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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:* **25/03/2021**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM
THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND
(CHANCERY DIVISION)

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BETWEEN:

ERNEST GRAHAM

Appellant;

and

MATTHEW GRAHAM and KAREN GRAHAM

Defendant/Respondent;

_____

Before: McCLOSKEY LJ and McFARLAND J

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Representation
Appellant: Brian Fee QC and Nessa Fee, of counsel, instructed by Murnaghan Fee Solicitors

Respondents: Mark Orr QC and Mark McEwen, of counsel, instructed by Walker McDonald Solicitors

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McCLOSKEY LJ (delivering the judgment of the court)

The Dispute in Outline

[1] This is the judgment of the court to which both members have contributed. This is an appeal against the order of McBride J ("*the judge*") dated 19 August 2020 consequential upon two judgments delivered by the judge on 28 April 2020 and 03 July 2020 respectively.

[2] Ernest Graham, whom we shall describe as the plaintiff, is aged 92 years and infirm. Matthew Graham, whom we shall describe as the first defendant, is the fifth child of the plaintiff's eight children and is now aged 47. The second defendant is the spouse of the first defendant. The plaintiff brought proceedings against the first defendant arising out of a dispute between them relating to separately identified farmlands and certain buildings. The fundamental issue to be determined by the judge was whether the first defendant could establish an equitable interest in any of the disputed lands and, if so, what relief should follow. The judge determined this issue in favour of the first defendant.

[3] Two of the three disputed landholdings consisted of a single farm, outbuildings and a dwelling house. These comprised mainly "*The Graan*", together with the 35 acres of "*Ratona.*" The judge's order had three elements:

(i) The plaintiff was required to transfer (a) the farm house and outbuildings at The Grann, together with specified lands and the lands at Ratona to the first defendant.

(ii) A declaration that all of the other lands in contention are owned absolutely by the plaintiff.

(iii) An injunction restraining both defendants from entering into, occupying or farming the lands owned absolutely by the plaintiff.

Finally the judge, reflecting the specific litigation misconduct of the first defendant found by her, made no order as to costs *inter partes*.

The First Instance Judgments Summarised

[4] By way of preface, it is not necessary for the determination of the central issues canvassed before this court on appeal to rehearse the dense detail of the factual matrix. Recourse may be had to the first of the two judgments (the "*main judgment*") for this purpose.

[5] At [11] of her main judgment the judge rehearsed in admirable detail those factual matters which were not in dispute between the parties. It suffices to highlight the following:

(i) From around 1993 the first defendant, having completed a post-secondary education course at Greenmount Agricultural College, farmed the lands with the plaintiff.

(ii) In mid-2000 the farm house became the defendant's matrimonial home, while the plaintiff and his wife moved into a bungalow constructed on the adjacent Ratona lands.

(iii) From 1994 to around 2015 there was a series of commercial transactions and loan arrangements involving the plaintiff, the first defendant and two banks.

(iv) Relations between the plaintiff and the first defendant began to deteriorate around 2013 and by the beginning of 2015, had become irreparable.

(v) By late 2014 the farm had been effectively abandoned by the first defendant.

[6] Thus the first aspect of the evidential matrix at first instance consisted of a series of agreed facts. There was, however, much in dispute between the parties. This is reflected in [9] of the main judgement where the judge notes the multiplicity of lengthy affidavits, supplemented by 12 days of oral evidence and the plaintiff's evidence on commission. It was, therefore, incumbent on the judge to make a series of specific findings on contested factual issues.

[7] As a first step in this exercise the judge provided a summary of the evidence of the plaintiff, the first defendant and other witnesses, including an expert (a chartered accountant) at [21] – [84]. The judge then formulated the interface separating the parties. The nub of the plaintiff's case was that he had given assurances to the first defendant that the latter would inherit the farm, conditional upon the first defendant being an active farmer and maintaining the farm in a state fit for future generations. The plaintiff's alternative case was that the first defendant had suffered no detriment in any event. The third, alternative, limb of the plaintiff's case was that the first defendant was excluded from discretionary relief by litigation misconduct. Finally, as noted by the judge, the plaintiff had made an open offer entailing a payment of £150,000 to the defendants in consideration of receiving possession of the farmhouse and the farm, an acknowledgement of the plaintiff's title to all the lands and an undertaking that no challenge would be made to the plaintiff's Will.

