



THE COURT OF APPEAL

UNAPPROVED

Neutral Citation Number [2021] IECA 80
Court of Appeal Record Number 2020/45

**Costello J.
Collins J.
MacGrath J.**

BETWEEN

E.F.

**RESPONDENT/
APPLICANT**

- AND -

A.F.

**APPELLANT/
RESPONDENT**

JUDGMENT of Ms. Justice Costello delivered on the 23rd day of March 2021

Introduction

1. This is an appeal in family proceedings from the High Court (Gearty J.) on a motion for attachment and committal of the appellant (“Mr. F.”) in respect of an order of the High Court of 14 December 2017 (“the December 2017 order”). The respondent/applicant (“Mrs. F.”) claimed that Mr. F. had failed to pay maintenance, had ceased to pay the mortgage repayments on the family home and was refusing to sell the family home in breach of the December 2017 order. In addition to orders seeking his attachment and committal, Mrs. F. sought orders to compel Mr. F. to comply with the terms of the December 2017 order and other ancillary relief, including an order that accounts and/or enquires be made and an adjustment be made to the division of the net proceeds of the

family home “to reflect [Mr. F.’s] failure to discharge the mortgage on the said property from August 2018 to the date of sale” .

2. Originally, Mrs. F. sought a judicial separation and related orders in the Circuit Court. These were hotly contested. She then commenced divorce proceedings in the High Court. Mr. F.’s appeal of the order of the Circuit Court was consolidated with the divorce proceedings in the High Court. The consolidated proceedings were the subject of considerable case management in the High Court. The proceedings were acrimonious and were heard over eight separate days. Ultimately, the parties reached a measure of agreement in relation to their disputes concerning the family home and resolved their issues in relation to access for the child of the marriage (“K.”). No agreement was reached in relation to maintenance for K.

3. Abbott J. delivered a written judgment on 13 December 2017. He recorded that when the matter first came on for hearing before the High Court, the family home was hopelessly in negative equity. He noted that Mrs. F. had left the family home and that Mr. F. retained possession and resided in the family home. He identified two of the three main issues between the parties as being the fact that, (1) neither party would authorise the other to deal with Permanent TSB (“the bank”) to enable them to obtain some adjustment and restructuring of the mortgage repayments on the house, and (2) Mrs. F. was continually complaining of the fact that Mr. F. unilaterally reduced maintenance as ordered by the court and did not pay the mortgage, notwithstanding that he had an opportunity to rent an extra room constructed to the family home, referred to as the annex.

4. In order to break what the High Court described as “*the constant cause of disagreement in relation to who should negotiate with the bank regarding restructuring of the mortgage*”, the court directed that Mr. F. should be solely responsible for same. It was directed that Mr. F. should negotiate a settlement with the bank with a view to allowing the

parties to escape, as best they could, from their joint burden of debt which would disqualify them both from obtaining further credit if they ever wished to buy a property again. The parties negotiated a draft order which was to govern their respective interests in the family home and the trial judge decided to increase the maintenance "*forthwith*" to be paid by Mr. F., bringing it to €475, but declined to order that Mr. F. should pay the arrears of maintenance which had accrued by that stage.

5. The order of the court granted a degree of divorce and ordered that maintenance be varied to the sum of €475 per month. The court made the following ancillary orders:-

- “1. An order pursuant to section 10(1)(b) and section 36 of the 1995 Act declaring the parties to each have a 50% beneficial interest in the family home at ... subject to the terms hereinafter set out.*
- 2. An order for sale of the family home pursuant to section 10(1)(a)(ii) of the 1995 Act SUBJECT to a stay upon the said order upon the following terms:*
 - (a) The stay shall remain in place for a period of no longer than two years from the 1st day of April 2017 and the order for sale shall be vacated in the event that [Mr. F.] secures the release of [Mrs. F.] from the mortgage and any mortgage arrears upon the said property within the above said period of two years, in which case there shall be an order pursuant to section 9 of the 1995 Act transferring the entire legal and beneficial interest of [Mrs. F.] in the said property to [Mr. F.] for his sole use and benefit absolutely.*
 - (b) In the event that [Mr. F.] fails to secure the release of [Mrs. F.] from the said mortgage and mortgage arrears within the above said two year period, the stay on the order for sale shall expire on the 31st day of March 2019.*

