact and unaltered by the proceedings. The beneficial interest in the land was merely considered relevant by the learned trial judge in terms of calculating the wealth of the respondent.

THE LAW AND CONCLUSIONS

It is, of course, correct, as submitted by counsel for the applicant, that the court is given a wide discretion in making, *inter alia*, an order that a spouse should make a lump sum payment towards the general maintenance of the other party to the marriage. It is also correct that one of the twelve criteria set out in section 16(2) sub-sections (a) to (l) includes the property and other financial resources which each of the spouses is likely to have in the foreseeable future. It seems to me that in his general consideration of the principles governing the division of this family's resources the learned trial judge's approach was entirely correct. He was concerned to establish a situation where the husband would be enabled to generate an income to assist in the support of his wife and children, while at the same time the wife would be provided with the monetary resources which she needed to provide herself with a separate home. He also – and this received comparatively little attention in any of the submissions made to this court – envisaged the necessity for the wife to take positive steps to earn an income through her own efforts, something which she appears not to have done so far. The real issue before this court, however, is whether the learned trial judge erred in his definition of the family home to include the 22 acres in the legal ownership of the respondent's father and in his resulting assessment of the respondent's financial assets – the assets which fell to be divided between the respondent and his wife.
The term *"family home"* is defined in section 2 of the Family Home Protection

Act 1976, as amended by section 54(1)(a) of the Family Law Act 1995. The amended section provides as follows:

> ***"2.***—*(1) In this Act "family home" means, primarily, a dwelling in which a married couple ordinarily reside. The expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides or, if that spouse has left the other spouse, ordinarily resided before so leaving.*
> *(2) In sub-section (1), 'dwelling' means any building or part of a building occupied as a separate dwelling and includes any garden or other land usually occupied with the dwelling, being land that is subsidiary and ancillary to it, is required for amenity or convenience and is not being used or developed primarily for commercial purposes, and includes a structure that is not permanently attached to the ground and a vehicle, or vessel, whether mobile or not, occupied as a separate dwelling."*

In ***National Irish Bank v Graham*** [1995] 2 I.R. 244 this court stressed that the term *"family home"* is restricted to the precise terms of the Family Home Protection Act 1976. The court held that the definition of *"family home"* could not be extended by the judiciary beyond the words of that Act. Finlay C.J. in his judgment (at page 251) said:

"Firstly, I am quite satisfied that the word 'primarily' contained in the first sentence in this section means, in its ordinary construction and in the construction which must be given to it in this section, that the definition of a family home as a dwelling in which a married couple ordinarily reside is in the first place the appropriate definition within the Act. The necessity for that word becomes clear when one considers the second sentence contained in the sub-section namely 'the expression comprises, in addition, a dwelling in which a spouse whose protection is in issue ordinarily resides' etc. You have clearly therefore in this section a primary definition and you have an additional or subsidiary definition; both are expressed in complete terms and leave no room for the addition of any other subsidiary definition by judicial interpretation."

It is therefore clear that in referring to the *"family home"* as including the 22 acres the learned trial judge erred.

Ms Clissmann argues, however, that even if the 22 acres are not included in the family home as such, that land may be included in the family assets that fall to be divided between the spouses because, she submits, the husband had acquired a beneficial interest in it. It is obvious that he has not required a beneficial interest through any contribution – direct or indirect – to its acquisition. Even in the somewhat liberal context of family law the making of improvements to

property cannot establish any form of beneficial title; see, for example, ***McC v McC*** [1986] I.L.R.M 1 and ***N.A.D v T.D.*** [1985] I.L.R.M. 153.
It is claimed on behalf of the applicant that the respondent has acquired a beneficial interest in the 22 acre plot through proprietary or promissory estoppel, or, as counsel put it, through estoppel by representation. The difficulty about making this argument, in my view, is that in order to establish such an estoppel there must actually be a promise, or at least a reasonably clear direct representation or inducement of some kind. It is not sufficient to say that this or that was permitted to happen or that third parties looking at the situation thought that a particular outcome was likely. Neither is it enough that a man who is seeking a loan implies to his bank manager that his father may be going to transfer land to him. This principle is clear from the cases on which Ms Clissmann relies in her argument. In ***Smyth v Halpin*** [1997] 2 I.L.R.M. 38, as set out in the head note, the plaintiff asked his father to provide him with a site where he could build a house, but his father responded *"this place is yours after your mother's day – what would you be doing with two places?"* The plaintiff's father suggested that the plaintiff should build an extension to the family home. An extension was designed by an architect on the assumption that the entire house would eventually belong to the plaintiff. The site on which the extension was built was transferred to the plaintiff so that he could use it as security to borrow the money required to build the extension. The father had left the house to his wife for life and subsequently to the plaintiff. In a later will he left the house to his wife for life and subsequently to one of the plaintiff's sisters. At page 40 of the report Geoghegan J. sets out what happened:
"The father suggested that the plaintiff build an extension to the family home. The reference to the plaintiff being left the place after his mother's day did not take the plaintiff by surprise because in 1983 he had had an earlier discussion with his father in the kitchen of the house during which the father asked him did he want the place and he said he did. I accept that this conversation took place also.

