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The Conveyancing Conundrum: Reviewable Dispositions and the *In Camera* Rule

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Introduction: legislative background

A key feature of the current divorce and judicial separation legislation is the power to review (and potentially overturn) dispositions intended to defeat or limit ancillary relief orders made or likely to be made by the court. This power is crucial in light of the extensive range of orders available in the context of property and maintenance,¹ which would effectively become meaningless if they could be defeated by the transfer of assets to third parties. The range of assets that can be considered by the courts in the making of ancillary property orders is very extensive, and includes not only assets currently in the possession of the parties, but property likely to be received by them in the future:² a diversion of wealth from expected sources might therefore have serious implications for property orders, just as the sale of an asset for less than market value could frustrate maintenance orders and other forms of financial relief. “Disposition” is broadly defined:³ the wide range of cases relating to similar provisions in the English context⁴ suggest that almost any activity can amount to a reviewable disposition.⁵

At present,⁶ the power to review and set aside dispositions is contained in section 35 of the Family Law Act 1995⁷ and section 37 of the Family Law Divorce Act 1996.⁸ In both Acts, the provision is broadly framed, and the court can make a *quia timet* order (anticipating the frustration of possible future orders in unresolved proceedings), as well as setting aside transactions that would defeat orders already made.⁹ A number of restrictions apply to the availability of relief. In the *quia timet* context, the application must be made by a spouse who has instituted proceedings that have not yet been

¹ Ss.7-15 of the Family Law Act 1995 and ss.12-19 of the Family Law (Divorce) Act 1996.

² S.16(2)(a) of the Family Law Act 1995 and s.20(2)(a) of the Family Law (Divorce) Act 1996.

³ S.37(1) of the Family Law (Divorce) Act 1996 defines a “disposition” as “any disposition of property howsoever made other than a disposition made by a will or codicil”.

⁴ S.37 of the Matrimonial Causes Act 1973 (England and Wales).

⁵ See, e.g., *F v. F (S Intervening)* [2003] 1 F.L.R. 911, where it was held that fraudulently filing for bankruptcy to frustrate a spouse’s claim for relief was a reviewable disposition within the meaning of s.37 of the Matrimonial Causes Act 1973. Note, however, the difficulties that have arisen in the context of the unilateral surrender of secure tenancies by one spouse; despite the potential effect on the other spouse, such a surrender has been held not to constitute a “disposition” within the meaning of the 1973 Act: see *Hammersmith and Fulham London Borough Council v. Johnstone*; *Barnet London Borough Council v. Smith* [1992] 1 F.L.R. 465. Similarly, the loss of a right to buy, due to the surrender of the tenancy, was held not to amount to a “disposition” in *Bater v. Greenwich London Borough Council* [1999] 2 FLR 993. For further discussion, see Conway, “Protecting Tenancies on Marriage Breakdown” (2001) 208 Fam. L.J. 31.

⁶ The power was first granted in section 29 of the Judicial Separation and Family Law Reform Act 1989 (“the 1989 Act”), but this was repealed by the Family Law Act 1995.

⁷ Hereinafter referred to as “the 1995 Act”.

⁸ Hereinafter referred to as “the 1996 Act”.

⁹ Coggans & Jackson, *Family Law (Divorce) Act 1996* (1998) (hereinafter “Coggans & Jackson”), p. 95.

resolved.¹⁰ The disposition must also have been made with the intention of defeating, limiting or preventing an order of the court. However, this intention will be presumed, and the burden of proof reversed, where the transaction would defeat a claim for relief, and took place less than three years before the date of application, or has not yet taken place.¹¹ Even where a transaction is reviewable, the power to avoid is discretionary, and the court may well conclude that avoidance is inappropriate, for example, because the harmful consequences would outweigh any potential gain to the plaintiff.¹²

