Neutral Citation No. [2007] NIQB 72

Ref:	**GILF5837**

Judgment: approved by the Court for handing down
*(subject to editorial corrections)**

Delivered:	**28/9/07**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

GERALDINE FENNELL

Plaintiff;

-and-

DAVID A LEITCH, A MERVYN ANDERSON, RONALD A ROBINSON, ERIC A W KYLE, VERA A WOODS, STEPHEN L COCKCROFT AND JAMES R PRINGLE PRACTISING AS JOHNS ELLIOTT SOLICITORS

Defendants.

GILLEN J

[1] The plaintiff in this case is a retired research psychologist. The defendants are a firm of solicitors practising as Johns Elliott ("JE"). The first named defendant is David Leitch ("DL"). The claim by the plaintiff against the defendants is couched in terms claiming damages for negligence, breach of contract, undue influence groundless accusations and violation of human rights. The claim arises out of circumstances in which in October 2002 the plaintiff instructed the defendants to represent her in litigation with the administrator of the estate of her late Uncle John B Carolan ("the deceased") in proceedings brought by the administrator of the estate Mark Tinman a solicitor in the firm of C and H Jefferson ("MT") against the plaintiff. Additionally the current claim arises out of proceedings brought by the plaintiff against MT as personal representative of the deceased for money she claimed was due to her for work and services rendered by her at the request of the deceased during the time she had cared for him prior to his death.

Background

[2] The deceased died in 1999. He had lived at 420 Upper Newtownards Road, Belfast ("the house"). He and his sister made wills in or about 1991 each leaving their estate to the other and providing that if they were the survivor it would be left to their nieces and nephew, namely the plaintiff and her brother Desmond ("D") and her sister Rosemary ("R"). His sister died in 1992 and the estate then passed to the deceased. Although there was some dispute about the manner in which the makeup of the estate was eventually revealed, in essence the estate comprised the house, valued approximately £80,000 at probate, cash of £280,000 and a share portfolio. There were two executors named in the will both of whom renounced and MT remained the sole executor. It was the plaintiff's case that she had lived with her uncle between in or about 1992 and his death in 1999 and had cared for him during that period.

[3] During the lifetime of the deceased, an order of care and protection had been made appointing the Official Solicitor as controller of his estate, the application having been made at the request of the plaintiff's brother and sister D and R. The plaintiff's view had been that this was quite unnecessary and she had been opposed to the order being made. The plaintiff's case was that she had resided with the deceased at the house in January 1992 and lived with him in a caring capacity continuously until his death in 1999. The counsel called this period "the caring years". The deceased was then in his late 80s and was suffering from malnutrition in 1992 and clearly required help and assistance. It was the plaintiff's case that she cooked meals, cleaned the house, washed clothes on his behalf and helped look after the garden. She also alleged she helped the deceased in business and household affairs, lodging cheques to his bank account and paying all household expenses. The deceased had opened a household account in the joint names of himself and the plaintiff in the Northern Bank to enable expenses to be paid. The plaintiff drove his car and transported the deceased wherever he wished to go. It was the plaintiff's case that the deceased had told her how much he appreciated what she was doing for him and that it was his wish "to make it good to her". The plaintiff alleged that she understood this to mean that he would make specific provisions for her in his will in recognition of all the help she had given him.

[4] In the course of this trial the plaintiff dealt at great length with a number of issues that she submitted were of cardinal importance both in the claim brought against her by MT and in her claim against the estate. These included.

[5] First, as already indicated, her sense of injustice that the deceased had been perfectly capable of handling his own affairs and that it was quite unnecessary for the Office of Care and Protection to have acted on his behalf. She had followed the guidelines to have this revoked but despite involving a number of solicitors, namely Mr Bell of Bigger and Strahan and Mr Allister Rankin she had not been successful. She visited trenchant criticism on Master

Hall for his conduct of the Office of Care and Protection in dealing with her late uncle. She asserted that a committee ought not to have been appointed and that whilst the medical consultants who had reported had all given favourable reports on her uncle's medical capabilities she had not been allowed to see the report of Dr Herrick until late in the proceedings brought by her against the estate .

[6] Secondly Dr Fennell asserted that her uncle had an account of £250,000 in the Isle of Man earning 5% interest. She argued that in the early 1990s she had an account in the Anglo Irish Bank in Dublin earning 9% and that her uncle wanted to transfer funds from the Isle of Man account in 1993-94. Allegedly he had completed the relevant forms and posted them. It was her case that her uncle, despite his entreaties to the manager of the Northern Bank had not been able to secure this change and had missed the close off date with the Anglo Irish Bank to have this money transferred. It was her earnest wish that the administrator should pursue this matter with the Northern Bank and the Official Solicitor, to obtain the file and papers from Bigger and Strahan and to institute proceedings. It was her case that evidence subsequently emerged which showed that the bank was "up to no good" and had engaged in meetings with her brother and sister. The plaintiff insisted that the bank was motivated to keep the account of her uncle and to do so was prepared to resort to subterfuge to prevent her uncle from changing his account.

