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*(subject to editorial corrections)**

2014 13469

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

BETWEEN:

MAURA CONNOLLY AS PERSONAL REPRESENTATIVE OF THE ESTATE OF JOHN JOSEPH CONNOLLY BY THE OFFICIAL SOLICITOR, HER NEXT FRIEND

Plaintiff;

and

PATRICK CONNOLLY

First Defendant;

and

GERARD CONNOLLY

Second Defendant;

and

SEAN CONNOLLY

Third Defendant.

HORNER J

INTRODUCTION

[1] The plaintiff was the widow of John Joseph Connolly Deceased ("the deceased"). The plaintiff acted through a controller, the Official Solicitor, who was her next friend because she lacked capacity. The plaintiff had suffered a serious stroke before the trial. The plaintiff sought to set aside two transfers of land made by the deceased when he was well into his 80s. The first transfer was to the first defendant and it related to lands and buildings contained within Folio 10677 County Down which were known as the Close. The second transfer of land by the deceased was to the second defendant and was comprised within Folio 10676 County Down. The transfers were not subject to any right of residence in favour of the plaintiff nor was there any duty to maintain the plaintiff imposed by the transfers on the transferees, the first and second defendants. The plaintiff's claim alleges that the deceased lacked capacity to make these gifts of land to the first and second named

defendants and, further, or in the alternative, also that they exercised undue influence upon him. A further claim was also made by the defendants very late in the day and which appeared to be based on proprietary estoppel, although this was not formally set out in any pleadings. Tragically, the plaintiff died just before the proceedings concluded although she would not have been aware of this because of her physical and mental condition.

[2] The first and second defendants are sons of the deceased. The second defendant is resident in the United States of America and has been for many years. The third defendant is a grandson of the deceased and the son of the first defendant. He subsequently received Parts 2 and 4 of Folio 10677 executed by the first defendant on 23 January 2012. As a volunteer this transfer will fail if the original transfer of Folio 10677 is set aside. All the defendants deny that the deceased lacked capacity and they all deny that they exercised any undue influence over him. They claim that the gifts of land by the deceased were of his own free will, in accordance with the law, and that they had not been procured by unconscionable conduct on their behalf. Indeed, both the first defendant and the second defendant made the case that they had been in some way promised the lands by the deceased in the late 1990s.

BACKGROUND FACTS

[3] The plaintiff and the deceased were married in 1956. The deceased inherited lands from his family in 1954 and he farmed those until he became physically unable to do so. The plaintiff and the deceased moved into the small cottage on the deceased's lands. The plaintiff like many a farmer's wife supplemented the income from the farm by rearing hens and selling eggs and other items in the local market.

[4] The plaintiff claims that the cottage was enlarged and modernised. According to the plaintiff she was the driving force in achieving these improvements. She also contributed financially to the costs of carrying out this work. For example she claims that she paid for the remodelling of the bathroom and kitchen. She also says that in the last few years she was instrumental in putting in new carpets, a new bed, CCTV, an alarm system and security lights in the house. The defendants do not accept that this is entirely true. While they admit that the plaintiff organised and purchased the furniture and fittings, the first defendant (and second defendant) claims that he gave his labour for free to enable many of these works of improvement to be carried out.

[5] The plaintiff and the deceased had 7 children. Gerard, the second named defendant and the eldest, as I have already recorded, emigrated to the United States, Maureen, Patrick who has his own taxi firm and is the first defendant, Sean, Anne who gave evidence, Siobhan who lives in Dublin and Eamon who is a farmer in the locality. Both Gerard and Eamon are unmarried. The plaintiff and the deceased were visited regularly by members of the family and especially by Siobhan, Maureen, Anne, Eamon and Patrick, although there is some dispute about the

frequency of these visits. The first defendant claims that he and Eamon attended more assiduously than their sisters. It is not possible for me to reach a final conclusion on this issue because I did not hear from all the siblings. But it is certainly common case that all returned from time to time to the family farm to see their parents and to give them assistance in their old age. It is also clear that this is a family divided. The first defendant claims he has been assaulted by Maureen. Siobhan, who took a sabbatical from her work as a teacher in Dublin to look after the plaintiff, has on her version of events been the subject of a deliberate and nasty campaign of harassment by the first defendant and Eamon Connolly. There are non-molestation proceedings pending. Siobhan alleges that the first defendant assisted by Eamon has tried to ensure that the plaintiff was placed in a nursing home and he sought to achieve this by making unfounded allegations to the social services that she, Siobhan, had alcohol issues. I am not in a position to resolve these disputes save to say that the present proceedings, far from assisting in the healing of old wounds, are likely to deepen them and make them more raw.