[8] The judge then recorded the essence of the first defendant's case: in reliance upon the plaintiff's assurances, he had chosen to become a farmer rather than pursuing another career; he had acted to his detriment by expenditure on the farm and farmhouse; he had been an active farmer; his inability to deal with the bank debts had not been attributable to him; and, finally, he considered that a transfer of The Graan farmhouse and farm to him was appropriate.

[9] The judge began the necessary task of judicial fact finding by formulating the following questions:

(i) Was any promise made by the plaintiff to the first defendant and, if so, in what terms?

(ii) What detriment, if any, did the first defendant sustain?

(iii) Was it unconscionable for the plaintiff, via an alteration of his last will and testament, to divide the disputed lands in equal shares among his eight children, to be contrasted with his initial bequest which had been to bequeath the same in their entirety to the first defendant?

(iv) To what extent was the plaintiff's promise to the first defendant fulfilled?

(v) What benefits had been enjoyed by the first defendant?

(vi) What detriment had been suffered by the first defendant?

(vii) Had the first defendant been guilty of misconduct either (a) vis-à-vis the plaintiff or (b) in his conduct of the litigation, or both?

As the formulation of these questions indicates, they are interconnected and cumulative in nature.

[10] In our summary of the judge's findings pertaining to each of the aforementioned questions we shall employ the same subparagraph numbering:

(i) The plaintiff "*repeatedly, expressly and impliedly*" assured the first defendant that he would inherit the entire farm, conditional upon the first defendant "*… running the farm as a farm and doing so in a competent business-like manner so that there would be a farm to pass on to the next generation.*"

(ii) The first defendant acted upon the aforementioned assurance and did so to his detriment in a non-monetary fashion – by leaving school when aged 16, pursuing agricultural studies thereafter, deciding to become a farmer on the family farm (a "*life changing decision*") and, in this way, determining "*… where he and his family would live and how they would spend their time and money.*"

(iii)&(iv) From 1993 to 2014 the first defendant "*… fulfilled the promise to farm the land …* [working] *initially closely with his father and* [devoting] *the majority of his time to farming and expanding the farming enterprise*". In the context of increasing debt the first defendant "*… continued to lead a luxurious lifestyle, driving expensive cars and continuing to go on several foreign holidays*" and "*… getting involved in non-farming activities such as the sale of sites and the installation of a bio digester*". By 2014 he had abandoned the farm, leaving it in "*disrepair and disuse.*"

(v) The first defendant had obtained a series of benefits: he "*… had rent free accommodation and a good income from the farm*". However, this "*.. was in lieu of wages for the work that he carried out on the farm*". Most of the bank debt of £1 million had been accrued to the first defendant via his "*recklessness and luxurious lifestyle*". In addition he had enjoyed the benefit of "*… the proceeds of farm machinery, single farm payments and the TB Compensation Monies*" albeit "*… these monies largely relate to income which he would have been entitled to in terms of his employment as a farmer*" (and, this court would add, were therefore neutral in nature).

(vi) The detriment suffered by the first defendant was that he "*… as a result of the promise lost the opportunity to purchase his own home and lost the opportunity to have another career together with the income that that would have produced.*"

(vii) With regard to misconduct: the first defendant had "*… behaved very badly towards his elderly father and as a result of his behaviour has caused him much stress and upset …*" Furthermore the first defendant had engaged in litigation misconduct by his non-compliance with "*several discovery orders.*"

The Judge's Conclusions

[11] In the foregoing way the factual framework within which the determination of the outcome of the litigation was undertaken was shaped by a combination of agreed facts and judicial findings of fact. The next question for the judge, as recorded at [112] of her main judgment, was "*how to satisfy the equity.*" The preface to this exercise was expressed at [111]:

> "*… I am satisfied that it is unconscionable for the father to renege on his promise and to now only give* [the first defendant] *a one eighth share of the farm. I find that this would not be adequate compensation for the loss he has sustained on reliance on the promise made.*"

[12] The judge then turned to the issue of relief. How to satisfy the equity? Her self-direction at [112] was in these terms:

> "*In determining the appropriate relief to be granted it is necessary to consider again the promise, the extent to which it was fulfilled, the nature of the detriment to the promisee, the benefit obtained by the promisee, any misconduct by the parties and the claims of third parties.*"

The judge's point of departure was fashioned by two key findings of fact: both parties had fulfilled their mutual promises for approximately 21 years, while the first defendant had failed to fulfil the "*condition"* thereafter, engaging in conduct bearing the stamp of "*recklessness.*" Thus, reasoned the judge, this was not a case "*… where equity demands the expectation should be satisfied*".

[13] The judge then turned to the benefit/detriment/misconduct equation. She considered a "*clean break settlement*" to be necessary. This would not entail "*a precise science.*"

[14] The judge expressed her omnibus conclusion at [117], in the following terms: [MCB 11212 28/04/20 [2020] NICh 7]:

> "*The expectation in this case was the entire farm which equated to £3M approximately. Matthew has already received £1M. His detriment equates to the loss of a home and income. Considering all the circumstances in the round, including misconduct and the claims of others, and the need for a clean break, I consider that the equity in this case would be satisfied by giving Matthew the farm house and outbuildings at the Graan together with the 48 acres in Ratona. This equates to approximately £0.5M. I consider this is his entire entitlement. For the avoidance of doubt it is my view that he has no further claim on the estate of the plaintiff and the plaintiff is therefore free to leave his remaining estate as he so wishes."*

While noting that the outcome exceeded what had been offered in the "*Calderbank*" letter, the judge decided to reflect the first defendant's litigation misconduct by making no order as to costs *inter-partes*.

[15] The parties having been invited to agree the terms of the final order, and having failed to do so, the judge then considered their respective written representations, providing the impetus for her supplementary judgment, which had the following features:

(i) The judge's statement in the main judgment that the total value of the two land holdings comprising the farm, farmhouse and outbuildings was £3 million was incorrect: this should have been £2.65 million.

(ii) Reckoning the £1 million which the judge found had been received by the first defendant in monetary benefits, therefore, produced a figure of £1.65 million rather than £2 million.

(iii) The judge confirmed that the land division solution in the main judgment was designed to compensate the first defendant in the sum

of £0.5 million in kind, highlighting the absence of agreement between the parties on any alternative mechanism for achieving this.

[16] The necessary adjustments to the figures initially espoused by the judge are ascertainable from [13] – [14]: ([2020] NICH 13)

> *"[13] The court now having the benefit of the field map and schedule of field numbers which includes details of acreage is now satisfied that the valuation of The Graan at £1.5 M included the valuation of the lands at Ratona at £350,000. The court however does not accept the submission that there was a miscalculation of the value of the lands sold to settle the Northern Bank debt and therefore does not amend the reference in the judgment to £1M in respect of these lands on the basis that that £1M was referred to in the judgment as an approximate valuation…... as an approximate valuation …*
>
> *[14] The court therefore finds that the total value of the lands in dispute is £1.65 M, which consists of The Graan valued at £1.5M and the lands at Cleggan and Moneyourgan valued at £ 150,000. It therefore finds that the total value of the farm before sale of lands to settle the Northern bank debt was £2.65M rather than the figure of £3M referred to in the judgment. Accordingly, the court amends the judgment to reflect these findings. Consequently paragraph [7] should be amended as follows:*
>
> - *The sentence commencing "He valued the farmhouse…" and the next sentence should be deleted and substituted with, "He valued the farmhouse, sheds and the farm of 128.5 acres at The Graan at £1.5 M which valuation included the valuation of approximately 35 acres at Ratona in the sum of £350,000. The lands in dispute therefore in total are valued at £1.65M"*
>
> - *The last sentence of paragraph [7] should be deleted and substituted with the following; "Therefore the entire value of the lands owned by the plaintiff before payment of the Northern Bank debt was approximately £2.65M."*
>
> *Paragraph [117] should be amended as follows:*
>
> - *Delete the second sentence and substitute it with the following; "The expectation in this case was the entire farm which equated to £2.65M."*