[7] Thirdly, the plaintiff made much of what she alleged was the bad behaviour of her brother and sister. It was the plaintiff's case that they had been motivated by a desire to ensure she did not continue living with her uncle so as to prevent her claiming a greater share than her one third outlined in her deceased uncle's will. Allegations against her family, including her nephew, included physical violence. It also emerged, that at a meeting in the Drumkeen Hotel on 10 April 1992 between the deceased, her brother and sister and a representative from the firm of solicitors King and Gowdy, instructions had been given to the solicitors to write on 10 April 1992 on behalf of the deceased requesting the plaintiff to leave. It was the plaintiff's argument that the late arrival of this file, which she only saw on 19 December 2003 when a settlement had already been entered into, would have been a crucial factor illustrating the bad faith of her siblings. She also alleged that this letter had been used to her disadvantage with social workers, the police at the time of the alleged physical assault on her and the administrator MT. It was her case that during most of the caring years, when her siblings were intending to have her removed from B's house, she became the "accused". She referred to groundless accusations by her siblings, social care, Master Hall, and the Northern Bank. She claimed that the late arrival of documents in the case showed that such accusations by her siblings persisted even in the face of assurance to them by her uncle and by others that he was glad to have her presence, care and assistance.

[8] After the death of the deceased, MT was involved as personal representative in dealing with the estate. There were discussions between the plaintiff and MT about the disposal of the house. On 3 September 2001 MT wrote to the plaintiff accepting an offer for the purchase of it for £80,000 subject to contract. The plaintiff's evidence was that whilst she believed that an agreement had been drawn up whereby as part of her share in the estate she would keep the house, she accepted that there was no binding agreement about it coming to her. Moreover in 2002 a first floor wall collapsed in the house with bricks falling onto the landing and down the staircase. It was the plaintiff's belief that this altered the valuation of the house and indeed the valuer acting on behalf of the administrator had valued the house at £72,500. A subsequent dispute had arisen between the plaintiff and MT who had refused to accept the altered valuation notwithstanding the plaintiff's assertion that the new valuation of £72,500 had been made by a valuer acting on behalf of the administrator.

[9] Agreement could not be reached between the beneficiaries of the estate as to the distribution of the estate. The end result was that MT issued a Summons on 20 June 2002 under Order 85 Rule 2(3)(e) of the Rules of the Supreme Court (Northern Ireland) 1980 (see paragraph 20 hereafter) seeking, inter alia ,the title deeds of the house which he alleged the plaintiff was refusing to hand over to him and an interim distribution of funds in the estate .

It was the plaintiff's contention that she had not refused to hand over the title deeds but rather had insisted that MT deal with a number of queries before the matter of the transfer of deeds could progress further.

[10] The plaintiff had originally been represented by the firm of Brangam and Bagnall from in or about 7 June 2002.

[11] It was the plaintiff's case that while unrepresented i.e. prior to June 2002 she engaged in correspondence with MT on the question of the estate. During the case she emphasised to me that she had attempted to get legal representation but had been unable to do so. Her lack of representation at this stage was a matter that she frequently referred to during the hearing and which she felt would have influenced the judge dealing with this aspect of the case had it been made known to him . There were clearly a number of exchanges between MT and herself concerning the transfer of the house to her. Examples of these include:

[12] On 3 August 2001 the plaintiff e-mailed MT indicating that "to move things along, I am ready to accept the valuation of £80,000 as reasonable. So I'm prepared to have the house assigned to the Carolan trust at that valuation as part of my share of the estate". I pause to observe that the Carolan trust had been a trust which, the plaintiff argued the deceased had wished to set up for the purposes of academic development of developing research into the

plaintiff's work. MT had replied by correspondence of 3 September 2001 indicating that, subject to contract, he was prepared to accept her offer of £80,000 for the above mentioned property and then asked her if she was holding the title deeds or had any information as their whereabouts. In an e-mail on 14 September 2001, the plaintiff had indicated that she believed she knew where the title deeds were and expected to be able to locate them. MT continued to press her for these title deeds. It is clear that thereafter the plaintiff was not prepared to yield these title deeds up to the administrator pending him answering/dealing with a number of queries which she raised with him. These included such items as accounts from the firm of Bigger and Strahan with reference to work previously done on behalf of the deceased, money paid to a home help supervisor, the outstanding account of Mr Rankin from the solicitors firm of Cleaver, Fulton and Rankin who had been retained by the deceased, household accounts, rates, tree removal, insurance premiums and the transfer of the house. In addition there was an issue about a possible claim against the Northern Bank Limited arising out of the plaintiff's allegation that the bank had failed to deal appropriately with funds belonging to the deceased as referred to in paragraph 6 of this judgment. This failure to yields up the deed obviously impeded MT's administration of the estate.

[13] In a letter of 8 March 2002, MT wrote to the plaintiff indicating, inter alia, that her brother and sister had required an interim payment in respect of their share of the residue of the deceased's estate. The letter went on state:

> "Your e-mail does not disclose the grounds for your claim. Unless you are challenging your brother and sister's entitlement to receive an equal share of the residue of the estate I can see no reason for not meeting this request and I am now sending to each of them the sum of £100,000.
>
> You have still failed to provide me with the title deeds of the above property. They are required so that I can prepare an assent to transfer that property to you and the administration of the estate cannot be completed until these are received. If you are not prepared to comply with this request, please state the reason for such refusal so that I may take whatever further steps are appropriate to ensure the administration of the estate is completed satisfactorily."