- (c) *Furthermore, the said stay shall expire and the order for sale shall become operative forthwith in the event that [Mr. F.] fails to discharge the full mortgage (on the basis of the Managed Variable Rate required by Permanent TSB Bank or such other rate as may be stipulated by the Permanent TSB Bank from time to time) and together with the mortgage protection policy upon the property at any time prior to the expiry of the said two year period or the release of [Mrs. F.] from the mortgage and mortgage arrears, whichever is the sooner.*
- (d) *In the event that the property is sold as provided for herein, any net proceeds shall be divided equally as between the parties and any negative equity shall likewise be borne equally by the parties.*
- (4) *It is ordered pursuant to section 10(1)(b) and section 36 of the 1995 Act that any contribution made by [Ms. H.] prior to the transfer of the said property to [Mr. F.] or, in the alternative, its sale in accordance with the term herein shall not result in any beneficial interest in the property accruing to or vesting in the said [Ms. H.]. This has been confirmed in writing by [Ms. H.] by way of statutory declaration, a copy of which is attached to this order.*
- (5) *In the event of sale, DNG to be appointed auctioneers and the solicitors for the parties to have joint carriage of the sale. The auctioneers to advise in relation to the conditions of sale and the parties to be bound by the reasonable advices of the said auctioneers.*
- (6) *[Mr. F.] shall be at liberty to solely negotiate with the lending institution in relation to the release of [Mrs. F.] from the said mortgage and mortgage arrears in the period up to 31st of March 2019 and [Mrs. F.] will fully*

co-operate in this regard subject always to [Mr. F.] keeping [Mrs. F.] fully informed of the progress in this regard.

- (7) *[Mrs. F.] will promptly sign all documentation relating to the reinstatement of the mortgage protection policy pending sale/transfer of the property. [Mr. F.] to discharge all associated costs and payments in relation to its continuation.*
- (8) *In the event of the transfer of the property to [Mr. F.] in accordance with the terms hereof:*
 - (a) *An order pursuant to section 54(3) of the 1995 Act dispensing with the requirement of the consent of [Mrs. F.] to any future disposition of the family home.*
 - (b) *An order pursuant to section 10(1)(a)(i) of the 1995 Act granting to [Mr. F.] an exclusive right of occupation in the family home for his life.*
- (9) *An order pursuant to section 10(1)(a)(i) of the 1995 Act granting to [Mr. F.] an exclusive right of occupation in the family home up to and including the 31st day of March 2019.*
- (10) *An order pursuant to section 9(5) of the 1995 Act authorising the County Registrar to sign all documents necessary to give effect to the terms hereof in the event of a default by either party in complying with same within 14 days of written request.” (emphasis added)*

6. The December 2017 order reflected the agreement reached by the parties who were each represented by solicitor and senior counsel. The terms of the order reflect the agreement of the parties that Mr. F. would be responsible for discharging the monthly mortgage payments.

7. It is common case that Mr. F. did not make the maintenance payments as provided for in the December 2017 order. From March 2018, he ceased to pay the sum of €475

monthly and unilaterally determined that he should pay the sum of €300. Mrs. F.'s solicitors, Regan Solicitors, contacted Mr. F. in relation to this issue. On 19 June 2018, he objected to purchasing school uniform/school tracksuit for K. in addition to monthly maintenance payments, and he objected to paying for afterschool care for K. which, he asserted, was no longer required and which he requested should go towards out of school activities. He said he received no financial support for his access to K. and that Mrs. F. "enjoys a generous income". He requested that the parties renegotiate the maintenance payment and concluded by saying that if the matters were not rectified:-

"I will have no alternative but to re-enter the matter and to seek a variation to the maintenance order."

8. This latter point is of significance as Mr. F. never applied to vary the December 2017 order, despite being aware that it was possible for him to do so. As of 3 May 2019, when Mrs. F. swore the affidavit grounding the motion for attachment and committal, she avers that the arrears of maintenance were €2,500, and that it continued to accumulate each month.