[6] There is no dispute that the deceased immediately prior to his death suffered from dementia. Nor is there any dispute that in the few years before his death, the dementing process affected his understanding of what was happening and with whom he was dealing. There is however a dispute about when the onset of these mental problems associated with his dementia manifested themselves and how that dementia progressed. There is no doubt that he suffered from urinary incontinence in the latter years of his life. This can be a symptom suffered by someone who has dementia. A catheter was inserted into the plaintiff in 2008. Although he was referred to the memory clinic in 2008 he failed to attend on a number of occasions. He also did not go for a CT scan which had been arranged for him. At this stage the deceased was not able to make arrangements himself and depended on members of his family. No satisfactory explanation has been offered to the court as to why the deceased was not brought to the hospital either for a scan or to the memory clinic.

[7] It is also common case that the deceased transferred Folio 10677 County Down to the first defendant and Folio 10676 County Down to the second defendant in the years before he died. The first defendant then purported to transfer parts 2 and 4 of the lands contained within Folio 10677 County Down to the third defendant. All these transfers were for nil consideration.

[8] It also appears the deceased transferred two tranches of land to Eamon Connolly in the years before he died for natural love and affection. These transfers are not challenged in these proceedings. Eamon Connolly claimed to have had a very close relationship with the deceased and that he enjoyed the deceased's complete trust and confidence, as evidenced, inter alia, by the deceased's decision to leave all the burial arrangements to him. Prima facie it would appear that on the basis of Eamon's own testimony that the onus would lie on Eamon to satisfy the court that the transfers of the land to him had been of the deceased's own free will. However, the transfers have not been the subject of any scrutiny by this court because there has been no challenge in these proceedings to those transfers.

Mr Bentley QC told the court that the plaintiff was not disputing the transfers of any land to Eamon because it was always the deceased's settled and continuing desire that Eamon should have the benefit of the lands transferred to him so that he could continue farming. Accordingly, I make no finding in respect of the validity or otherwise of those transfers of land.

[9] There were many disagreements on many matters. These included:

(a) When did the deceased's mental condition deteriorate?

(b) Did the deceased display obvious signs of disorientation and incapacity on a holiday to Spain in 2001 or 2004 and, if so, was this due to dementia or to sunstroke?

(c) When did the deceased stop driving his car because he was unable to remember where he was going or how to get home?

(d) When did the disputed transfers of the land, the subject of the present action, take place?

(e) Why would the deceased have disposed of his lands in Folios 10676 and 10677 to two of his children and leave the plaintiff, his widow, with no visible means of support should he predecease her?

[10] Despite much of the plaintiff's evidence in her affidavit being contentious, none of the defendants originally gave oral testimony nor did they seek to file affidavits themselves. At the outset of the hearing I made it clear to them the importance of their challenging the evidence led by the plaintiff. At the close of the evidence I asked for written submissions from each side. The written submissions of the defendants were replete with evidence from, inter alia, the first defendant about various matters which were and are in dispute. On the basis that they were personal litigants, I reconvened the court to check if they had understood my original instructions. They claimed to have been confused and wished to give oral testimony when I made it clear I could not take into account the unsworn evidence contained in their final submissions. Mr Bentley QC, for the plaintiff, did not oppose this course. He was able to cross-examine both the first defendant and the second defendant when they gave oral testimony. Mr Bentley's concession did him and his client credit. It was a generous one in the circumstances.