- *Delete the reference to 48 acres and substitute with words "approximately 35 acres."*

[17] The essential submission on behalf of the plaintiff at that stage was that to reflect the above revised calculations the equity in money terms to be satisfied was £250,000 rather than £0.5 million. The judge rejected this submission. In order to do justice to the reasons for doing so it is necessary to reproduce [15] of the supplementary judgment in full:

> *"[15] In so far as the court is entitled to review its decision given the amended valuation of the land the court refuses the plaintiff's request to amend its reasoning set out at paragraph [117] and rejects the submission that it should change its conclusion in respect of the order required to satisfy the defendant's equity. For the reasons set out in the correspondence sent by the court to the plaintiff's and defendants' solicitors dated 12 May 2020 and for the reasons which appear below the court does not consider that the reasoning set out in paragraph [117] requires to be amended. The court does not accept the submissions of the plaintiff that the Court decided the defendant was entitled to ½ of the total value of the land less £1M and therefore erred in awarding a sum equivalent to £500,000 because the lands were wrongly valued and in light of the amended valuation the appropriate award should be in the order of £250,000. As appears from paragraph [117], in calculating the equity due to the defendant the court took into account a number of factors and gave different weight to each factor according to its importance based on the particular facts of this case. The valuation of the land was but one of the factors taken into account. After considering all of the relevant factors and after giving particular weight to the need to compensate the defendant for loss of home and income the court concluded that the equity in this case should be satisfied by giving the defendant the farmhouse, yard and outbuildings at the Graan together with the lands at Ratona. These lands together are worth £0.5M. The court notes the revised valuation of the lands in dispute. The court concludes that the change in value of the lands in dispute from £3M to £2.65 M does not affect its conclusion that the first named defendant's equity is satisfied by the transfer of the farmhouse, yard and outbuildings at The Graan together with the lands at Ratona comprising some 35 acres approximately. This is because the weight the court attached to the value of the lands was significantly less than the weight attached to the other factors set out in paragraph [117] and in particular the weight afforded to the need to compensate the defendant for loss of home and income. Consequently, the revised valuation of the*

> *land from an approximate valuation of £3M to £2.65M is not of a sufficient amount to change the conclusion of this court that the equity should be satisfied in the manner set out in paragraph [117]. Accordingly, the court does not change its reasoning in paragraph [117] and in particular does not change the figure of £0.5M referred to in paragraph [117]. For these reasons the terms of the order set out at paragraph [118] remains unchanged."*

In this way the order proposed in the main judgment was affirmed and, armed with further information provided by the plaintiff's representatives, it was drawn up with greater particularity. This court notes that in its final form it did not include the injunction in favour of the plaintiff mooted in the main judgment. It seems that nothing of substance turns on this, subject to contrary submissions in the wake of this judgment.

Governing Principles

[18] There is no shortage of modern authority on the doctrine of proprietary estoppel. In *Gillett v Holt* [2001] CH 210, one finds the following illuminating passage in the judgment of Robert Walker LJ at 340 C/D:

> *"…. It is important to note at the outset that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four watertight compartments … the quality of the relevant assurances may influence the issue of reliance, …. Reliance and detriment are often intertwined and …. whether there is a distinct need for a 'mutual understanding' may depend upon how the other elements are formulated and understood. Moreover the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine. In the end the court must look at the matter in the round."*

The decided cases show that detriment can potentially take many forms. For example, and of some resonance in the present case, it may consist of relinquishing a career or educational opportunities as noted in *Ottey v Grundy* [2003] EWCA Civ 1176.