9. It had been the hope of Mr. F. that he could negotiate with the bank to release Mrs. F. from the mortgage, and the mortgage arrears, and to restructure the mortgage so that he could remain in possession of the family home and become its sole owner. That was provided for in the December 2017 order. His partner, Ms. H., agreed to make financial contributions to assist Mr. F., as is set out in that order. In his affidavit sworn on 25 July 2019, Mr. F. averred that he discharged the mortgage to the bank "*until the time [the bank] notified I your Respondent that the mortgage was in the process of being sold to a fund who are administrated (sic) in Ireland by Start Mortgages*", the "*fund*" referred to therein being Lone Star Funds ("Lone Star"). He did not inform the court in his affidavit that in June 2019, after the motion issued, he repaid Ms. H. €10,000. This emerged from the

books of appeal he filed and at the hearing of the appeal. There is no evidence to suggest that the trial judge was aware of this, nor is it evident that, in making the December 2017 order, Abbott J. contemplated that the monies to be paid by Ms. H. might be repaid to her in advance of either the transfer of the family home into the sole name of Mr. F. or its sale.

10. The last payment made by Mr. F. on the mortgage was in August 2018. He thus missed the September 2018 repayment. Therefore, in accordance with Clause 2(c) of the December 2017 order, the stay on the order for sale of the family home automatically expired and the order became operative "*forthwith*".

11. Mr. F. had negotiated a restructure of the mortgage with the bank in February 2018. This involved a six-month trial arrangement to demonstrate his repayment capacity under the new arrangements. At the end of the trial arrangement, it appears that the bank agreed to offer him a long term alternative repayment arrangement. The difficulty from Mr. F.'s perspective was that the decision of the bank to enter into a loan sale agreement with Lone Star, which included the mortgage over the family home, occurred during the six-month trial arrangement. The long term restructuring of the mortgage, which would involve releasing Mrs. F. from the mortgage and releasing her from her liability for any mortgage arrears, had not yet been agreed. It would appear, though he did not so state, that Mr. F. was of the opinion that the proposed sale to Lone Star affected his opportunity to secure the release of Mrs. F. from the mortgage and mortgage arrears, and for Mr. F. to become the sole beneficial owner of the family home in accordance with the terms of the December 2017 order to such an extent as to justify the cessation of the monthly mortgage payments.

12. Mr. F. did not inform Mrs. F. or her solicitors of his unilateral decision to cease to make the mortgage repayments after August 2018. This decision had obvious and significant implications for her, as well as for him, not least because she had a 50% interest in the equity of redemption and a 50% exposure to any shortfall in the event that the

property was sold in negative equity. Mr. F. did not explain on affidavit what became of the sums which otherwise would have been used to discharge the mortgage repayments. In particular, on Mr. F.'s own account, the annex to the family home continued to be rented up until December 2018, and Mr. F. ceased to utilise this income to make the mortgage repayments.

13. Mrs. F. discovered that Mr. F. had defaulted on the mortgage repayments in January 2019. Her solicitors wrote calling upon him to rectify his default in relation to the mortgage repayments and as the maintenance arrears. On 25 January 2019, Mr. F. wrote to Regan Solicitors, Mrs. F.'s solicitors, as follows:-

“You may or may not be aware that the subject mortgage with [the bank] is in the latter stages of being sold on to a fund. I am engaging fully with [the bank] regarding the transfer of the mortgage from [the bank] to the fund...

[The bank] have made an offer to me on the 17th January 2019 which is valid until 3rd May 2019. [The bank] are fully aware of the payments made solely by me since December 2012 on the joint mortgage and this has formed part of the current negotiations with [the bank] and the offer made to me on the 17th January 2019.

The mortgage/property order states that your client should not interfere with my negotiations with [the bank] and I am actively negotiating with [the bank] on this matter. I confirm that I will not be instructing DNG to sell the subject property at this time.

If the offer from [the bank] dated 17th January is not availed of by me on or before the 31st March 2019 I will then be in a position to instruct DNG on the sale of the subject property from the 1st April 2019.”

14. The details of the offer of the bank, of 17 January 2019, were not placed before the court. But it is clear from this letter that, whatever its terms, Mr. F. considered it to be of potential advantage to him. The letter does not address the fact that he had stopped making the repayments, nor explained why he took this decision. It is notable that he says that he will be in a position to instruct DNG on the sale of the property from 1 April 2019, which disregards the fact that the stay on the order for sale expired in September 2018 when he failed to make the mortgage repayment due. He does not state that he was unable to make the repayments, nor that there had been a change in his financial circumstances.