[11] Both the first and second defendants considered that their entitlement to the lands arose out of statements made by the deceased in the late 1990s when he was of full mind and they were doing work around the home farm. The first defendant gave evidence of, among other things, cutting hedges and renewing drainage pipes to prevent flooding. The second defendant put his skills as a time served painter and decorator to good use when he returned home every year to the family farm for a two-week holiday. They claimed that the deceased had intended to gift the lands

to them in the late 1990s. It was necessary to point out that this case, namely that the deceased had transferred or promised to transfer the disputed lands in the 1990s had never been made in any pleading. Also the claims made about what the deceased had said even on their evidence were vague and amorphous. It was difficult to conclude even on the defendants' own case that the deceased was making an outright gift of the lands to the first and second defendant and/or that he was seeking to transfer the lands comprised in Folios 10676 and 10677 to them. In the circumstances it was no surprise that such a claim had not been included in the pleadings before the court.

LEGAL PRINCIPLES

Capacity

[12] The legal test for capacity is the same regardless of whether what is being considered is an inter vivos transaction or the making of a will. In Re Beaney Deceased [1978] 1 WLR 770 Martin Nourse QC sitting as a Deputy High Court Judge said at page 774d-g:

> "In the circumstances, it seems to me that the law is this. The degree or extent of understanding required in respect of any instrument is relative to the particular transaction which it is to effect. In the case of a will the degree required is always high. In the case of a contract, a deed made for consideration or a gift inter vivos, whether by deed or otherwise the degree required varies with the circumstances of the transaction. Thus, at one extreme, if the subject matter and value of a gift are trivial in relation to the donor's other assets a lower degree of understanding will suffice. But, at the other extreme, if its effect is to dispose of the donor's only asset of value and thus, for practical purposes, to pre-empt the devolution of his estate under his will or on his intestacy, then the degree of understanding required is as high as that required for a will, and the donor must understand the claims of all potential donees and the extent of the property to be disposed of."

[13] In this case the deceased was transferring his assets and, in doing so was leaving the plaintiff wholly dependent on the charity of the first and second defendants and other members of her family. It also precluded her from leaving the "matrimonial assets" to all her children, bar Eamon (presumably because he had already been gifted land) as she had planned to do so.

[14] It is also important to remember that "the burden of proving lack of mental capacity lies on the person alleging it": see Gorjat v Gorjat [13] ITELR 312 at 351.

However it is important to note that the evidential burden can shift to the defendant if a prima facie case of lack of capacity is made out: see Williams v Williams [2003] EWHC 742 (Ch).

Undue Influence

[15] The law in respect of undue influence has been the subject of consideration by the House of Lords in the recent past in Royal Bank of Scotland plc v Etridge (No 2) [2001] UKHL 44. Following this it was subsequently the subject of a comprehensive summary by Lewison J in Thompson v Foy [2009] EWHC 1076 (Ch). Lewison J sets out in his judgment the relevant legal principles in a succinct form at paragraphs 99-101. He says:

> "**Undue influence**
>
> ***The law***
>
> 99 I turn next to undue influence. The law relating to undue influence is comprehensively discussed by the House of Lords in Royal Bank of Scotland Plc v Etridge (No.2) [2002] 2 AC 773. The following principles are relevant to the present case:
>
> (i) The objective of the doctrine of undue influence is to ensure that the influence of one person ("the donee") over another ("the donor") is not abused ([6]);
>
> (ii) If the donor intends to enter into a transaction, but the intention was produced by means which lead to the conclusion that the intention thus procured ought not fairly to be treated as the expression of the donor's free will, the law will not permit the transaction to stand ([7]);
>
> (iii) Broadly, there are two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes unfair advantage. ([8]);
>
> (iv) The principle is not confined to abuse of trust or confidence. It also extends to the exploitation of the vulnerable ([11]);

(v) Disadvantage to the donor is not a necessary ingredient of undue influence ([12]). However, it may have an evidential value, because it is relevant to the questions whether any allegation of abuse of confidence can properly be made, and whether any abuse actually occurred ([104]);

(vi) Whether a transaction has been brought about by undue influence is a question of fact ([13]);

(vii) The legal burden of proving undue influence rests on the person alleging it. The evidence required to discharge the burden of proof depends on the nature of the alleged undue influence, the personality of the parties, their relationship, the extent to which the transaction cannot readily be accounted for by the ordinary motives of ordinary persons in that relationship, and all the circumstances of the case ([13]);

(viii) If the claimant proves (a) that the donor placed trust and confidence in the donee or that the donee acquired ascendancy over the donor, and (b) that the transaction calls out for explanation, the claimant has discharged an evidential burden, which will also enable an inference of undue influence to be drawn, and thus satisfy the legal burden, unless the donee produces evidence to counter the inference which would otherwise be drawn ([14], [21] and [156]);

(ix) This is simply a question of evidence and proof. At the end of the day, after trial, there will either be proof of undue influence or that proof will fail and it will be found that there is no undue influence. In the former case, whatever the relationship between the parties and however the influence was exerted, there will have been found to have been an actual case of undue influence. In the latter there will be none ([93]).