[14] The plaintiff replied by way of e-mail of 11 March 2002 adverting to the alleged long delay of MT between early December 2001 to March 2002 in replying to her and that he had failed to fully respond to her queries which, as a residuary legatee, she was entitled to address to the administrator. With reference to the title deeds she said:

> "Regarding the title deeds for the house, there is no question of my not complying with your request. I have been waiting for you to respond to my legitimate questions before moving on to the matter, and also until I would have a solicitor to act for me, as you have requested. I have found there are aspects of the entire situation that have made it difficult for me to find representation."

[15] On 17 April 2002, MT replied in the following terms:

> "You have failed to put forward any good reason why we should not make an interim distribution of the estate in the terms previously proposed nor have you provided me with the title deeds of the property and unless we hear from you within seven days withdrawing your objection and providing me with the deeds we intend to make the appropriate application to the court. Use will be made of the correspondence for fixing you personally with the costs of the proceedings."

[16] In correspondence of 21 April 2002, the plaintiff e-mailed MT indicating that she would be occupied professionally for the next four weeks and was therefore unable to respond. She drew attention to the lengthy delays which she alleged had occurred on his part over the course of his involvement and which she said had been caused more recently by his failing to address and clarify issues that she had raised.

[17] In correspondence of 28 May 2002 MT again corresponded with the plaintiff on the basis that he had reviewed the file again. His letter included the following:

> "In relation to the first question, as previously advised, that claim (ie the claim for interest by Bigger and Strahan on their account) is being disputed. Bigger and Strahan assert that they are entitled to interest at the court judgment rate on their account since 21 September 1997. I do not consider this claim as tenable.
>
> In relation to the second matter, I have previously advised that your brother, for whom I am acting as attorney, did not see any merit in the estate incurring further expense in investigating the possibility of a claim against Northern Bank Limited. I understand

> that both Bigger and Strahan and Cleaver, Fulton and Rankin were retained by your uncle previously to advise in relation to this matter and on the basis that neither of those firms and know the Official Solicitor who was also aware of the matter, considered that it should be pursued, I see no basis for further expenditure being incurred by the estate in re-examining this matter.
>
> Neither of the foregoing are relevant in any case to the proposal which I have made for an interim distribution which was first mooted in my letter of 8 March 2001, nor to the transfer of property into your name. In that respect I would refer you to my letter dated 3 September 2001 when I first sought confirmation that you had the title deeds. You subsequently indicated that you were aware of their whereabouts but have failed to produce them despite being requested to do so on a number of occasions. You also indicated in your letter dated 4 May 2002 that you had contact with a solicitor with a view to 'formulating a claim' in respect to the administration of your uncle's estate. Since then you have not taken any steps to pursue that matter nor given any information as to the grounds for that claim. I wish to make an interim distribution as previously advised. If you are not willing to disclose the grounds of your complaint or provide me with the name of the solicitor whom you have instructed so that I can contact him or her directly on this matter, it will be necessary, as indicated in my letter of 17 April 2002, for me to apply to the court for permission to make the interim distribution and to obtain an order requiring you to deliver up to me the documents of title. In the absence of a satisfactory response before the end of the week, that application will be made."

[18] By way of e-mail of 31 May 2002, the plaintiff replied to MT protesting at the short notice given and questioning at the alleged inaccuracy of the information he held about the action against the Northern Bank.

[19] MT responded by 6 June 2002 indicating that the plaintiff had had plenty of time to deal with the matter and that they intended to issue the appropriate proceedings.

[20] Essentially then it was the plaintiff's case that she had withheld the deeds until these queries including resolution of the Northern Bank issue were dealt with because this was the only leverage which she had.

[21] MT then caused to be issued an Administration Summons pursuant to Order 85 Rule 2(3)(e) of the Rules of the Supreme Court (Northern Ireland) 1980 on 20 June 2002 in which he sought an order to distribute the estate of the deceased to Desmond Fennell and Rosemary Fennell in the sum of £100,00 each, and an order requiring Dr Fennell to deliver up to the administrator the title deeds to the dwelling house.

[22] It is clear that the plaintiff at this time instructed Brangam Bagnall & Company (on 7 June 2002). She indicated to me that she had handed over the title deeds to them. Thereafter it appears that they applied to come off record from the plaintiff, an application which was granted by Master Ellison on 4 October 2002.

<u>The Engagement of the defendants</u>

[23] In October 2002 the plaintiff had engaged the services of JE. An attendance note of 22 October 2002 seems to reflect the original instructions given. That note records the gravamen of the matters I have raised above. The note goes on to record that MT had now taken out the summons to distribute a £100,000 to each of the other beneficiaries. The plaintiff wished to take the house which although valued at £80,000 at the date of the death she considered was now worth less in light of the disrepair. The instructions from the plaintiff were to the effect that she did not want to retain the house but that she could not meet the personal representatives' requirements of moving out of the house within six weeks to allow them to sell.

[24] JE informed MT of the instructions on 22 October 2002 shortly before the hearing which had been fixed for the determination of the summons.

[25] On 23 October 2002, clearly having taken instructions from the plaintiff, JE wrote a three page letter to MT outlining the circumstances as that firm understood them to be. By this time the title documents had already been given to MT. JE proposed in that letter that the earlier agreement, which had been subject to contract, for her purchase of the house for £80,000 should now be revised to £72,500 in light of the fact that in the earlier part of that year a first floor wall had collapsed with bricks falling on to the landing.

[26] I observe that before me the plaintiff criticised this letter because it failed to record that the figure of £72,500 had been arrived at on the basis of the valuer's report from a Mr Cowan, who had been retained as a valuer on behalf of the administrator. It was her case that the failure to record the basis upon

which the valuation had been made diluted the weight of the point being made and constituted negligence.