15. There were further exchanges of correspondence between Mr. F. and Regan Solicitors. On 3 March 2019, Mr. F. wrote to Regan Solicitors stating:-

“... I advise you that the subject mortgages transferred to Start Mortgages early February. Start Mortgages are now reviewing my application to remove your client from the subject mortgages.

If my application is not progressed by close of business on the 31st March 2019 then your client and I can begin the process of instructing the subject family home for sale.”

16. It should be noted that he no longer said that he would instruct DNG on the sale of the property from 1 April 2019. His position now was that after 31 March 2019, the parties could “begin” the process of instructing DNG in relation to the sale. Either way, having regard to the clear terms of the December 2017 order, Mr. F. was not entitled to try to dictate the timing of the sale of the family home. Clause 2(c) of the order clearly

provided that if Mr. F. failed to discharge the full monthly mortgage payment (as occurred in September 2018) the stay on the order for sale expired and the order became “*operative forthwith*”.

17. The date for the sale of the family home slipped again. On 5 April 2019, Mr. F. wrote to Regan Solicitors stating that the court order referred to a stay on the order expiring on 31 March 2019 (in fact the stay had expired months before) but it did not state that the subject property was to be on the market for sale on 1 April 2019. He said that the order gave no final date for placing the family home on the open market. He said that, as of 1 April 2019, he was offering to “*discuss the sale of the subject property with [their] client*”. With regard to the arrears he said as follows:-

“I disagree with your claim that I have failed, neglected and declined to discharge the mortgage payments. All payments were fully discharged by myself to [the bank] until September 2018. At that point our mortgage began the process of transferring to a fund – namely Start Mortgages.”

18. The latter sentence is a *non sequitur* and it is difficult to understand the basis upon which Mr. F. says that he did not fail to discharge the repayments after August 2018.

19. Despite the fact that the stay on the order for sale expired in September 2018, on 18 April 2019, Mr. F. wrote to Regan Solicitors indicating that there was a further delay in relation to the sale of the property. He said he had an appointment scheduled with his solicitor on 30 April 2019 and after that meeting, he said he “*will update you then with solicitor contact details regarding a future sale.*” He also referred to his negotiations with Start Mortgages to agree a reduced settlement figure and a release of the mortgage after a future sale. He said “*[t]hese negotiations with Start Mortgages must take place prior to notifying Start Mortgages of a future sale.*” This precondition, imposed unilaterally by

Mr. F., inevitably further postponed the sale of the family home. The letter concluded “*[r]est assured that I am committed to selling the subject property on a future date.*”

20. The net effect of Mr. F.’s refusal to repay the mortgage from August 2018, and his refusal to put the family home up for sale until at least after the end of April 2019, was to delay, by a period of eight months, implementing the December 2017 order for sale of the family home.

21. Mrs. F. issued a motion on 3 May 2019 re-entering the proceedings and seeking an order for the attachment and committal of Mr. F. in relation to his failure to pay maintenance and his failure to comply with the order directing the sale of the family home. The motion sought an order directing Mr. F. to pay Mrs. F. the sum of €2,500 by way of arrears of maintenance to date, together with an order directing Mr. F. to comply with the payment of maintenance into the future. She also sought an order for taking accounts and/or enquiries and that an adjustment be made to the division of the net proceeds of sale of the family home to reflect Mr. F.’s failure to discharge the mortgage on the property from August 2018 to the date of sale.

22. The motion, which was returnable for 24 June 2019, was adjourned to July 2019 to afford Mr. F. the opportunity to deliver a replying affidavit. He swore an affidavit on 25 July 2019 contesting the application. He explained that he paid €300 per month, rather than the €475 ordered, because Mrs. F.’s financial position had improved, he had incurred additional expenses during the time K. was with him under the access arrangements, which ought to be credited against the award of maintenance, and that certain childcare costs, which were factored into the sum ordered by the High Court, no longer arose.