> *For the purpose of constructing the extension to the house, the services of an architect, Mr O'Daly, were retained and his designs were done in the context that the entire house would ultimately become the plaintiff's. In order to build the extension, the plaintiff had to apply for a loan from the First National Building Society but that Society needed security. Accordingly the site had to be transferred to the plaintiff and this was done. What emerged was in no sense a real house but rather a self-contained section of a house…I find it difficult to conceive that the plaintiff would ever have adopted his father's suggestion in relation to the*

extension to the house if it was not understood that he was to become the ultimate owner of the entire house."

The clear evidence of an actual promise, which was quite specifically acted upon, was before the court. The court accordingly directed that an appropriate deed or instrument be executed to effect the vesting of the remainder interest in the house in the plaintiff.

In ***Cullen v Cullen*** [1962] 1 I.R. 268, an earlier Irish case, the plaintiff's wife won a portable house in a competition. She gave this house to her son (M.). He offered it to his father who refused it. M. began to prepare a site for it on his own lands. When the plaintiff went to Dublin his wife thought it would be suitable to have M.s house erected on the family lands at Adamstown and she sought her husband's permission to do so. He replied by messenger that he was making the place over to her and she could erect the house where she liked. As a result M erected the house on the lands at Adamstown rather than on his own lands.

In the course of a comprehensive judgment Kenny J. said (at page 291):

"I am satisfied that Martin would have erected the house on his own lands if the plaintiff had not given Mrs Cullen permission to put up the house at Adamstown and that he erected the house on the lands at Adamstown because he relied on the permission given. I am convinced that the plaintiff knew at all times that Mrs Cullen had given the house to Martin and that the house was being erected for Martin to live in."

Kenny J. held, however, that Martin had not acquired a right to compel his father to transfer the site to him. At page 292 he concluded:

"I am of opinion, however, that the plaintiff is estopped by his conduct in giving consent to the erection of the house at Adamstown when he knew that the house had been given to Martin and that the plaintiff cannot now assert any title to the site on which the house has been erected. There was a representation by him that he consented to this and that representation was acted on by Martin who spent £200 at least in erecting the house and gave a considerable amount of his time to his work...While the estoppel created by the plaintiff's conduct prevents him asserting a title to the site, it does not give Martin a right to require the plaintiff to transfer the site to him."

In an earlier part of his judgment (at page 280) Kelly J. referred to the position of adult children who reside on their parents' property:

"Whatever be the position of children under 21 years of age who live in their father's house, those over 21 are licensees of their father when they are on property (including the family home) belonging to him. If the site of the bungalow is left out of consideration for the moment, the defendants were

licensees of the plaintiff when they were on the premises at Adamstown and they had not any proprietary interest in them."

This was stated despite the fact that the sons in question had operated the family business on the lands at Adamstown for a considerable period during their father's absence.

The operation of the same principle may be seen in the English cases to which this court was referred. In ***Inwards v Baker*** [1965] 1 All E.R. 446 a specific suggestion was made to a son that he should build a bungalow on his father's land, which he did, and he lived in the bungalow unchallenged for over thirty years. It was held by Lord Denning that since he had been induced to build the bungalow and had expended money for that purpose in the expectation of being allowed to remain there, equity would not allow the expectation so created to be defeated, and accordingly the defendant was entitled to remain in occupation of the bungalow as long as he desired to use it for his home. There was, however, no question of transfer of title.