(x) Proof that the donor received advice from a third party before entering into the impugned transaction is one of the matters a court takes into account when weighing all the evidence. The weight, or importance, to be attached to such advice depends on all the circumstances. In the normal course, advice from a solicitor or other outside adviser can be expected to bring home to a donor a proper understanding of what he or

> she is about to do. But a person may understand fully the implications of a proposed transaction, for instance, a substantial gift, and yet still be acting under the undue influence of another. Proof of outside advice does not, of itself, necessarily show that the subsequent completion of the transaction was free from the exercise of undue influence. Whether it will be proper to infer that outside advice had an emancipating effect, so that the transaction was not brought about by the exercise of undue influence, is a question of fact to be decided having regard to all the evidence in the case ([20]);
>
> (xi) The nature of the advice required is that someone free from the taint of undue influence should put before the donor the nature and consequences of the proposed transaction. It is not necessary for the adviser to recommend the transaction. An adult of competent mind is entitled to enter into a financially unwise transaction if he or she wants to ([60] and [61])."

Proprietary Estoppel

[16] In Thorner v Major [2009] UKHL 18 Lord Walker said at [29] that:

> "Proprietary estoppel is based on three main elements … a representation or assurance made to the claimant, reliance on it by the claimant, and detriment to the claimant in consequence of his (reasonable) reliance."

[17] The issue of proprietary estoppel has not only been raised very late in the day but also the factual basis before this court is weak. It has not been pleaded. In the circumstances I see no need to discuss whether proprietary estoppel is an acquiescence based principle, representation based principle or a promise based principle or all three and what role, if any, unconscionable behaviour should play: see 12.34-12.037 of Snell's Equity (33rd Edition).

THE EVIDENCE

[18] Before applying the legal principles it is necessary to determine the facts. This is because there is little measure of agreement on the key issues. The disputes between the plaintiff on the one hand and the defendants on the other hand ranged far and wide. Indeed, the defendants raised issues which were not included in their defence. They placed the exclusive blame for this omission on the legal team they had dismissed on the first morning of the hearing and who were not therefore in a position to defend either their reputations or their actions. At paragraph 9 of this judgment I set out some of the disagreements which have arisen among the parties.

The key disputes between the parties so far as these proceedings are concerned were, as follows:

(i) Were the transfers of land executed in 2005 or 2008?

(ii) Did the deceased have capacity to make these transfers of land in 2005?

(iii) Did the deceased have capacity to make these transfers of land in 2008?

(iv) Did the deceased repose trust and confidence in the defendants or any of them, in 2005 or 2008?

(v) Did the defendants, or any of them, exercise undue influence over the deceased?

(vi) Can the defendants rely on proprietary estoppel?

[19] The plaintiff says the deceased lacked capacity in 2005. The defendants deny this. The plaintiff in her affidavit says that the deceased started to exhibit symptoms of dementia in the late 1990s/early 2000s. She complained on a holiday in Spain in 2001 or, much more likely 2004, that the deceased went missing and that he could not be allowed out on his own. He was irritable, suffered from headaches, had panic attacks and the couple never went on holidays again. She complained that in 2004/2005 he started to experience difficulty in recognising his own children. He suffered from short-term memory difficulties. He was unable to manage his finances and was given pocket money. He believed junk mail to be real and developed urinary incontinence. In 2008 a catheter had been installed. He stopped going outside. He would shout back at people on TV believing he knew them. He was frequently agitated, especially during the night. The date of the onset of these symptoms has been the subject of much debate in these proceedings.

[20] Anne Connolly who stayed at her parents' house swore inter alia that:

(a) The first defendant regularly collected the deceased's pension.

(b) Her mother was of good character, truthful and not a liar but she did not accept her claim that the deceased had difficulty in recognising his children in 2004/2005 or that there had been any problem at this time with his short-term memory.