23. In relation to mortgage repayments, he relied upon events predating the December 2017 order which, according to him, explained the current difficulties. In particular, he presented the case that but for the wrongful actions of Mrs. F. pre-2017, the mortgage

would not have been sold by the bank to Lone Star. He said that it would be unfair and disproportionate to award Mrs. F. anything other than the 50% interest in the net equity or net shortfall awarded by the December 2017 order. He denied that he was refusing to sell the family home and blamed Mrs. F. for any delays by reason of her failure to contribute to the costs of preparing the house for sale in accordance with the advices of DNG.

24. The application was heard by the High Court (Faherty J.) in late July 2019 who adjourned the matter to a vacation sitting in September 2019 to allow the sale of the family home to proceed.

25. Mr. F., who works in the property business, prepared the property in accordance with the advices of DNG and placed the property for sale in September 2019 in a “*show house*” condition. He repainted the property and furnished it with furniture he borrowed from his parents. Fortunately, for all concerned, by 3 October 2019 the family home was “*sale agreed*” at a strong price. Thereafter, progress unfortunately stalled. On 1 October 2019, Mr. F. e-mailed Start Mortgages offering a compromise figure in full and final settlement of the mortgage account. He said:-

“If the offer is not accepted by Start Mortgages as final settlement for the subject mortgages it is my intention to re-enter the matter in our court system with the aim to retain my family home.”

26. Mr. F. continued to try to negotiate with Start Mortgages but without success. He did not “*re-enter*” the proceedings in court, though the motion, the subject of this appeal, was still before the court.

27. It appears that the title deeds of the property were not sought on accountable receipt and then there was some confusion in Start Mortgages as to whether they were in Dublin or in Donegal, all of which led to delay in preparing contracts for sale. Mrs. F.’s solicitors were concerned that the sale would be lost and the motion was heard in the High Court

(Gearty J.) on 14 January 2020. By that time, sixteen monthly repayments in the sum of €2,862.54 had been missed, leading to arrears of €45,800.64. The tenant in the annex to the family home left in December 2018 and the annex had not been re-let on the advices of DNG who said that this would facilitate the sale of the property. The net result was that from January 2019 onwards no rental income was available to repay the mortgage. The arrears of maintenance had risen to the sum of €3,900 by the time the matter came on for hearing before the High Court on 14 January 2020.

28. It is important to note that Mr. F. never brought a motion seeking to vary the terms of the December 2017 order, either as regards the maintenance obligations or in relation to his obligations as regards the family home. It is also important to observe that Mr. F. placed no evidence before the court to show that he could not pay the maintenance ordered or the mortgage repayments. He adduced no evidence to show that there was any change in his financial circumstances.

The decision of the High Court

29. The trial judge read the papers in advance of the hearing and heard the submissions of the parties over a day. She delivered an *ex tempore* judgment. She held that Mr. F. agreed to pay the mortgage throughout the two-year period over the stay ordered in the December 2017 order. It was agreed that upon the sale of the family home that any net proceeds were to be divided equally and any negative equity was to be borne equally. She held that:-

“... this was clearly on the basis that the mortgage would be paid in the intervening period. The normal meaning of these terms could not include an understanding that if the mortgage was not paid by [Mr. F.], [Mrs. F.] would then agree to bear the resulting negative equity or whatever the result of that failure to pay was. That simply is not, it seems to me, a sensible interpretation of the terms of the ancillary

orders and of the judgment read together. There are now mortgage arrears due.

That is not, it appears to me, a matter for [Mrs. F.] but for [Mrs. F.], given the terms of the earlier orders.”

30. She held that Mr. F. breached the order directing him to pay the mortgage and to pay maintenance and that he had not sought, at any stage, to adduce evidence that he could not make either payment. She then held that the issue was how best to enforce the payments in each case. In the notice of motion, the sum sought in respect of arrears of maintenance was €2,500, though on the date the matter came before her, these had risen to €3,900. She made an order directing Mr. F. to pay the sum of €2,500, on the basis that this would take account of some of the arguments made by Mr. F. and because that was the amount claimed in the notice of motion. Mr. F. agreed to pay the sum of €475 per month as continuing maintenance for K. in accordance with the December 2017 order, and he agreed to set up a standing order to give effect to his undertaking to comply with the order for maintenance.