In the more recent case of ***Gillett v Holt*** [2000] 2 All E.R. 289 were that in 1952 Gillett, who was then twelve years old, met and became friendly with Holt, a thirty eight year old gentleman farmer and bachelor. Four years later Gillett left school on Holt's suggestion to work on his farm, and continued to work for him for nearly forty years. During that time he moved into a property owned by Holt's company and, through his wife and children, effectively provided Holt with a surrogate family. Over the course of their relationship, Holt gave Gillett repeated assurances, usually before an assembled company on special family occasions, that he would inherit the farm business and in 1986 executed a will leaving Gillett his residuary estate. At a later stage Holt summarily dismissed Gillett and made another will excluding Gillett entirely. It was held that the doctrine of proprietary estoppel could not be treated as subdivided into three or four watertight compartments. Rather, the *quality of the relevant assurances* could influence the issue of reliance which was often intertwined with detriment (my emphasis). In that case the judge had erred in holding that Holt's assurances were incapable of forming the foundation for an enforceable claim based on proprietary estoppel. The crucial issue was the quality of the assurances that were given – in other words, the quality of the promise.

This principle permeates all the cases on which the applicant relies. Ms Clissmann specifically refers to ***Salvation Army Trustee Company v West Yorkshire Metropolitan County Council*** [1981] 451P and Cr. 179 as establishing a criterion of *"conscious silence"*. But even in this case the *"conscious silence"* followed after a period where very specific and detailed representations were made to the Salvation Army by the local

authority, on which the Salvation Army strongly relied, and as a result of which they embarked on the building of a new hall.

It seems to me, therefore, that in the present case the respondent operates on the 22 acre plot under a licence from his father. In order to establish a beneficial interest accruing to the son by means of a proprietary or promissory estoppel there must be at least some clear evidence of an actual promise, inducement or representation by the father to the son that he intended the son to be the owner of the land. Inferences from conduct are not sufficient, particularly if they are not supported by the evidence at the trial.

Mr F. senior gave evidence in the High Court. On reading his evidence, the strong impression that comes across is that he is quite determined to retain the ownership of his land. On the 17th April at page 87 to 88 of the transcript, Ms Clissmann puts questions to him about his son's activities on the 22 acres. At question 403 she asks:

"403. Q. And you have permitted him – or would it be fair to say that you have permitted him to do all of that?

A. Sure, yes.

Q. Would it be fair to say that you have encouraged him?

A. I can't say I encouraged him nor I can't say I discouraged him, there was nothing else he could do, he had no job.

Q. Can you tell the court does anybody else use the lands, the 22 or 30 acres other than your son and daughter-in-law?

A. No, my daughter doesn't use it – my son is there, my daughters are in Dublin.

Q. Sorry, I mentioned your daughter-in-law.

A. Well, she hasn't been there for a long time. Q. Your son treats that land as his own, or does he treat the land as his own, the 22 or 30 acres – the land around his house – his family home?

A. He doesn't treat it as his own, he treats it as any land is in the habit of being treated.

Q. Like a farmer treats his land?

A. Yes as a farmer...

Q. Treats his own land?

A. Yes, as a farmer treats his land, it is kept fertilised, it is kept rolled and kept the same as any land should be kept.

Q. So he treats it as his own?"

At that stage Mr Mohan, then senior counsel for the husband, intervened to protest that Ms Clissmann was cross-examining her own witness.

At page 95 of the same transcript Ms Clissmann questions Mr F. senior about the water supply to his son's family home. At question 436 onwards a series of questions occur:

"436 Q. Very good, My Lord. Mr F., we understand that the well which feeds water to the family home of C.F. and your son?
A. Yes.
437 Q. Is the land registered in your name?
A. That is correct.
438 Q. With regard to that are you prepared to co-operate in trying to clarify the title so that there will be a wayleave?
A. Pardon.
439 Q. Would you be prepared to give a wayleave for the well. Would you allow access to the well for anybody who might own that house?
A. I would hold control over the well. I own the well and I intend to hold it.
440 Q. What do you do with the well Mr F.?
A. It supplies water to the land…

444. Q. With regard to the septic tank would you be prepared to co-operate with regard to access to the sceptic tank?
A. I am not too sure whether the septic tank is on my land or not.
445 Q. Well, if it were Mr F, would you be prepared to co-operate? A. I would not…
447 Q. Well, I may be mixed up, Mr F., if there is a soak pit perhaps on lands in your name, would you be prepared to co-operate in relation to that?
A. I would not."