[27] The letter went on to record the history of the plaintiff moving in with the deceased in January 1992 and the fact that she had lived continuously with him until his death in 1999. It purported to have set out all the care which the plaintiff had given to the deceased during those years. Significantly as recorded at paragraphs 6 and 7 it states:

> "6. On a number of occasions Mr Carolan told our client how much he appreciated what she was doing for him and how it was his wish to 'make it good to her'. Our client understood him to mean by this that he would make specific provision for her in his will in recognition of all the help she gave him.
>
> 7. At one time (believed to be 1995) Master Hall of the Office of Care and Protection suggested to our client that she might be paid a sum of '£9,000, £11,000 or £13,000' per annum for acting as carer for Mr Carolan. Our client did not pursue this at the time but it is clear that if she had not been there to look after him, his estate would have incurred nursing home fees in excess of these sums."

The letter went on to record in the penultimate paragraph:

> "We would hope to conclude our investigation and advise our client in a relatively short timescale. However she will be leaving the country next week to go to the USA and will not be back until Christmas. If you accept the proposal we have put for interim distributions of £72,500 and a sale of the house to our client at this same figure, this would not prejudice our client's possible claim against the estate. We believe that this claim can be addressed and dealt with fairly quickly so allowing the administration to proceed on completion."

[28] A memorandum of 23 October 2002 records MT contacting DL of JE and informing him that he would not be agreeing to any extension of time because allegedly the plaintiff had had ample time to raise this matter and had been with a number of solicitors in the past. MT alleged that the plaintiff had absolutely no defence whatsoever to his claim to distribute the estate in the manner proposed.

[29] The plaintiff then e-mailed DL on 24 October 2002 drawing his attention to some matters which had arisen during their discussion and including the following paragraph:

> "b. I would like to be clearer about what we will be asking the court, beyond possibly to approve the plan that you and I discussed i.e. regarding the interim distribution. I hope that my chance to have an airing of the injustice of my siblings' conduct is not going to be lost, given the pressure of the Friday deadline."

I observe at this stage that this reference to the alleged misbehaviour of the plaintiff's siblings towards her was to be a recurring theme throughout these proceedings.

[30] On 24 October 2002 DL wrote to the plaintiff setting out a proposal which he had made to MT namely that the house would be bought at £75,000, that a cash distribution of £100,00 be made to both her siblings and £25,000 to her. That letter included the following paragraph:

> "This would effectively kill off any claim you might have as carer because the administrator is now holding cash of £250,000 and after the distribution he would left with only £25,000. I expect most of this will be used up in costs.
>
> I do not think your claim as carer stands much chance of success on the information we have seen to date and I believe that it may be in your best interests to accept this proposal. I could attempt to include in the agreement the term that the administrator drops all claims against you, including claims for rent and costs."

This was also a recurring theme that was to manifest itself throughout the case. On a large number of occasions DL, and the retained counsel Mr McBrien BL and, for a brief period, Mr Humphries BL had all indicated that the claims for her as carer was very weak indeed. The concerns of DL and counsel about the costs which the plaintiff could incur also became a regular feature throughout the rest of this case.

So far as the hearing on 25 October was concerned, the letter of 24 October 2002 included the following:

> "If the application proceeds in absence of agreement the very best we can hope for is a short adjournment of

> one or at the most two weeks to allow you to file an answering affidavit. However, we have spoken to an official in the Chancery Office and we have been warned by her that on the last occasion this matter was before the court the judge said that he would make the order sought by the administrator unless a substantive affidavit was filed by you. Although a recent appointment as your solicitor may be regarded as a significant change in circumstances it may not be sufficient to secure an adjournment."

[31] The hearing that took place on 25 October 2002 and a further hearing on 15 November 2002, both before Girvan J (as he then was) to deal with the administrator's summons have been the subject of strong criticism by the plaintiff. Initially her criticism was pointed at the judge and thereafter at her solicitor. On 15 October 2002 Girvan J indicated he was prepared to order release of £72,500 to the siblings the deeds of the property having been delivered to the administrator by this time. On 15 November 2002 the court ordered that an interim distribution be made and ordered costs against the plaintiff.

[32] Thereafter the trial of the plaintiff's action against MT for compensation for the caring years commenced on or about 15 December 2003, resulting in a settlement of the case on 19 December 2003.The administrator had counterclaimed against the plaintiff for rental and the cost of repair to the house. The settlement was as follows:-

> "IN THE HIGH COURT OF JUSTICE FOR NORTHERN IRELAND, CHANCERY DIVISION
>
> Between: GERALDINE FENNELL, Plaintiff
>
> And MARK TINMAN, Defendant
>
> It is hereby agreed between the parties hereto that the claim and counterclaim in the above proceedings shall be adjourned generally with liberty to either party to re-enter same on the basis of the terms set out in the Schedule attached hereto.
>
> Dated this 19th day of December 2003
>
> SCHEDULE

1. The Plaintiff shall give up possession of 420 Upper Newtownards Road, Belfast on or before Friday 20th February 2004 (time being of the essence).

2. If the Plaintiff does not give up possession as aforesaid then the Defendant shall be entitled to obtain an Order for possession by consent together with such additional costs as may be incurred in relation thereto before the Chancery Judge on/after Monday 23rd February 2004 without the need to involve the Plaintiff.