The principal defence to a claim that a disposition is reviewable is that it is “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”.¹³ The first of these cumulative requirements (consideration) appears straightforward,¹⁴ and the second (good faith) has not yet given rise to difficulty, insofar as it can be considered separately from the issue of notice. However, the third element (absence of notice) has led to unforeseen difficulties in the conveyancing context.¹⁵ As recently as 1998, Coggans and Jackson were able to comment that meeting the criteria for reviewability “would appear to require a high degree of collusion as between the disposing spouse and the purchaser”.¹⁶ However, in light of the decision in *Tesco v. McGrath*,¹⁷ it would appear that this is no longer the case, and that the impact of the reviewability provisions on conveyancing transactions (and hence on financial resolution after marital breakdown) may be heavy indeed.

¹⁰ Note that a similar restriction applies in s.37(2) of the Matrimonial Causes Act 1973 (England and Wales), though the requirement there is that the action must be brought by a person who has brought proceedings for financial relief against another. As Coggans and Jackson note in the Irish context, this appears to preclude applications by respondent spouses, even though relief might be equally appropriate and desirable in this context (Coggans & Jackson, p. 96). They point out that the respondent in this situation would either be compelled to initiate proceedings on his or her own behalf (with cost implications), or would have to resort to the inherent equitable jurisdiction of the court to grant Mareva orders (with associated implications for the burden of proof).

¹¹ S.37(4) of the 1996 Act and s.35(5) of the 1995 Act. This may be contrasted with the burden of proof in applications for Mareva orders, where the plaintiff is required to establish an intention on the defendant’s part to frustrate the judgment of the court: see *O’Mahony v. Horgan* [1995] 2 I.R. 411 at 419.

¹² E.g., compare *JR v. PR (AR Notice Party)* [1996] 1 I.F.L.R. 194 with *JD v. DD* (unreported, High Court, McGuinness J, May 14, 1997). In the first case, McGuinness J found that the transferee had constructive notice of the transferor’s imputed intention of defeating his wife’s claim, but held that this was an issue that must be “approached with some proportionality, with a degree of ordinary common sense and in the context of the parties’ present position” ([1996] 1 I.F.L.R. 194 at 208). She then concluded that this was not a case where the court’s jurisdiction to set the transaction aside should be utilised, primarily because of the complexity of the conveyancing proceedings (necessitating consents by the husband’s numerous siblings), and because the net gain to the husband’s assets was likely to be so minute (if indeed a gain materialised at all). In the second case, a trust established by the husband after the wife had instituted judicial separation proceedings, and which contained £148,000, was set aside.

¹³ S.35(1) of the 1995 Act and s.37(1) of the 1996 Act.

¹⁴ As noted by Coggans & Jackson (*supra*, p. 97), the Act does not specify the extent of such consideration, e.g. whether full market value is required.

¹⁵ The sole reference in the Parliamentary Debates to the power to review dispositions is by Deputy Dukes, who merely commented that he welcomed the provision as “useful and wise”, ensuring that spouses could not evade the legislation; see 467 *Dáil Debates* Col 1955 (Second Stage).

¹⁶ Coggans & Jackson (*supra*), p. 97.

¹⁷ Unreported, High Court, Morris J, June 14, 1999.

Tesco v. McGrath

In *Tesco Ireland Ltd. v. McGrath*,¹⁸ the defendant agreed to sell land to the plaintiff for £1.8 million. The purchaser requested confirmation that the transaction was not a “disposition”, as defined by the 1989 or 1995 Acts, for the purpose of defeating a claim for relief under either Act.¹⁹ In correspondence, it was revealed by the vendor’s solicitors that differences had arisen between the vendor and his wife. However, the vendor’s solicitors offered a statutory declaration that no proceedings of any kind had been issued, and that no application or order of any kind had been made in relation to the property under the marital breakdown legislation. The declaration would also include an assurance that the sale of the property was not a disposition for the purpose of defeating a claim for relief under the 1995 and 1996 Acts. The declaration was subsequently amended, indicating that proceedings had commenced under the family law legislation and that an interim maintenance order had been made. The purchaser’s solicitors refused to close on the basis of this declaration, and sought “sight of the proceedings, pleadings and any Order made in the proceedings”.²⁰ The vendor’s solicitors replied that it was not within their capacity to disclose information pertaining to *in camera* proceedings, and subsequently gave notice of an intention to rescind the contract,²¹ unless the requisition was withdrawn.