During the course of Mr F.'s evidence he was questioned about his will. It appeared that he was somewhat confused about the possible question of a trust. His solicitor, Mr Osborne intervened at this point. Eventually a copy of Mr F. senior's will, dated 5th October 2001, was produced to the court. This is included in the material before this court. Following a number of legacies the residue of his estate is dealt with as follows:
"All the rest, residue and remainder of my property of every nature and kind both real and personal that I may die possessed of I give devise and bequeath to my wife, A, for her lifetime and after her death to my son J.D.F. for his lifetime and after his death I leave on trust to my trustees subject to the following terms and conditions:
(1) to my granddaughters M and E.F. daughters of my son J.D.F. on condition that he has principal custody and be responsible for their upbringing, education and religious education until they attain 21 years or later at the discretion of my said trustees. In the events that the courts do not grant custody or C.F. refusing custody of my said grandchildren to my said son, I direct that this inheritance be forfeited and descend on the following terms:

(2) my said property I grant to my trustees and I charge them with exercising the following power of appointment on the date of death of my said son J.D.F.
(3) to appoint one of the following in fee simple
(a) M.F.
(b) E.F.
(c) G.F. my daughter
(d) M.F. my daughter
(e) any child or children of my son J.D.F. other than at (a) and (b) above.
In default of appointment I direct that the property shall go to my daughters G. and M. or their issue in equal shares."

It is, of course, clear that Mr F. senior is, at least to some extent, motivated by hostility to his daughter-in-law, and the uninvolved observer may not find his attitude particularly attractive. Nevertheless his stated position is that not only has he no intention of transferring the land in question to his son during his lifetime but even after his death he is unwilling to bequeath to his son more than a life interest. That was his evidence at the time of trial in April 2002. Other than his tacit permission from in or about 1998 onwards to the respondent to carry on his stud farm business, there was no evidence before the High Court that he had previously made any promise, offered any inducement or given any assurance to his son that he would transfer to him the 22 acres that is in issue.

In my view, therefore, the doctrine of promissory or proprietary estoppel cannot operate. The respondent has not by the operation of an estoppel acquired a beneficial interest in the 22 acres in question. The 22 acres thus cannot be held to be an asset of the respondent or a part of the matrimonial assets of the couple and the learned trial judge erred in so treating it.

It would, perhaps, have been open to the learned trial judge pursuant to section 16(2)(a) of the Act of 1995 to give some weight to the future prospects of the respondent in calculating the lump sum to be paid by him to the applicant, but it was not, in my view, open to him to include the total value of the 22 acres owned by Mr F. senior as an integral part of the value of the family home and subsequently to divide that value equally between the spouses. I would allow the appeal on that ground. It is unnecessary to deal with the subsidiary grounds of appeal.

What, however, should be the outcome of allowing this appeal? Over three years have passed since the hearing in the court below – three years in which the value of property in the counties bordering on the greater Dublin area has escalated and the financial position of the parties may well have substantially altered. This court cannot, in the course of an appeal, receive evidence of these matters. Neither is it desirable, or even sensible, for this court to attempt to

readjust the orders made by the learned High Court judge on the basis of the figures that applied in 2002. It seems to me that the only course open to this court is to return the matter to the High Court to enable up-to-date financial and valuation evidence to be received and a fresh adjudication made.
I am well aware that for the parties this is a most unfortunate outcome. Already a disproportionate amount of the parties' resources have been spent in legal costs. At the conclusion of the hearing of this appeal the court strongly suggested to the parties that even at that late stage the wisest course would be for the parties to endeavour to reach an agreed settlement; I would now reiterate that advice in the strongest possible terms. It is of no advantage to either party to expend further resources on litigation either in this particular matter or in the other aspect of the proceedings which, the court was informed, is also under appeal.
In this context I will also refer to some remarks made by the learned Chief Justice at the conclusion of a recent family law matter The Oireachtas, in framing our family law statutes, has given a wide ranging and virtually unlimited jurisdiction to the Circuit Court. No doubt this was done in order to enable litigants to avoid the very high costs that are inevitable in a prolonged High Court action. Where the parties in family law proceedings are, to use the current phrase, of *"high net worth"*, and many millions of euros are at stake, it may be necessary to invoke the jurisdiction of the High Court. This is not such a situation. As the learned Chief Justice remarked in the earlier case, it is difficult to understand why the decision was taken to risk the cost implications of a High Court action in the light of the limited financial resources of this family.

THE APPLICANT'S APPEAL

The factual background to this second appeal has been set out earlier in this judgment. The applicant appeals against the order of O'Sullivan J. in the High Court made on the 14th November 2002, by which he found the applicant guilty of contempt of the High Court for failing to comply with the judgment and order of the court dated the 16th day of May 2002.
The grounds of the applicant's appeal are set out as follows:

"1. That the learned judge erred in law and in fact in finding the applicant guilty of contempt for failing to comply with the judgment and order of the High Court dated the 16th May 2002 as the said order did not specify the school attended by the infants.
2. That the learned judge erred in law and in fact in ordering that in lieu of imposing a fine on the said

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