3. In consideration of these terms the Plaintiff shall remove the household contents of 420 Upper Newtownards Road, Belfast on/before Thursday 19th February 2004 (time being of the essence).

4. The Plaintiff hereby acknowledges and accepts that these terms are in satisfaction of her claims against the Estate in these proceedings.

5. The Plaintiff agrees that the Defendant's costs of this litigation in respect of the Plaintiff's claim shall be borne by her, such costs to be taxed in default of agreement on the indemnity basis.

6. If the said costs referred to in Clause 5 above have not been agreed on/before Friday 20th February 2004 then the Defendant shall be entitled to obtain by consent from the Chancery Judge as soon as practicable thereafter an Order in the terms of Clause 5 above together with any additional costs arising out of any such application without the further involvement of the Plaintiff.

7. The Defendant accepts that these terms are in satisfaction of the Defendant's counterclaim herein.

8. In further consideration of these terms the Defendant agrees to pay the sum of £3375 (three thousand three hundred and seventy five pounds sterling) to the Plaintiff's Solicitors, Johns Elliot, on/before Friday 20th February 2004 (time being of the essence) in respect of the Plaintiff's claim, the said sum to come out of the Deceased's estate.

9. If the said sum referred to in Clause 8 above has not been paid on/before Friday 20th February 2004 then the Plaintiff shall be entitled to obtain by consent from the Chancery Judge as soon as practicable thereafter an order in the terms of Clause 8 above together with any additional costs arising out of any such application without the further involvement of the Defendant.

10. In further consideration of these terms the Defendant agrees to waive and/or abandon any claim against the Plaintiff in respect of any alleged variation and/or fluctuation in the share portfolio belonging to the Deceased.

11. In further consideration of these terms the Defendant agrees to waive and/or abandon any claim against the Plaintiff in respect of the present state of repair of 420 Upper Newtownards Road, Belfast.

12. Desmond Fennell and Rosemary Fennell hereby join in these terms and agree to be bound by them as if the reference to the Defendant were to them jointly and/or severally.

13. The Defendant shall seek to recoup its costs in the first place from the Plaintiff's share of the Estate and only in so far as the said share shall be insufficient to meet same shall the Defendant be entitled to seek enforcement against the Plaintiff's other assets wheresoever they may be.

14. In so far as the Plaintiff's share of the Deceased's estate has not been dissipated by the Defendants said costs then the said balance shall be paid to the Plaintiff's Solicitors, Johns Elliot, who are hereby authorized to give a valid receipt for same to the Defendant.

15. The Plaintiff acknowledges that any insurance policy in respect of the building and contents of 420 Upper Newtownards Road, Belfast is held by her on trust for the Defendant.

16. In the event that the claim and/or counterclaim in these proceedings is re-listed on the basis of these terms or otherwise then in the further event of

compliance with all the terms mentioned herein the said claim and counterclaim may be announced as settled on terms endorsed on Counsel's briefs with each party having liberty to apply.

Dated this 19th day of December 2003"

[33] The documents in the current case against JE comprised approximately 33 lever arch files containing several thousands of pages of evidence. The trial itself lasted over 16 days. I wish to make it clear at this stage that my judgment is based on a number of matters which I have chosen to illustrate my reasoning and does not attempt to set out the vast array of detailed minutiae which was present in this case.

[34] The plaintiff was unrepresented throughout this case although she did have the assistance of a Mackenzie friend. (I issued the customary admonition to this person about the confidentiality of the documentation in this case). As a result her pleadings were not couched in the manner that would have been expected if she had had the assistance of a professional lawyer. They included allegations in the writ of "groundless accusations, violating the plaintiff's human rights and undue influence "which were not the nature of the legal claim which in the event she was making. It was soon clear to me that the heart of her case was a claim of negligence and breach of contract against the defendants. I was influenced in my approach by Ashmore v Corporation of Lloyd (1992)1 WLR 446 at pp.453-4 where Lord Templeman objected strenuously to the practice of taking "every point conceivable without judgment and discrimination " and exhorted judges to control the conduct of proceedings .Lord Roskill agreed with him (at p448), saying:

> "The Court of Appeal appear to have taken the view that the plaintiffs were entitled of right to have their case tried to conclusion in such manner as they thought fit and if necessary after all the evidence on both sides had been adduced. With great respect, like my noble and learned friend, I emphatically disagree. In the Commercial Court and indeed in any trial court it is the trial judge who has control of the proceedings. It is part of his duty to identify the crucial issues and to see they are tried as expeditiously and as inexpensively as possible. ..... Litigants are not entitled to the uncontrolled use of a trial judge's time. Other litigants await their turn. …"

Consequently at the outset of the case I attempted to distil the essence of what her case was and to put it into an orderly sequence. With her agreement, and

without dissent from Mr Thompson QC who appeared on behalf of the defendants with Mr Good, I crystallised in open court five primary areas where she alleged negligence had occurred on the part of her solicitor, the defendants. They were as follows:-

[35] The defendants' preparations for the interlocutory hearings of 25 October 2002 and 15 December 2003.

[36] The defendants' conduct of these hearings and the trial commencing 15th December 2003("the action").

[37] The defendants' advice and improper pressure on the plaintiff to settle the action.

[38] The defendants' failure to properly advise her in the aftermath of the settlement and in particular as to the contents of the settlement.

[39] The defendants' decision to come off the record on or about prior to the hearing before Weir J on 23 February 2004 to deal with the terms of the settlement .