In the ensuing proceedings, the court was asked to determine, *inter alia*, whether the proposed statutory declaration was adequate to ensure that the purchaser would be a person acting in good faith and without notice within the meaning of the 1995 Act, and to satisfy the purchaser that the transaction was not a reviewable disposition within the meaning of that Act. The court was also asked whether the vendor should furnish the purchaser with copies of any claims, pleadings and orders made in family law proceedings involving the vendor and his wife, or whether the statutory declaration should state that no claims brought in any proceedings by the vendor’s wife could affect the title to the property, if this could be truly stated. The issue at this point essentially boiled down to one of notice: would the proposed statutory declaration absolve the purchaser of constructive notice in respect of an intention by the vendor to deprive his wife of financial relief? Or would the awareness by the purchaser of the vendor’s involvement in marital proceedings be sufficient to fix it with notice?

Constructive Notice

Following *Reynolds v. Waters*,²² the vendor in *Tesco* argued that once a purchaser makes all proper inquiries regarding possible family law claims affecting the property, and is informed of facts which would confirm the position, if verified by statutory declaration, then it is not reasonable to insist on more unless there is reason to doubt the accuracy or veracity of the statements in the proposed statutory declaration. However, the purchaser contended that a more accurate comparison was with *Somers*

¹⁸ Unreported, High Court, Morris J, June 14, 1999 (hereinafter referred to as “*Tesco*”).

¹⁹ Under Requisition 26.2 of the Law Society standard form Requisitions on Title.

²⁰ Unreported, High Court, Morris J, June 14, 1999 at p. 4.

²¹ Under General Condition 18 of the Agreement for Sale.

²² [1982] I.L.R.M. 335 (hereinafter referred to as “*Reynolds*”).

v. *W.*²³ That case also included a statutory declaration by a vendor husband, for the purposes of the Family Home Protection Act 1976,²⁴ where it was stated, *inter alia*, that, under a separation agreement, the wife had no interest in the house, and that it was no longer her family home. In fact the separation agreement made no reference to the house, but was not produced to the plaintiff purchaser's solicitor. Relying on the declaration, the plaintiff completed the purchase, but this was rejected as sufficient title by a subsequent purchaser, thus necessitating a judicial examination.

Regarding the notice issue, the Supreme Court in *Somers* held that good faith depended on knowledge of relevant circumstances, including knowledge of facts that would have come to the attention of a purchaser had he exercised ordinary prudence, circumspection or skill. Thus, "notice" included constructive notice. On the facts, the plaintiff was not a purchaser in good faith, as the defendant's right to have her consent sought, and her claim to a share in the property owing to financial contributions, would have come to the knowledge of the plaintiff's solicitor had he made such inquiries as he ought reasonably to have made. Accordingly, the purported assignment to the plaintiff was void.²⁵

The conflicting High Court and Supreme Court judgments in *Somers* are of particular interest regarding the issue of constructive notice. Doyle J, in the High Court, felt that the plaintiff had done all that was reasonably necessary to confirm the title of the defendant's husband, including obtaining a statutory declaration to cover the gap in the evidence of title caused by the absence of the separation deed and of the wife's consent. He commented,

*"To hold that the inquiries made by the plaintiff's solicitor were inadequate would be to add a new dimension to the practice of conveyancing. There are many transactions in the course of a solicitor's practice when he may reasonably rely on assurances given to him by another practitioner".*²⁶

He then cited the words of Lord Upjohn in *National Provincial Bank v. Ainsworth*:²⁷

*"It has been the policy of the law for over a hundred years to simplify and facilitate transactions in real property. It is of great importance that persons should be able freely and easily to raise money on the security of their property. Of course an intending purchaser is affected with notice of all matters which would have come to his notice if such inquiries and inspections had been made by him as ought reasonably to have been made... But surely any inquiry, if it is to be made reasonably, must be capable of receiving a positive answer as to the rights of the occupier and lead to a reasonably clear conclusion as to what those rights are?"*²⁸

²³ [1979] I.R. 94 (hereinafter referred to as "*Somers*").