(c) She accepted he had problems with his memory in 2008.

(d) She thought he had gone on holiday to Spain in 2004.

(e) She accepted that the plaintiff, her mother, having lived with the deceased for 50 years would know him better than anyone else.

(f) She had noticed problems at night when among other things he wandered about not fully aware of where he was. She thought this had occurred 5-10 years before.

[21] Eamon Connolly said that:

(a) He had a field transferred to him in September 2005 for nil consideration by the deceased.

(b) The deceased lived and managed on his own when the plaintiff went into hospital at the end of 2004 following a fall and had no difficulty in doing so.

(c) The deceased executed the transfers in September 2005. He had left the deeds into Tiernans, the deceased's solicitor since 1992, to enable the transfers of land to the first and second defendants to take place.

(d) The deceased began to deteriorate between 2005 and 2008. He had begun to wet his bed. The deceased was seen by Sharon Campbell, a Social Worker in 2008 not 2005.

(e) He accepted that by 2008 his father was "doddery".

(f) The deceased was unable to recognise him in 2009/2010.

(g) He did not know why the deceased did not attend three appointments at the memory clinic or the CT scan but said that he personally did not have the time to take him to such appointments.

(h) He claimed he never put him under any undue pressure. He accepted that his mother planned to share the lands equally with all her offspring except him, on the basis that he had already got his fair share.

[22] The first and second defendants claimed that their father had made it clear from the late 1990s that he wanted them to have the lands, and not sell them. But he also wanted to allow the plaintiff to have her day at the farm house. The arrangements as to how she was to be maintained were somewhat more opaque although the defendants accepted that they had a moral responsibility to look after the plaintiff. They said that the transfers of land to them were to be effected following the handing over of the deeds to the deceased's solicitors, Tiernans, in May 2005. All the defendants were clear that the transfers had been made by the deceased in 2005. The first and second defendants who gave evidence claimed that the deceased had the necessary capacity in 2005, although they were somewhat more circumspect about his capacity in 2008.

[23] The GP's notes and records record that in April 2005 his son (thought to be the first defendant) complained of increased forgetfulness on the part of the deceased, increased frequency of going to the toilet at night including occasional bedwetting. There was a further complaint of urinary incontinence and confusion in October 2005. There was another complaint of incontinence in 2006. In October 2007 there was a complaint from his wife and daughter that he had a poor memory and has been confused at times in the past year. In November 2007 it was noted that the deceased's daughter had had no contact with the Dementia Team. In March 2008 the GP was informed that the deceased had failed to attend appointments organised by the Dementia Team. Dr Flood from the deceased's GP's practice noted that he had attended the Memory Clinic in April 2008 where he had displayed a moderate degree of cognitive impairment consistent with an ongoing dementia process. Dr Flood had not assessed his capacity. He thought that the deceased was on borderline moderate/mild mental impairment and agreed that there were no psychotic features. He was asked if the problems in Spain in 2001 or 2004 could be attributed to sunstroke. He declined to comment as this was a matter on which he had no expertise.

[24] Dr Paul, Consultant Psychiatrist, saw all the plaintiff's records. When he made his initial report he did not have access to the notes made by Dr Macauley. He formed the view the deceased had a probable neurocognitive disorder ("the dementia process"). In his report he said that the dementia process was ongoing in 2008 and he did not have the capacity to transfer his lands to his sons. It was his sworn evidence that the deceased probably did not have sufficient mental incapacity to make the transfers of the land in 2005. He had noted a history of forgetfulness going back 5-6 years , urinary incontinence and a MMSE score of 20/30.

[25] Dr Macauley, Consultant Psychiatrist at Daisy Hill Hospital with responsibility for the Dementia Team, did not disagree with Dr Paul's conclusions. He refused to be drawn on whether the deceased's behaviour in Spain was consistent with sunstroke because he had no expertise in this area. But he did consider that it was consistent with dementia.

[26] Sharon Campbell, Social Worker, assessed the deceased, she claimed in August 2005. Her report records inter alia:

(i) The deceased has had memory difficulties over the past few years.