The legal principles governing this case

[40] I consider it is helpful if I set out some of the salient legal principles which have served to guide me in my determination of this case:-

[41] A solicitor, in common with other professional men, is required to exercise reasonable care and skill. The question of whether a defendant solicitor has made a mistake in any given case is usually capable of a definite answer. The issue of whether that particular mistake was negligent is a matter upon which (in borderline cases) the mere citation of authority is unlikely to be decisive. The judge must apply what he perceives to be the standard of "the reasonably competent solicitor". In Midland Bank v Hett, Stubbs and Kemp (1979) Ch. 384, Oliver J emphasised that a solicitor should not be judged by the standard of "particularly meticulous and conscientious practitioner …. The test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession".

[42] The duty of care and skill has in the leading text books been derived from Tiffin Holding Ltd v Millican 49 D.L.R. (2D) 216 ("Tiffin's case") as follows:

> "The obligations of a lawyer are, I think, the following:
>
> (i) To be skilful and careful;

> (ii) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;
>
> (iii) To protect the interests of his client;
>
> (iv) To carry out his instructions by all proper means;
>
> (v) To consult with his client in all questions of doubt which do not fall within the express or implied discretion left to him;
>
> (vi) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria."

Obviously the precise content in any case will vary according to the circumstances.

[43] A solicitor is not expected to be faultless in his judgment. Jackson and Powell on Professional Negligence 5th Edition at para. 10-080 states

"The Statement of Tindal C.J. in Godfroy v Dalton (1830) 6 Bing. 460 – approved by Scrutton LJ in Fletcher and Son v Jubb Booth and Helliwell (1920) 1 KB 275 at 280 is as follows:

> "It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a case is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that crassa negligentia or lata culpa mentioned in some of the cases, for which he is undoubtedly responsible. The cases, however, which have been cited and commented on at the bar, appear to establish, in general, that he is liable for the consequences of ignorance or non-observance of the rules of practice of this court; for the want of care in the preparation of the cause for trial; or the attendance thereon with his witnesses, and for the mis-management of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of

> such as are usually entrusted to men in the higher branch of the profession of the law."

[44] In determining whether the solicitors exercised reasonable care and skill, he should be judged in light of the circumstances at the time. His actions or advice may, with the benefit of hindsight be shown to have been utterly wrong, but as Megarry J said in Duchess of Argyll v Beuselinck (1972) 2 Lloyds Report 172 at 185: "Hindsight is no touchstone of negligence."

[45] The relationship of solicitor and counsel surfaced in the instant case. It is right to say that a solicitor, particularly in the modern era when there has been a shift in the relationship between the two branches of the legal profession, cannot abdicate his professional responsibility merely on the basis of advice from counsel. He must still apply his mind to the advice received. I consider the matter as being well summarised in the New Zealand Court of Appeal in Harley v McDonald (1999) 3 N.Z.L.R. 545 at 573 where the court stated:

> "Ordinarily the advice of counsel will be a powerful factor upon which solicitor can rely, but only if the advice comes in properly reasoned form and the solicitor is satisfied, after appropriate consideration, that the advice is tenable."

[46] Within that context, however, I believe that the principles set out in the leading authority of Locke v Camberwell Health Authority (1991) 2 Med.L.R. 249 at 254 still govern approaches to such cases. The principles were as follows:

> "(1) In general, a solicitor is entitled to reply upon the advice of counsel properly instructed.
>
> (2) For a solicitor without specialist experience in a particular field to rely on counsel's advice is to make normal and proper use of the Bar.
>
> (3) However, he must not do so blindly, but must exercise his own independent judgment. If he reasonably thinks counsel's advice is obviously or glaringly wrong, it is his duty to reject it."

[47] The result of this is that whilst the defence "reliance on counsel's advice" is now rather more limited than it was in the past it still has force. Moreover, as I will deal with shortly counsel himself no longer enjoys immunity from suit in light of the House of Lords decision in Hall v Simmons (1999) 3 WLR 873 ("Hall's case").

[48] A solicitor has a duty to advise on the legal hazards of a transaction but no more. In Dutfield v Gilbert H Stephens and Sons (1988) 18 Fam. Law 473 Lincoln J said:

> "It was the duty of the solicitor to inform and advise, ensuring that the information and advice was understood by the client. It was not part of his duty to force his advice on the client."

[49] However if the advice of the solicitor given is disregarded, the solicitor must carry out his client's instructions or else determine the retainer if the circumstances justify him in doing so. Accordingly a solicitor has a duty to warn a client of the risks. He does not perform his duty merely by reporting facts to the client and then seeking instructions. In McMullen v Farrell (1993) 1 I.R. 123 at 142-143 Barron J stated:

> "A solicitor cannot in my view fulfil his obligations to his client merely by carrying out what he is instructed to do. This is to ignore the essential element of any contract involving professional care or advice … In my view a solicitor when consulted has an obligation to consider not only what his client wishes to do but also the legal implication of the facts which the client brings to his attention. If necessary, he must follow up these facts to ensure that he appreciates the real problem with which he is being asked to deal."

[50] If a solicitor fails to give advice which is specifically requested, that is a clear breach of contract and a clear breach of duty. Claims for failure to give advice commonly arise where the solicitor fails to give advice which it was his duty to proffer, whether or not specifically requested. Similarly, there is a duty to keep the client informed with a clear explanation of the issues raised in any manner and ensure that he is properly informed about the progress including the likely timescale and costs. There is generally a duty in this context to point out any hazards of the kind which would be obvious to the solicitor but which the layman may not appreciate.