²⁴ Hereinafter referred to as "the 1976 Act".

²⁵ S.3 of the 1976 Act.

²⁶ [1979] I.R. 94 at 104.

²⁷ [1965] A.C. 1178.

²⁸ *Ibid.*, at 1233.

In contrast, Henchy J in the Supreme Court felt that the statutory declaration drafted by the plaintiff's solicitor, in particular, was inadequate to cover the gap in title, commenting:

*“Considering that the plaintiff’s solicitor had never seen the separation agreement, which made no reference to the contract premises, this averment was a wild and inaccurate leap in the dark. Without any real inquiry as to the fact and without any inspection of the separation agreement, words which expressed the opposite of the truth were put into the husband’s mouth.”*²⁹

Noting that the onus of proving she had acted in good faith, under 1976 Act, rested on the plaintiff, he stressed the need to “look and inquire further” when the known facts “beckoned him to do so”, on pain of being fixed with constructive notice.³⁰

On the facts, the plaintiff and her solicitor knew the premises had been a family home, that the marriage had broken down and that there was a separation agreement, yet they had not enquired further. Henchy J concluded, “This statutory declaration... was inaccurate in fact and unfounded in law”,³¹ and could not be relied upon.³² Stressing the need for full investigation, he continued:

*“Expedition... is to be commended, but not at the expense of due investigation of title. When the plaintiff’s solicitor asked to be supplied with the separation agreement... he should not have allowed himself to be fobbed off... Considering the dire risk of a void conveyance, it was foolhardy to close the sale without seeing the separation agreement. Had it come to hand it would have shown itself to be worthless as a document of title, and to be no basis for the statutory declaration on which the sale was completed... It was folly to close the sale... without insisting on the prior consent in writing of the defendant... The inescapable conclusion is that the true facts... would have come to the plaintiff’s knowledge if “such inquiries and inspections had been made as ought reasonably to have been made”. Therefore, the plaintiff must be held to have purchased with notice of those facts, so that the property she acquired... was not acquired in good faith”.*³³

He concluded that, contrary to opinion of Doyle J, a “new dimension” was already added to conveyancing practice by 1976 Act.³⁴

The robust approach taken by the Supreme Court in *Somers* may be contrasted with that taken in England and Wales, where the expansion of the doctrine of constructive notice has been resisted for the very reasons identified by Doyle J in the High Court in *Somers*. For example, in *B. v. B.*,³⁵ the solicitor acting for both the mortgagor and the

²⁹ [1979] I.R. 94 at 107.

³⁰ *Ibid.*, at 108.

³¹ *Ibid.*, at 109.

³² In fact, the wife had a dual claim: one claim under trusts law, due to her contributions, and one under the 1976 Act. Notice was therefore an issue twice over, though that point is somewhat conflated in the judgment of Henchy J. In his judgment, Griffin J correctly stressed that financial contributions were not necessary for protection under the 1976 Act: see [1979] I.R. 94 at 114.

³³ *Ibid.*, at 110-111.

³⁴ *Ibid.*, at 111.