[19] A comprehensive formulation of the applicable principles is found in the judgment of Lewison LJ in *Davies v Davies* [2016] EWCA Civ 463 at [38]:

> *"Inevitably any case based on proprietary estoppel is fact sensitive; but before I come to a discussion of the facts, let me set out a few legal propositions:*

i) Deciding whether an equity has been raised and, if so, how to satisfy it is a retrospective exercise looking backwards from the moment when the promise falls due to be performed and asking whether, in the circumstances which have actually happened, it would be unconscionable for a promise not to be kept either wholly or in part: Thorner v Major [2009] UKHL 18, [2009] 1 WLR 776 *at [57] and [101].*

ii) The ingredients necessary to raise an equity are (a) an assurance of sufficient clarity (b) reliance by the claimant on that assurance and (c) detriment to the claimant in consequence of his reasonable reliance: Thorner v Major at [29].

iii) However, no claim based on proprietary estoppel can be divided into watertight compartments. The quality of the relevant assurances may influence the issue of reliance; reliance and detriment are often intertwined, and whether there is a distinct need for a "mutual understanding" may depend on how the other elements are formulated and understood: Gillett v Holt [2001] Ch 210 *at 225; Henry v Henry* [2010] UKPC 3*; [2010] 1 All ER 988 at [37].*

iv) Detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances: Gillett v Holt at 232; Henry v Henry at [38].

v) There must be a sufficient causal link between the assurance relied on and the detriment asserted. The issue of detriment must be judged at the moment when the person who has given the assurance seeks to go back on it. The question is whether (and if so to what extent) it would be unjust or inequitable to allow the person who has given the assurance to go back on it. The essential test is that of unconscionability: Gillett v Holt at 232.

vi) Thus the essence of the doctrine of proprietary estoppel is to do what is necessary to avoid an unconscionable result: Jennings v Rice [2002] EWCA Civ 159*; [2003] 1 P & CR 8 at [56].*

vii) In deciding how to satisfy any equity the court must weigh the detriment suffered by the claimant in reliance on the defendant's assurances against any countervailing benefits he

> *enjoyed in consequence of that reliance: Henry v Henry at [51] and [53].*
>
> *viii) Proportionality lies at the heart of the doctrine of proprietary estoppel and permeates its every application: Henry v Henry at [65]. In particular there must be a proportionality between the remedy and the detriment which is its purpose to avoid: Jennings v Rice at [28] (citing from earlier cases) and [56]. This does not mean that the court should abandon expectations and seek only to compensate detrimental reliance, but if the expectation is disproportionate to the detriment, the court should satisfy the equity in a more limited way: Jennings v Rice at [50] and [51].*
>
> *ix) In deciding how to satisfy the equity the court has to exercise a broad judgmental discretion: Jennings v Rice at [51]. However the discretion is not unfettered. It must be exercised on a principled basis, and does not entail what HH Judge Weekes QC memorably called a "portable palm tree": Taylor v Dickens [1998] 1 FLR 806 (a decision criticised for other reasons in Gillett v Holt).*"

At [39] – [41] Lewison LJ reflected on the competing doctrinal approaches to the essential aim of the exercise of the court's broad judgmental discretion. At [40] he inclined to the view that in a case where both the claimant's expectations and the element of detriment can be defined with reasonable clarity and the claimant has performed his part of the quasi-bargain, the court is likely to vindicate the claimant's expectations. At [41] the judge described the following as "*a useful working hypothesis*":

> "*… a sliding scale by which the clearer the expectation, the greater the detriment and the longer the passage of time during which the expectation was reasonably held, the greater would be the weight that should be given to the expectation.*"

[20] Citation of other reported cases is unnecessary. What emerges from the governing principles with some force is the absence of hard and fast rules, coupled with a heavy emphasis on the fact sensitive nature of every case. In short, there is no legal algorithm to which the court can have recourse.

Issue Joined

[21] Much care and thought were evidently invested in the preparation of the parties' respective written and oral submissions, for which the court is obliged. We confine ourselves to a brief outline. The central tenets of the appellant's challenge to the first instance judgments and order were these:

(i) The judge's holding that one part of the bundle of lands in dispute (Drumboory and Cavanakeery) had a value of "*approximately £1 million*" was unsustainable, given the incontrovertible evidence that these lands had been sold, realising a sale price of £840,000.