[51] One of the principal areas in which a client looks to the solicitor for guidance is in the explanation of legal documents. The solicitor owes a general duty to explain such documents to the client or at least to ensure that he understands the material parts.

[52] The conduct of litigation is in part a matter of routine and in part complex and difficult. The skilful use of a request for further information or a timely application for specific disclosure may bring the other party to recognise

the strength of the case being faced. However the solicitor is not negligent if he fails to display exceptional ingenuity in matters of tactics or procedure (see Chapman v Van Tool (1857 8A&B 396). What is required of a solicitor is reasonable competence and reasonable familiarity with the procedures of the courts in which he practices.

[53] Decisions in matters of evidence frequently involve a high degree of judgment. Witnesses on the fringe of events or corroborative witnesses often turn out to do more harm than good. Errors of judgment made by solicitors in this regard are unlikely to be held negligent. (See Godefroy v Dalton (1830) 6 Bing. 460.) If the solicitor is acting on the advice of counsel, he usually has a good defence (see Gregg and Co v Gardner (1897) 2 I.R. 122 at 126.) An apposite case in this instance is Roe v Robert McGregor and Sons Limited (1968) 1 WLR 925 where solicitors acting for contractors who erected a fence and were sued for negligence by plaintiffs who crashed into the fence, failed to interview a passenger in the car who it was reasonable to suppose would be extremely unlikely to give evidence against his friend the driver. The Court of Appeal considered that this was a reasonable exercise of discretion not to interview such a person.

[54] It may not be negligent if a solicitor fails to scrutinise all the evidence closely. In Allen v Unigate Dairies Limited (1994) Ch. 205, one of the complaints was that the solicitors failed to enquire as to the significance of a line on a plan which in fact represented a wall between their client and the noise which he claimed induced his hearing loss. As a result of the failure to carry out this task, the case collapsed at trial. The Court of Appeal held that the solicitors were not negligent.

[55] A solicitor is bound to exercise reasonable care in the conduct of settlement negotiations and in advising on the merits of any settlement proposed. Such advice often entails weighing up imponderable factors and a mere error of judgment is unlikely in practice to constitute negligence. There is no general rule that a lawyer was or was not immune from liability in advising a client to settle (see Hall's case). The question is whether the solicitor has exercised reasonable care in the conduct of settlement negotiations and in advising on the merits of any settlement proposed.

[56] As a matter of law and professional conduct a solicitor can only determine the retainer for good reason and upon reasonable notice.

[57] In any claim for negligence against the solicitor, the burden lies on the plaintiff to prove that his original claim had a real and substantial and not a negligible prospect of success. The evidential burden lies on the defendant to show that despite their having acted for the plaintiff in that litigation and charge for their services, the litigation was of no value to their client, so that he lost nothing by their negligence in causing it to be struck out. If the plaintiff's

original prospects of success were more than merely negligible, the court must come to a realistic assessment of those prospects (see Mount v Barker Austin (a firm) 1998 PNLR 493 ("Mount's" case)).

[58] I adopt what Sir Murray Stuart-Smith said in the Court of Appeal in England Hatswell v Goldbergs (a firm) ("Hatswell's case") 2001 EWCA CIB 2084 at para. 48:

> "The process for the court is a two stage process. First, the court must be satisfied that the claimant has lost something of value. An action which is bound to fail (or, as it was put in this court in Allied Maples Group Limited v Simmons and Simmons (1995) 1 WLR 1602 at 1614 has no substantial prospect of success and is merely speculative) is not something of value. It is only if the claim passes that test that the court has to valuate in percentage terms of the full value of the claim what has been lost."

[59] Most recently in Veitch and Anor v Avery Times Law Reports 29 August 2007, the Court of Appeal in England considered the issue of any loss caused by a solicitor's negligence in wrongly advising his client that he was in default under a loan agreement with his bank. The court held that a claimant client who had no chance, as in the case under consideration , of trading himself out of his difficulties even had the solicitor not behaved negligently, was not entitled to more than nominal damages against the solicitor. In that case the court decided that both on the conventional claim for damages on the balance of probabilities and as one for loss of chance, the applicant failed on both formulations since on the view of the evidence the business was already doomed to failure.

Conclusions

[60] The defendants did not call evidence in this case and thus I have determined this matter on the evidence of the plaintiff and her witnesses, matters emerging in cross-examination and the documentation before me. I have come to the conclusion that the plaintiff's case in this matter must be dismissed. My reasons are as follows.

No real or substantial chance of success

[61] I consider that the litigation upon which this plaintiff had embarked at the time of instructing the defendant had no real or substantial chance of success and at best was merely speculative. She has failed to prove that she lost the opportunity to pursue a claim that had something of value ie. that it had a real and substantial rather than merely a negligible prospect of success.

[62] The plaintiff in this action had been fully appraised of the inherent weaknesses in her case and the lack of prospect for success. Before these defendants came into the action, counsel instructed by her previous solicitors Brangam Bagnall and Company had in two separate letters during July 2002 and August 2002 set out his views of extreme pessimism about her chances of success. Mr Leitch, once the defendants came into the action, was consistently pessimistic. It is the duty of a competent solicitor to advise on the legal hazards and warn on the risks of litigation. Mr Leitch did this comprehensively and frequently. He left her in no doubt as to the weakness of her case. Some instances will suffice.