³⁵ [1995] 1 F.L.R. 374.

mortgagee knew that the mortgagor had been involved in divorce proceedings and that the property was the matrimonial home. He was unaware that the mortgagor's former wife had claimed ancillary relief or that she had unresolved financial claims and was owed money for the house. He did not raise queries on these points, as he believed he already had the information needed. The Court of Appeal held that no actual knowledge could be attributed to the mortgagee through its solicitor, and that the solicitor could not reasonably be expected to seek information from anyone other than the mortgagor. Hoffmann LJ commented:

*“The critical question is... whether he ought reasonably to have made inquiries which would have revealed that the wife did have a claim. That, it seems to me, involves the proposition that where a lender knows that a borrower has been involved in divorce proceedings he is under an obligation not only to inquire of the borrower himself as to whether the wife has any interest or potential interest in the property sought to be charged, but to check up through other sources as to whether or not that information is correct. It seems to me that to impose such a duty would require far too much of a person dealing in land”.*³⁶

Similarly, in *Whittingham v. Whittingham*,³⁷ Balcombe J held that it would be an “impossible... burden” to require a person dealing with land, with someone he knows to have been divorced, to investigate whether the other party's divorced spouse had outstanding claims in relation to the land.³⁸ In *LeFoe v. LeFoe and Woolwich PLC*,³⁹ a case involving an extraordinary level of fraud by the husband, the court accepted the mortgagee's evidence that its valuer was “not briefed to be on the look-out for undeclared spouses or partners, and will not have seen the mortgage application form which gives details of the applicant's marital status”.⁴⁰ Hence, the wife's presence in the house during the valuation was not sufficient to put the mortgagee on notice of the husband's fraud.

The Court of Appeal has also strictly construed the kind of notice that is required, emphasising that it must be notice of an intention to deprive the other spouse of relief. This approach was taken to extremes in *Kemmis v. Kemmis (Welland & Ors. Intervening); Lazard Brothers & Co. (Jersey) Ltd. v. Norah Holdings Ltd. & Ors.*⁴¹ In that case, the bank “knew almost as much about the husband's affairs as he did and certainly that the wife was in occupation”.⁴² However, at the time of the mortgage, the wife was not engaged in or contemplating divorce proceedings, even though she had lived apart from her husband for many years. Since no proceedings were then in existence or imminent, no intention could have existed, of which the bank could have had notice, even though the circumstances might strongly suggest such an intention.⁴³

³⁶ *Ibid.*, at 379.

³⁷ [1979] Fam. 9 at 16.

³⁸ It is likely that a different approach would be taken in Ireland, given the lack of provision in the legislation for a “clean break”.

³⁹ [2001] 2 F.L.R. 970.

⁴⁰ Per Nicholas Mostyn QC, sitting as a deputy High Court Judge, [2001] 2 F.L.R. 970 at 989.

⁴¹ [1988] 1 W.L.R. 1307.

⁴² *Ibid.*, at 1320 (*per* Purchas LJ).

⁴³ One could argue that this view is misguided, as the legislation does not require that proceedings are extant or imminent at the time of the disposition, and one can readily imagine a situation where a spouse planning to instigate proceedings might seek to “prepare the ground” by financial restructuring.

In the opinion of Nourse LJ, “To hold otherwise would be to extend the doctrine of constructive notice to limits which have never before been allowed to it”.⁴⁴ Thus, while constructive notice may well arise in the English context,⁴⁵ its scope is conservative by Irish standards.

Reviewability and Conveyancing

Given the force of Henchy J’s comments in *Somers*, it is perhaps unsurprising that a similarly stringent approach was taken by Morris J in the High Court in *Tesco*. Morris J held that the purchaser was aware that the vendor was experiencing marital difficulties and that it was clear that the vendor’s wife was pursuing claims under the family law legislation. There was therefore a realistic danger that the court would presume, unless the contrary could be proven, that the present disposition was for the purpose of defeating this matrimonial claim. Citing the decision of Henchy J in *Somers*, and distinguishing *Reynolds*, Morris J held that the purchaser would not be able to establish its good faith simply by relying on the proposed statutory declaration, and would not be able to show that it had acted without notice of the vendor’s intention to defeat a potential claim. In other words, it appears that a statutory declaration stating that a transaction is not affected by the reviewable disposition provisions is insufficient to guarantee title to the purchaser, unless supported by appropriate documentation (in this case, copies of family law proceedings and other documentation).