(ii) The first defendant had complained that they had lost the deceased on a few occasions and he had been walking on the road not knowing where he was going or what he was doing. The plaintiff was blamed by the first defendant for covering up his father's difficulties which included an inability to remember "family, neighbours or friends who he has known for years". He had incontinence problems and became disorientated in the middle of the night, requiring a reminder of where he was. They keys of his car were taken

from him in 2004 because he was at that stage considered to be "too high a risk".

[27] The Community Psychiatric Nurse, Maria McParland, saw the deceased in May 2008. She referred to his urinary incontinence, his 5-6 year history of forgetfulness and inability on occasions to recognise family members. The notes record marked repetition and inability to recognise family. In 2009 it is common case that he did not have the capacity to consent to an operation.

[28] The defendants assert that there was an error in the dates recorded by the Social Worker and that the deceased had seen Sharon Campbell in 2008 not 2005. Furthermore, any records suggesting that the deceased suffered from mental incapacity in 2005 were plainly wrong. I found Ms Campbell to be a completely believable witness and the suggestion put to her that she had mixed up 2008 with 2005 was simply ludicrous. I note that she had originally recorded that the deceased was born in 1930, but changed it to 1920. The dates recorded in her report are therefore entirely consistent with 2005 and entirely inconsistent with 2008. Despite this the first defendant maintained that this examination had taken place in 2008. Indeed, it is likely that Ms Campbell received some of the information for her report directly from the first defendant.

[29] I have no doubt the dates in the medical records, the dates in the report of the social worker and the dates in the plaintiff's affidavit are accurate. Quite clearly the deceased who in 2005, I find, was unable to remember who were members of his family or his friends, who became disorientated and would go wandering, not knowing where he was, did not have the capacity to make gifts of the lands that he owned.

[30] The defendants rely on a receipt from Tiernans, Solicitors, of the deeds of Folios 10676 and 10677 in 2005 as evidencing that this is when the transfer of the lands took place. It is quite common for solicitors to receive title deeds for safe keeping. Significantly, there were no written instructions produced calling for the transfer of the lands, the subject of these proceedings. Nor were there any complaints that the transfers had not been affected by Tiernans between 2005 and 2008. The first defendant's explanation was that he was unaware of what had to be done to transfer land and that he considered the lands had been officially transferred to him when the deeds were received by Tiernans. This rings false for a number of reasons:

(i) The first defendant struck me an intelligent man who ran his own taxi business. I did not believe him when he claimed that he did not know that a deed had to be executed to make a legal transfer of lands.

(ii) He then claimed that the transfers had been signed in 2005 but not registered until 2008. This was not the case made in the pleadings and it rather looked to be a desperate attempt to make a new case at the eleventh hour.

(iii) Mr Brassil, the solicitor in Tiernans who it is alleged witnessed the transfers may be a convicted criminal but he could, if compelled, by subpoena, have given sworn evidence. He was in a position to say when the transfers took place as he was a person who the defendant's claimed at the trial witnessed the deceased's signature on the transfers. He was not called.

(iv) Mr Orr QC, on behalf of the defendants at the start of the trial but before he was dismissed, claimed that the solicitor who witnessed the transfers was a Mr Cormac McDonnell of Tiernans. This was later contradicted by the first defendant. However, the known signature of Mr Brassil is completely different to the signature of the solicitor who had witnessed both transfers.

(v) The defence allege at paragraph 11 that the land certificates were given to the first defendant in 2003 to give effect to the wishes of the deceased but they were not handed into the solicitors until May 2005. This was explored under the Notice for Further and Better Particulars. The answer was that the land certificates were given to the first defendant in 1997, which on its face is inconsistent with the defence and the case now being made. It rather looked as if the evidence was being made up by the defendants as they went along.

[31] There was no response to the pre-action letters from the plaintiff's solicitors from any of the defendants. There can be no doubt that the case being advanced by the defendants at the trial bore little resemblance to the case made on their pleadings. The defendants placed the blame for this exclusively on their solicitors, who if they had acted, as the defendants allege, were guilty of gross incompetence and misconduct. The criticism levelled at counsel by the defendants suggested they were little better. The defendants did know how to make a complaint because there is a letter dated 7 July 2008 from them complaining that Tiernans had promised to contact them on the Monday following a meeting but had failed to do so. It was made clear in no uncertain terms that if Tiernans did not make contact within 7 days then they would be reported to the Law Society.