31. In relation to the sale of the family home, the trial judge noted that the property was “*sale agreed*” and that the house was to be sold. She said that the mortgage should have been repaid by Mr. F. and “*that the fairest way to deal with that is to make the order ... that an adjustment be made in the division of the net proceeds of sale to reflect the failure to pay mortgage payments as set out in the affidavits since August 2018*”. She said that the arrears of mortgage should be calculated and that amount should be taken from the proceeds of sale of the family home when it is sold and she directed that there should be an account enquiry in this regard.

32. Subsequent to the hearing before Gearty J., Mrs. F. issued a further motion for attachment and committal of Mr. F. seeking injunctive relief in respect of his alleged interference with the sale of the family home. This motion came on before the High Court

(Jordan J.) on 2 March 2020 when Jordan J. commented that Mr. F. had used “*devious methods*” to disrupt the sale. The sale closed in March 2020 and there was a small negative equity borne equally by the parties, and each party contributed towards the costs of the sale.

The appeal

33. Mr. F. appealed on five grounds. At the hearing of the appeal, he did not pursue his appeal with regard to the maintenance order or the refusal to adjourn the hearing in January 2020. He had paid the arrears of maintenance in accordance with the order of the High Court. He had paid some continuing maintenance, but no standing order was in place and Mrs. F.’s counsel said his history of paying maintenance remained erratic.

34. There was a dispute in respect of the costs Mr. F. incurred in preparing the house for sale and the degree to which Mrs. F. had contributed to these expenses, but no evidence was placed before the court in this regard which thus cannot be resolved.

35. The only substantive matter in the appeal was the order of the High Court that accounts and/or enquiries should occur to ascertain the extent of the loss occasioned to Mrs. F. by reason of the non-payment of the mortgage by Mr. F. between September 2018 and March 2020, and the credit the court ordered should be afforded to her for this default. Mr. F. said that this was a wrongful variation of the December 2017 order and that it was unfair to him. He said he should not be obliged to make good any loss arising from his non-payment of the mortgage. It was not provided for in the December 2017 order and it was unfair, given his disproportionate efforts to repay the mortgage in the past. He could not afford to make the repayments and it would be unjust to penalise him.

36. While no updating affidavit was put before the court, Mr. F. informed the court that Ms. H. ceased to assist him with the mortgage repayments after August 2018 when the bank notified Mr. F. of the fact that the loan was to be sold to Lone Star. Mr. F. also

informed the court that in June 2019, when the motion was returnable before the court, and when he was nine months in arrears in respect of mortgage repayments, he repaid Ms. H. €10,000, which she had previously advanced to him. There was no proper evidence of any of this before the court, either from Mr. F. or Ms. H. It is not clear whether Ms. H. required repayment of the sums advanced by her or even if she had any entitlement to do so. The position is wholly unsatisfactory.

Decision

37. Mr. F. repeatedly referred to matters which pre-dated the December 2017 order as an explanation and/or justification for his unilateral decision to cease to make the mortgage repayments. As Mr. F. was well aware, he was bound by the terms of the order unless and until it was varied and that it was open to him to apply to the court to vary, either or both, the maintenance order or the order for repayment of the mortgage. He did not avail of the opportunity to do so. He cannot therefore argue that he is not required to comply with the terms of the December 2017 order on the grounds that it is either unjust or had become unaffordable.

38. Mr. F. breached the December 2017 order. He unilaterally decided not to repay the mortgage after August 2018 when he learned of the intended sale of the loan and mortgage by the bank to Lone Star. The inference is that he was only willing to comply with the order so long as he thought he could negotiate the release of Mrs. F. from the mortgage and mortgage arrears, and thus become the sole owner of the family home (though, in fact, he appears to have subsequently pursued the same issue with Start Mortgages, so it is clear that he did not abandon the prospect of his efforts to have Ms. F. removed from the title in August 2018). Mr. F. did not inform Mrs. F. or her solicitors of this decision. Under Clause 2(c) of the December 2017 order, which was agreed by Mr. F. with the benefit of advices of senior counsel and solicitors, he did not put the house up for sale in September