Unfortunately for conveyancers, Morris J then went further, and held that the vendor’s solicitors were correct in their assertion that they could not produce the required copies of relevant family law proceedings and documentation, as these were covered by the *in camera* rule. Caselaw allowed for possible exceptions to the *in camera* rule, such as a situation where the information was required in the interests of justice, which could not otherwise be satisfied.⁴⁶ However, Morris J stated, “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”.⁴⁷ He also held that even if the defendant were in a position to state in a statutory declaration that no claim in any proceedings brought by the vendor’s wife could affect the property, the purchaser could not rely on it (although he did not say whether this was because the position might subsequently change, or because the purchasers would have had notice of the proceedings). Since the purchaser insisted in persisting with the requisition, and demanding sight of proceedings, a demand with which the vendor’s solicitors were unable to comply, and since the alternatives proposed by the vendor’s solicitors were unacceptable to the purchaser, the vendor was entitled to rescind the contract of sale.

The Conveyancing Conundrum

⁴⁴ [1988] 1 W.L.R. 1307 at 1334.

⁴⁵ See, e.g., *Sherry v. Sherry & Anr* [1991] 1 F.L.R. 307. Here, the Court of Appeal held that the production by the husband of an order freeing properties from inhibitions registered by his wife was not sufficient to discharge the respondent from his duty to make inquiries, particularly when the presence of the inhibitions had correctly raised doubts in the mind of the respondent’s solicitor. In this context, the court held that a simple question to the wife’s solicitors, or the solicitors dealing with the husband’s matrimonial affairs, would have made the position clear.

⁴⁶ *Eastern Health Board v. Fitness to Practice Committee of the Medical Council* [1998] 3 I.R. 399.

⁴⁷ Unreported, High Court, Morris J, June 14, 1999, p. 17.

Following the decision in *Tesco*, it is clear that conveyancers are caught in a double bind, where it becomes apparent that a vendor is involved (or indeed, has been involved) in family law proceedings. Where such proceedings exist, it would be foolhardy indeed to proceed without assurance that the transaction will not subsequently be reviewed and possibly avoided. Yet, how is such assurance to be obtained, given the apparently almost limitless application of the *in camera* provisions, which deprive the vendor of the means of substantiating any declaration that the reviewable disposition provisions will not affect the transaction?⁴⁸ Nor are family homes the only property affected, as it is clear that the scope of the 1995 and 1996 Acts extends to *any* property disposed of by a spouse, with the intention of frustrating or limiting financial orders. The effect is potentially catastrophic, as it may restrict commercial transactions as well as the ability of parties to restructure family finances following on marital breakdown. Even where family law proceedings have been resolved, a sale may be prevented, given the apparent impossibility of producing orders that would, in fact, permit the sale.

This danger was foreshadowed in the comments of Doyle J in *Somers*, cited above, where he stressed the need to facilitate transactions, and the need to ensure that the questions asked are in fact capable of being answered. Without attributing undue prescience to Doyle J (as his focus was on the need to limit the doctrine of notice rather than on the potential implications of the *in camera* rule), it is striking that no attempt was made either in the Supreme Court in *Somers* or in the High Court in *Tesco*, to offer any practical guidance in dealing with the ensuing conveyancing difficulties. True, the Supreme Court in *Somers* was dealing with a separation agreement only, so that there were no family law proceedings to call the *in camera* rule into play, but it would have been helpful to practitioners to have considered the potential implications of the decision. The failure to consider the full implications is even more glaring in *Tesco*, where the briefest consideration suffices to demonstrate the disastrous consequences of the decision.