[32] However, there are no other letters of complaint either to Tiernans or the Law Society. The first defendant had used Luke Curran & Co, Solicitors, himself but they were not retained. The defendants claimed no one wanted to take the case over from Tiernans. Another solicitor had been approached but claimed that "no-one wants to go against them". So despite being unhappy with the service which the defendants claim was provided by Tiernans "for many years" they soldiered on and accepted a sub-standard service from these solicitors and the counsel they retained.

[33] I do not accept the defendants' version of events for a number of reasons:

(i) I had the opportunity to watch the first defendant give his evidence and I concluded that he was using the complaints against the lawyers as a fig leaf to

disguise the obvious difficulties with the case he was now trying to make and the case contained in the pleadings.

(ii) If the service of his legal team had been as bad as he described, I do not understand why other complaints had not been made to the Law Society.

(iii) The defendants if they had been truly warned about the alleged baleful influence of Tiernans on other solicitors' firms in the area, could have retained a firm from another part of the province. The plaintiff was able to retain solicitors from Belfast.

(iv) It defies belief that both counsel, and experienced counsel at that, allegedly acted contrary to the instructions which had been given by the defendants but the defendants did nothing until the morning of the hearing.

[34] I have no hesitation in concluding that the defendants have sought to make their legal team scapegoats to cover up the manifest deficiencies of their defence.

[35] To summarise the reasons why I am satisfied that the transfer of the lands did not take place in 2005 are as follows, and include:

(a) The transfers are dated 2008. No satisfactory explanation has been offered as to why if they took place in 2005 they were back-dated 2008.

(b) It is claimed that they were witnessed by a solicitor, Peter Brassil, but his signature seems to bear no resemblance to the signatures on the transfers.

(c) The defendants did not call Mr Peter Brassil, nor indeed did they call any solicitor from Tiernans to support the claim that these transactions took place in 2005 but were backdated. No explanation has been granted for this glaring omission. The court infers that the failure to call such a witness is because it is inimical to the defendants' case.

(d) The case made on behalf of the defendants by their senior counsel before he was dismissed was that the person who had witnessed the signature of the deceased on the transfers was Mr Cormac McDonnell.

(e) I simply did not believe Eamon Connolly when he gave evidence and said that the transfers took place in 2005.

(f) The defendants only made the case that the deceased made the transfers in 2005 when they dismissed their legal team on the morning of the hearing and asked to amend the defence to make this case for the first time.

[36] In any event if I am wrong and the transfers did take place in 2005 the deceased did not have capacity to gift the lands at that time. My reasons for so finding include the following:

(a) The sworn evidence of the plaintiff as to the deceased's history and onset of mental problems.

(b) The opinion of Dr Paul that he did not have capacity on the balance of probabilities.

(c) The complaint of the first defendant to Dr Flood that he suffered increased forgetfulness together with problems with urinary frequency and incontinence.

(d) The evidence of Sharon Campbell, Social Worker who interviewed him, the plaintiff and the first defendant. She recorded that the deceased was unable to manage without his wife telling him what to do. She also noted that he could not remember family, neighbours or friends.

(e) The uncontradicted evidence that he would get out of bed at night and had to be reminded that it was the middle of the night.

(f) I find that the keys of the car had to be taken from him in Christmas 2004 because he became disorientated and did not know where he was unless the plaintiff was there to give him instructions. He was at that time "too big a risk on the roads". I do note that he continued to take out insurance, but this was to allow the named drivers to use his car under his policy.

[37] If I am wrong and the transfers took place in 2008 and not 2005, then I have no doubt that the deceased did not have the necessary capacity to execute and transfer the lands. Indeed, it was not seriously disputed that the deceased did not have capacity in 2008. My reasons are as follows:

(a) Mr Eamon Connolly accepted in evidence that he did not have capacity because by 2008 he was "doddery".

(b) Dr Paul did not consider he had capacity.

(c) Dr Macauley did not consider he had capacity.

(d) Dr Flood did not consider he had capacity.

(e) The deceased was suffering from significant mental problems which are documented at that time, namely an inability to recognise family members, bedwetting, disorientation especially at night, moderate mental upset as

evidenced by a score of 20 out of 30 in the MMSE and the evidence of the plaintiff.