2018 when the stay automatically expired. Despite the fact that the annex was, on Mr. F.'s own account, let until December 2018, he did not utilise the rent from it to pay the mortgage, or a part thereof, for the months of September through to December 2018. I accept that it was reasonable not to re-let the annex thereafter, in reliance on the advices of DNG. That being so, it was unreasonable of him to allege that Mrs. F. ought to have let the annex to discharge her obligations. He unilaterally decided to postpone any sale of the family home until after 30 April 2019, and arguably then only accepted that a sale was bound to happen after Mrs. F. issued her motion for attachment and committal. There was no evidence that there was any change in his earnings or expenses. Notably, he chose to repay Ms. H. €10,000 rather than comply with the terms of the December 2017 order. Regrettably, I must conclude that he is not a reliable historian. The version of events he gives in correspondence, in affidavit to the High Court and to this court, was characterised by significant omissions and changes over time. Even after the decision of Gearty J. of 14 January 2020, Mrs. F. was required to bring a further motion for attachment and committal before the High Court in order finally to secure the sale of the family home in March 2020, more than a year later than the date provided for in the December 2017 order. At the hearing of the appeal, the court was told, without contradiction, that Mr. F. had not yet set up a standing order for the payment of maintenance.

39. For these reasons, I would reject the appeal.

40. However, in my opinion, it is appropriate to vary the order of the High Court.

Gearty J. ordered that accounts and/or enquiries be made and an adjustment be made in the division of the net proceeds of sale of the property to reflect Mr. F.'s failing to discharge the mortgage from August 2018 to the date of sale. The order, as it stands, does not direct how the repayments which were missed during the period the family home was in the process of being sold ought to be addressed. There are disputes between the parties as to

the responsibility for the delay in closing the sale after 3 October 2019, and whether there was a fair division of all of the costs associated with the sale. It is not at all apparent how this is to be conducted and will, of necessity, involve further expense by the parties, as well as further delay in bringing this dispute to a conclusion, which would not be in the interests of either party. It is desirable that this issue be resolved without further proceedings and for that reason, a more pragmatic approach is called for in my view.

41. As I have set out above, Mr. F. unilaterally postponed any sale of the family home until after 30 April 2019. I propose to direct that Mr. F. pay Mrs. F. a liquidated sum to compensate for that loss. He is responsible for arrears of mortgage repayments for at least eight months and Mrs. F. should not suffer this loss in the circumstances. The monthly repayment for each of the eight months was €2,862.54, bringing the total arrears for the eight months to €22,900.32. Had these mortgage repayments been made, Mrs. F.'s share of the equity of redemption would have increased by 50% of this figure *i.e.* €11,450.16. I am specifically allowing for a period of some months (from May until September 2019) to prepare the house for sale and I am not faulting Mr. F. for the delays in the sale from 3 October 2019. In so doing, I have had due regard to his arguments to the court.

42. Taking all these factors into account, I would order, in lieu of the High Court order for accounts and enquiries, that Mr. F. be ordered to pay to Mrs. F. the sum of €10,000 to reflect the loss occasioned to her by reason of his failure to make the mortgage repayments in accordance with the December 2017 order.

43. Finally, I should add that Mr. F. argued that the judgment of the High Court of December 2017 – though not the order – directed that further proceedings should be brought in the Circuit Court and, accordingly, the application to attach and commit him ought not to have issued in the High Court. The application was primarily for an order for the attachment and committal of Mr. F. so, it was appropriate that the motion be brought

before the court whose order was to be enforced, the High Court. The December 2017 order did not direct that any further applications should be brought in the Circuit Court so there was no order prohibiting Mrs. F. from bringing the motion in the High Court, the appropriate forum. Finally, and most importantly, Mr. F. raised this issue for the first time on appeal to this court, which was far too late in the proceedings. In the circumstances, I am satisfied that the application was properly brought in the High Court and, as Mr. F. is the appellant, he cannot now be heard to argue that it would not be appropriate for this court to hear and determine his appeal.

44. As Mrs. F. has been entirely successful on this appeal, my provisional view is that Mr. F. should pay to Mrs. F. the costs of the appeal, to be adjudicated in default of agreement. In the event that Mr. F. wishes to contend that an alternative order should be made, he should write to the office of the Court of Appeal within fourteen days of the delivery of this judgment requesting a short hearing in relation to the matter of costs. In so doing, he should note that in the event that the indicative order as to costs is not altered, he will be required to pay the costs of that additional hearing also.

45. As this judgment is being delivered electronically, Collins and MacGrath JJ. have read and indicated their agreement with this judgment and the orders I propose.