And yet, what were the options facing Morris J in *Tesco*? Was there any way in which he could have avoided ruling as he did? It has been clear for some time that the onward march of the *in camera* provisions is not to be hindered or curbed, other than by legislation.⁴⁹ It seems clear that the scope of the rule has now become so broad that no real alternative was left to Morris J, once he had held that it was necessary to view relevant proceedings and orders. It is equally clear that the strong language of the Supreme Court judgment in *Somers* would render it extremely difficult to hold that sight of proceedings was unnecessary. It might also be added that it is not the business of the courts to ensure that the law is practicable, however unhelpful a given ruling

⁴⁸ This, of course, assumes that we take the judgment of Morris J at face value: as pointed out by Horgan, Shannon and Gallagher, this “would lead to the extraordinary situation that certain orders which must come into the public arena, such as property adjustment orders, which must be registered in the (public) Registry of Deeds, cannot be exhibited in Family Law Declarations in conveyancing transactions... There are many other orders in family law proceedings which by statutory authority, or simple necessity, reach the public eye”. See Horgan, Shannon and Gallagher, “Reform of the *In Camera* Rule – a Sensitive Balancing Act” (2002) Bar Review 278 (June/July 2002) (hereafter “Horgan, Shannon & Gallagher”), at 280.

⁴⁹ For a recent discussion of the effects of the *in camera* rule, see Horgan, Shannon & Gallagher (*supra*).

may be to practitioners. One may well ask why the legislature has taken so long to deal with the extraordinary effects of the *in camera* provisions in so many situations.

Given the silence of the legislature, and the lack of judicial guidance, what, if anything, can be done to deal with the difficulties raised by the decision in *Tesco*? No practice note has been issued by the Law Society, and indeed, it is difficult to see what course of action may be recommended with confidence. Of course, there will be many situations where the vendor's involvement in matrimonial proceedings will not come to the notice of the purchaser, but what happens where such information must be revealed, for example, to explain why a property is no longer a family home? Indeed, in a small community, the vendor's marital situation may be common knowledge, presumably putting a purchaser on enquiry. Even where proceedings have apparently been finalised, the lack of a clean break is sufficient to raise the spectre of reviewability, even where blocking orders have been made (as of course, the existence of such orders cannot be revealed to the purchaser).

One possible solution, where proceedings have been resolved, might be for the court to exempt a portion of the order from the *in camera* provisions. However, even if this is accepted,⁵⁰ it does not help parties in unresolved proceedings. A more ambitious approach was taken in the recent case of *LO'M v. N O'M (otherwise known as N McC)*,⁵¹ the only reported decision in this area subsequent to the *Tesco* debacle. There, the applicant applied, *inter alia*, for a declaration that the sale or mortgage or disposal by him of any properties were not reviewable dispositions within the meaning of section 37 of the 1996 Act. The property in question consisted of a development and shareholding in a number of building companies owned by the applicant. At the time of the application, the parties were involved in divorce proceedings, having previously been engaged in other litigation, which had been compromised. The respondent had executed a deed of waiver surrendering her rights under the legislation with regard to the applicant's premises and consenting in advance to any future dispositions. An affidavit sworn on behalf of the applicant averred that the full and final settlement between the parties represented proper provision within the meaning of the 1996 Act. It was therefore argued that the respondent was not entitled to apply for orders under sections 13-18 of that Act (as counterclaimed by her in response to the applicant's claim for divorce). Consequently, since no orders could be made in the respondent's favour under sections 13-18, the disposal by the applicant of the land could not be a reviewable disposition with the intention of frustrating a potential order of the court or otherwise within the meaning of the 1996 Act. The respondent argued that she sought financial relief orders to ensure that proper provision existed for herself and the couple's children in light of the present circumstances and in the context of a failure to honour previous commitments given by the applicant. She also argued that the court did not have jurisdiction to make the order sought by the applicant, as the purpose of the section was to protect the other spouse, and the onus of proof was on the applicant to rebut the presumption of reviewability. In response, the applicant argued that it was within the court's inherent jurisdiction to make the order sought.