(f) The evidence of the plaintiff that he had been dementing from the late 1990s/early 2000s.

(g) The GPs record of 20 May 2008 which records a 5-6 year history of forgetfulness and inability on occasions to recognise family members.

(h) In the report of the Community Psychiatric Nurse which records his "cogitative decline" [sic] and his inability to recognise family members.

[38] Between 2005 and 2008 the deceased was clearly a vulnerable individual for the reasons I have set out elsewhere in this judgment. There can surely be no doubt that the transfers for natural love and affection of the Folios 10676 and 10677 to two of the deceased's offspring leaving the plaintiff with nothing even though she played a significant role in, for example, the modernisation and enlargement of the original matrimonial home, called out for an explanation. Such transfers of land by the deceased leaving the plaintiff with nothing were to his and his wife's obvious and manifest disadvantage. No explanation has been offered as to why the deceased would do such a thing to his wife. The only suggestions which have been tentatively advanced is that he did so because he was fearful that she would somehow give the lands to her sister Philomena or that the Trainors, neighbours with whom the deceased regularly did battle, would somehow use her ownership to acquire the lands. There was no justification for such beliefs (if the deceased did in fact harbour them), which further confirms the court's conclusion as to the deceased's mental state. There was however no evidence of any relationship between the deceased and the defendants where it could be said that the defendants or any of them had acquired an influence or an ascendancy over the deceased. So although the transfers themselves were to the deceased's manifest disadvantage, this is not a case in which the defendants were required to produce evidence to counter an inference of undue influence which would otherwise be drawn. Accordingly, I make no finding of undue influence in respect of the transfers of land.

[39] The claim for proprietary estoppel which was not pleaded, never got off the ground evidentially. There was no clear promise or assurance, there was no satisfactory evidence of detriment and, in any event, the minimum necessary to do equity, did not require the transfer of Folios 10676 and 10677 for nil consideration.

CONCLUSION

[40] The transfers of 15 September 2008 of Folio 10677 and of 8 October 2008 of Folio 10676 and necessarily the reported transfer of Part 2 and Part 4 of Folio 10677 County Down should all be set aside. I will hear counsel on the appropriate relief and on the issue of costs.

FURTHER THOUGHTS

[41] The Court of Chancery has in the past been said to be a court of conscience when exercising its equitable jurisdiction to set aside a gift procured by undue influence: see National Westminster Bank v Morgan [1985] AC 686 at 709. The old-fashioned distinction between the common law and equity had long since disappeared. This court however still exists to ensure that the law is upheld and most importantly that the rights of the weak, the vulnerable, and the infirm, both mentally and physically, are protected. As the age profile of society changes, the courts increasingly will have to deal with cases involving the elderly who can be particularly vulnerable to pressure, particularly emotional pressure from relatives, neighbours and carers. The minds of these vulnerable, elderly people can become easily confused. In those circumstances they may struggle to comprehend what assets they have, who are the members of their family and who deserve to benefit from the property they have acquired over the course of their lifetimes. It is the task of this court to ensure so far as it is possible that elderly people making transfers of lands or gifts of property or bequests of money have the necessary capacity to do so, and if so, that they are not the victims of undue pressure exerted by avaricious relatives or greedy "friends" or dishonest "carers".

[42] I consider that a solicitor acting for elderly persons who that solicitor may perceive to be vulnerable because of mental or physical infirmity should always proceed cautiously. If the solicitor has any doubts about the capacity of the elderly person to give a gift or make a will then the solicitor should ensure that the donor is medically examined. If the solicitor has any doubts about the influence being exercised by any person he should ensure that the donor fully understands what he or she is doing and is not operating under the influence of another. Whether it will be proper to infer that this advice has the necessary "emancipating effect," will depend on all the circumstances.

[43] Further, the prudent solicitor acting in the circumstances described above will keep a detailed written attendance note of all the steps he has taken to ensure that the donor has capacity and/or the gift is not tainted by undue influence. Memory can be slippery and unreliable. A prudent solicitor will appreciate that it is unwise, if not foolhardy, to have to rely on his or her memory alone should the circumstances of any transaction be challenged in court at a later date.