(ii) The judge's holding that the total value of the lands was £2.65 million was unsustainable, given the individual relevant facts either unchallenged or specifically found which indicated a total value of £2.49 million.

(iii) Given the above errors, the judicial assessment and reasoning which followed and culminated in a conclusion that the equity due to the first defendant was £0.5 million could not be sustained.

(iv) The benefit obtained by the first defendant (together with the second defendant) was far in excess of the amount assessed by the judge, namely £1 million.

(v) The judge failed to take into account that the plaintiff had given the Ulster Bank a first equitable charge over certain separate lands owned exclusively by him, with a value of some £160,000, as collateral for the first defendant's debt to the same bank of £550,000 plus interest, resulting in repossession proceedings by the bank against the plaintiff.

[22] Much (though not all) of the appellant's case is encapsulated in the following written submission:

> "*The Appellant says that the learned trial judge has made a significant miscalculation in holding the value of the disputed lands to be £2.65 million and in failing to recognise the debt dissipated was over £1.5 million. The learned judge failed to take any account of the current Ulster Bank litigation against the Appellant, which must reduce any equity by a further £160,000. The judge failed to give proper weight to the other benefits obtained by the Respondents.*"

The plaintiff's case is that, taking all relevant matters into account, no equity was due by him to the first defendant. Finally, the plaintiff challenges the judge's clean break solution, in this passage:

> "*… the judge has made a division of the lands, whereby the Appellant's bungalow is surrounded by lands granted to the Respondents* [who] *have been granted The Graan farmhouse and farm outbuildings, but not the Graan farm lands. The learned trial judge has therefore divided The Graan farm and its outbuildings, reducing the value of the farm as a going*

concern. The Respondents will also require rights of way over the Appellant's lands to access the farmhouse."

[23] The inter-related main strands of the submissions of Mr Mark Orr QC on behalf of the first defendant were the following. Valuation is not an exact science and is to be contrasted with sale; the trial judge was exercising a broad discretion; the debt to the Ulster Bank was joint and several in nature, the debtors being the plaintiff and the two defendants; the judge was entitled to hold that there was an equity in favour of the first defendant to be satisfied notwithstanding his (admitted) non-fulfilment of his part of the bargain, which was to be contrasted with a comparable contractual failing; and the principle that equity will not permit a promisor to resile from his promise resonated strongly in the circumstances. Mr Orr, finally, emphasising the principles summarised in the judgment of this court in *Kerr v Jamison* [2019] NICA 48 at [35] – [37], highlighted the factors of the lengthy trial and the judge's advantage in hearing and seeing several witnesses.

This Court's Conclusions

[24] The combined effect of several of the factors and legal principles highlighted by Mr Orr is that the scope for intervention by this court in this appeal is limited in nature. We agree. This court makes clear that it is not proposing to intrude either on the judge's rehearsal of factual matters not in dispute or in the judge's findings of fact in respect of contested matters. Findings of fact, particularly in the context of evidence adduced from witnesses in an adversarial forum, are for the trial judge and not the appellate court. While this is not an absolute rule, we consider that it applies in the present case. See the principles summarised in *Kerr v Jamison* [2019] NICA 48 at [35] – [37].

[25] The real question is whether there is any demonstrated material error in the exercise conducted by the judge on the basis of the uncontested factual matters and the further findings of fact made. It is in this context that the judge's approach to the issues of benefit and detriment in respect of the first defendant are of particular importance. Ultimately, the judge undertook what was essentially a balancing exercise. This entailed weighing the matters of benefit, detriment, unconscionability and misconduct, to include litigation misconduct in particular. This balancing was the central part of the judicial exercise of determining how to satisfy the equity which the court had diagnosed. This court is conscious that it must respect the broad discretion available to the judge in carrying out this exercise. However, before the stage of conducting this exercise was reached, it was incumbent upon the judge to ensure that the scales were properly balanced. This required [a] that all necessary findings of material fact be made, having balanced all aspects of the relevant evidence and that all material considerations be identified and, next, [b] that all of these ingredients be placed on the scales, to be followed by [c] the balancing exercise itself. The focus of this court is essentially on stage [b].