⁵⁰ Given the comments of Morris J in *Tesco* (cited above) on the absence of any public good which would justify setting the *in camera* rule aside, it is possible that courts would be reluctant even to partially exempt Orders for this purpose.

⁵¹ [2003] 1 I.L.R.M. 401 (hereinafter referred to as "*LO'M*").

It was conceded that the companies and their assets, as distinct from the shares in those companies (owned by the applicant), were not amenable to family legislation. While the company shares constituted personal property of the applicant, so that transactions involving those shares might constitute reviewable dispositions, this did not apply to sales of company property. Since no disposition of the applicant's personal property was presently contemplated, Roderick Murphy J held that it was not appropriate to grant the declaration sought in relation to such property. He also held that a declaration applying to "any properties" was "too general in nature",⁵² and that section 37 clearly "limit[ed] the rights of spouses in so far as the disposition of their property is concerned once proceedings have issued in relation to the Act".⁵³ Where a disposition is caught by Requisitions 24-26 of the standard Requisitions on Title, Roderick Murphy J held that this could be dealt with, from a conveyancing perspective, by a standard declaration which included an acknowledgement that the disposal is not a disposal for the purpose of defeating a claim for relief, as defined by the legislation. He therefore dismissed the application.

The judgment in *LO'M* is unsatisfactory in several respects. While the judgment suggests that transactions involving company property are protected by the corporate veil (thus offering an escape from the effects of *Tesco* in a commercial context), it has been pointed out elsewhere that the legislation allows the avoidance of a disposition by "the other spouse concerned or any other person".⁵⁴ The judgment also does not address how a standard declaration (such as was offered in *Tesco* itself) can absolve a party of notice, where he or she is aware of matrimonial proceedings. The whole point of *Tesco*, and indeed of *Somers*, is that once a party is on notice regarding proceedings, it is not possible simply to take the word of the vendors, or of their solicitors (who may not be aware of all relevant circumstances), without sight of supporting documentation. The absence of any detailed discussion of this issue in Roderick Murphy J's decision is to be regretted, although the ruling does hold out hope to beleaguered conveyancers that it may be possible to avoid the effects of *Tesco* by an appropriate declaration, though it is not clear how. The case also leaves open the possibility that a more specific declaration might be granted, where personal assets are being transferred.

Conclusion

The conveyancing implications of the decision in *Tesco* are extraordinary. It is clear that a major impasse has been reached: once a party has notice of marital proceedings (and possibly even of potential proceedings), it is imperative to ensure that the transaction is not caught by the reviewability provisions of the family law legislation. However, under the *in camera* rule, this apparently cannot be done, and it is uncertain whether the courts will facilitate transactions by exempting portions of orders to permit sales. If a statutory declaration is indeed a potential solution, as suggested in *LO'M*, it is vital that the nature and contents of such are clearly specified, yet to date

⁵² *Ibid.*, at 409.

⁵³ *Ibid.*

⁵⁴ S.35 of the 1995 Act and s.37 of the 1996 Act. This issue is discussed in Jackson and O'Riordan, "Reviewable Dispositions in Judicial Separation and Divorce" [1998] 2 Fam. L.J. 2 at 4. In any event, the possible protection of the corporate veil will not apply to most sales in the marital breakdown context, and of course, any move to place assets in a company name would itself be a reviewable disposition.

this has not occurred. It is, of course, possible that Morris J never intended his judgment to be so strictly construed,⁵⁵ but this seems a slender thread on which to hang a case. Ultimately, in the absence of any advice, and of any reform of the *in camera* provisions, the only point that seems clear is that the dilemma facing practitioners in this context is likely to be hideous, prolonged and intractable.

⁵⁵ As suggested by Horgan, Shannon and Gallagher (*supra*), at 280.

[DISCLAIMER]

This is the author's final version of this article;
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