[26] The judge's preparation of the notional scales before progressing to the balancing exercise and the associated injection of judicial discretion had the following significant features:

(i) The judge acted on the basis that the total value of the lands was £2.65 million, whereas the correct figure was £2.49 million. The difference is £150,000 in round terms.

(ii) The judge acted on the basis that the lands at Drumboory and Cavanakeery had a value of "*approximately £1 million*", whereas they had actually been sold for £840,000.

(iii) The judge did not include in the balancing exercise the fact that seven acres of one part of the overall portfolio of lands in dispute, namely the Nixon Hall Estate, had been retained by the first defendant and, further, he had received, and rejected, an offer of £150,000 for them.

(iv) Similarly, the balancing equation did not include the plaintiff's joint and several liability to the Ulster Bank for a debt of £550,000 incurred for the benefit of the first defendant and which, at the trial stage, had given rise to repossession proceedings by the bank against the plaintiff.

(v) Linked to (iv), the predictable settlement of around one third of this debt by the plaintiff, which would constitute an obvious benefit to the first defendant, was not considered.

(vi) There was no engagement with the evidence that not insubstantial income generated by the farming enterprise had been utilised in its entirety by the defendants for their own enjoyment and benefit and was not applied in part to reduce the farm debt.

(vii) Nor was there any engagement with the evidence relating to the purchase price of the Nixon Hall Estate (£1.35 million) or the sale price realised subsequently (£1.75 million), juxtaposed with the total borrowings from the two banks concerned enjoyed by the defendants, which indicated a benefit to them of potentially around £1.5 million.

(viii) Finally, there was no engagement with the evidence contained in the joint accountants' note which indicated, in substance, a pattern of reasonable income from the farming enterprise during a substantial part of the period under scrutiny, coupled with heavy drawings by the defendants from the farm account, exceeding £1 million, exclusively for their benefit.

[27] When one takes into account that the contest between the parties related to an overall estate of approximately £2.5 million in value, the materiality of the matters

listed immediately above cannot be gainsaid. Had the judge's approach at the stage when the balancing exercise was carried out been informed by taking these matters into account, one of the possible outcomes was a conclusion that there was no equity in favour of the first defendant to be satisfied. Another was an equity of substantially lesser proportions than that assessed by the judge. Thus, the materiality of leaving specified matters out of account and failing to engage with others is unmistakable.

[28] In addition to the foregoing it is evident to this court that the first defendant's litigation misconduct was more egregious than simply failing to apply with discovery orders and belatedly producing material documents in the course of the trial. It is clear that the first defendant failed to make comprehensive discovery, by some measure. Standing back, he acted in blatant defiance of the court throughout the pre-trial stage and during the trial. Furthermore, this defiance continued after the court had delivered its main judgment. It is appropriate to reproduce the following passage from the supplementary judgment in full:

> "{Counsel] *advised the court that no agreement could be reached between the parties because the* [first] *Defendant …. although represented by counsel and a solicitor wanted to speak directly to the Plaintiff's solicitors and the Plaintiff's solicitors felt unable to speak to him as a result. The Defendant's solicitors wanted to engage a mapping expert but the Defendants failed to put them in funds. As a result they were unable to engage constructively with the Plaintiff's solicitors and so an impasse had been reached.*"

This uncontested conduct on the part of the first defendant was in defiance of the court's exhortation at [120] of its main judgment that the parties agree an appropriate final order. Furthermore, this was manifestly antithetical to the overriding objective.

[29] Having regard to our analysis in paragraphs [24-28] above we conclude that this appeal should succeed. For the avoidance of any doubt, this court has satisfied itself that there is no divergence between the case made by the plaintiff on appeal and the case advanced at first instance.

[30] It is appropriate to add that it is common case that the judge correctly identified the applicable legal principles and, further, committed no error in the self-directions formulated. This court has considerable sympathy with the trial judge who found herself in the middle of an acrimonious family dispute in which no quarter was given and which had the added ingredient of one of the parties persistently failing to co-operate with the court, to the extent that contempt proceedings may well have been appropriate. This was exacerbated by the factor of a lengthy trial which, for various reasons, became protracted, spanning a total of 13 full and incomplete hearing days involving the evidence of eight witnesses/parties

scattered across a period of some seven months. However, with appropriate deference to the judge, this court is driven to conclude that having regard to what is highlighted in the foregoing paragraphs we find ourselves unable to agree with the outcome and final order.

Final Order

[31] What are the out-workings of the conclusion in [29] above? Our analysis of the general legal principles at paragraphs [18 – 20] establishes a requirement to weigh detriment suffered in reliance on assurances given against countervailing benefits enjoyed. Our observations at paragraph [27] have noted that if this were merely an arithmetical task it could impel to the conclusion that there was no equity to be satisfied at all; or, alternatively, an equity substantially less than ordered at first instance. But the approach must be more than the simply arithmetical. The court exercises a broad judgmental discretion and, ultimately, there is a necessity to avoid an unconscionable result.

[32] On balance, this court concludes that taking everything into account and bearing in mind that this is not a court of trial, there is an equity in favour of the first defendant to be satisfied by the plaintiff, but one of substantially lesser dimensions than that assessed at first instance. This court is also mindful of the compelling need for finality in this protracted and sad saga.

[33] We have reflected in particular on paragraphs [11](k),[26], [49], [50], [92] 4th bullet point and [98] of the main judgment, namely the fact that in 2000 the defendants, having been married for two years, acceded to the plaintiff's request and encouragement to leave the matrimonial home which they had been inhabiting in Enniskillen and move into The Graan residence, which became their new family home thereafter. They had lived there for 17 years before the plaintiff issued legal proceedings. They did all of the foregoing relying on the plaintiff's assurances. We consider this to be a matter of substantial weight in the balancing exercise. At paragraph [19] above we have emphasised the working hypothesis of Lewison LJ in *Davies* that greater weight can be given to an expectation depending on its clarity and the longer the time that it was reasonably held. The present case is one of unequivocal and repeated assurances and a resulting expectation of considerable strength and duration.

[34] Standing back, we consider that the plaintiff, in satisfaction of the equity, should transfer to the first defendant the residence at The Graan (postal address 79 Derrygonnelly Road, Enniskillen, Co Fermanagh BT74 5PB), together with sufficient outbuildings for domestic purposes only and an adjacent garden/paddock field. For the removal of doubt this would exclude the farm outbuildings which are situate adjacent to the dwelling. The lands at Ratona which were ordered to be transferred at first instance should be retained by the plaintiff.

[35] There is insufficient detail in the descriptions and valuation of this area in the appeal bundles for the court to achieve full particularisation at this stage. That said, the field marked 4/024/008/14/C (2.5 hectares) on the Farm Scheme Map exhibited to the Harold Montgomery's valuation of 3rd December 2018 and which lies immediately to the south of the residence is the garden/paddock field noted above and is in the foreground of the first photograph in the 'Lot 2' annex to the valuation is readily identifiable. This shall be included in the requisite transfer. The latter shall also include a right of way at all times and for all purposes over the driveway running from Derrygonnelly Road to the defendants' residence, together with such rights relating to services, sewerage and drainage *et al* as are required. Similar rights may also need to be reserved for the benefit of the retained agricultural land and outbuildings at The Graan.

[36] We will afford to the parties a reasonable opportunity to consider this judgment and to agree the terms of the final order. The latter shall include the terms of any legal conveyance which the court would intend to incorporate as an annexe to the final order. The parties are much better placed than this court to determine land boundaries and appurtenant rights. However, should they fail to do so the court will draw the final order on the basis of all information available to it and subject to any necessary further directions.