[63] By email of the 24th October 2002 Mr Leitch had written to her saying:

> "I do not think your claim as carer stands much chance of success on the information we have seen to date and I believe that it may be in your best interests to accept this proposal (*ie to purchase the house at £75,000 with a further £25,000 in cash to her equalling the £100,000 distribution to her brother and sister*)."

[64] Thereafter on 28 November 2002 he requested the plaintiff to answer a number of detailed questions about her claim which served again to illustrate at that early stage the profound weakness in her case. The correspondence made clear to her that there was no agreement in writing, there was no written reference to any such agreement, and any oral agreement was vague.

[65] At that stage the plaintiff had replied:

> "B was someone who was scrupulous about not being obligated, about paying his way, about treating people fairly. His assurances arose in the context where he was reacting/commenting on something concrete that I had done or was doing and he was telling me he would reciprocate. Except for the final one which was to enquire if he had any debts outstanding."

[66] There were no witnesses to his remarks other than compliments paid to her. A real weakness emerged in her case at Question 6 which Mr Leitch put to her in the following terms:

> "If all your uncle said to you was that he would 'make it up to you' then what exactly did he agree to pay you for carrying out your part of the bargain? If we cannot identify what the consideration was how can we

> ascertain the loss you suffered as a result of your uncle failing to keep his side of the bargain?"

[67] The answer from the plaintiff was:

> "When B expressed interest in setting up the research trust, that would have been the consideration. If that was out of the picture, I would have to fall back on my lay person's notion that the consideration would have to be calculated in terms of what Master Hall thought was appropriate in regard to my status as 'housekeeper and companion', which term he spontaneously applied to me, or, in terms of what Irish Aunts would have charged for having someone live in around the clock and do much of what I had been doing. I don't think B would have wanted such a person to be involved as closely as I was with his financial affairs."

[68] Similarly Mr Leitch posed the question "If you were aware of the contents of the will, did you ask him about the provision the will was suppose to make for you and didn't? Did you ask him whether your one third share of residue was your award for helping him from 1992 onwards?"

[69] The plaintiff's reply to this was; "No. I didn't discuss his will with B at all. Moreover I would never have thought that the one third was the reciprocation to which B referred. The three way split pre-dated these changed circumstances on my arrival on the scene. It was plain that neither of my siblings had done anything special for B for which their respective shares were reciprocation. The three way divide had to have been a mechanical operation, designed to have a will in place and leave my aunt's and uncle's affairs "in order".

[70] Mr Leitch went on to pose the question:

> "If you were aware of the contents of the will and did not raise any matters with him why did you not do so bearing in mind the agreement you had with him?"

[71] The plaintiff's answer was:

> "The answer there comes in two stages. Once B had begun to think of setting up a chair or a research trust, I was content to regard that as a promised reciprocation. Soon thereafter, however, the OCP intruded. Getting B disengaged became all consuming for B, and for me, on

> his behalf, i.e. it took top priority after day to day concerns of health and living were attended to."

[72] Mr Leitch posed a further crucial issue when he asked:

> "If the agreement was that you would be remunerated for your services why did you not ask for payment as you went along? Why wait for years and years to be paid?"

[73] The answer of the plaintiff was:

> "The shift to the research trust certainly played a part in that. However I think even if that hadn't intervened, I wouldn't have expected anyone to part with their possessions ahead of their death."

[74] Mr Leitch posed a further vital question:

> "You have already given me details of what you did for your uncle and what you also gave up in your life to be in a position to do what you did. Where the weakness lies is what exactly was promised by your uncle in return. The words 'I'll make it up to you' are not very helpful in this context. What you would now be saying to your uncle if he was available to hear it is 'You promised to give me X if I worked for you. In reliance on this promise I did the work for you. Therefore you cannot deny to me the X that you promised, and you must give it to me now. The obvious problem is what is X? What exactly can you now lay claim to? In what do you have a proprietary interest?"

[75] The reply of the plaintiff was:

> "For sure, the research trust is what I would refer to. And I would say and 'if you have changed your mind about that, then how do you propose to reciprocate'."

[76] I pause to observe that this attempt by Mr Leitch to tease out the difficulties in the plaintiff's case and possible answers to the problems reflected a professional and thorough attempt to make what was possible out of the plaintiff's case. It was clearly the product of careful thought and legal research and in my view complied with every competence that the plaintiff could have expected from a professional solicitor. It reflected the approach this firm

adopted throughout the case and, as I shall set out later in this judgment, is the antithesis of the negligence that this plaintiff alleges against them

[77] Mr McBrien was similarly assiduous and comprehensive in his analysis of the case and his legal research. He crystallised the inherent weaknesses in the plaintiff's claim on a number of occasions and his views were clearly communicated to the plaintiff. Some examples include the following.

[78] In an e-mail of 14 November 2002 Mr Leitch communicated to the plaintiff:

> "Counsel is concerned about the weakness of your case and the amount of costs you are putting at risk. He wishes to emphasise to you that he strongly advises you to instruct us now to enter into negotiations with a view to settling all matters. You need to realistic …. I appreciate that this will mean that you will not have your day in court and that you will not achieve much recognition from your brother and sister of the work you did for your uncle. ….. If, despite this advice, you wish to continue the litigation you have my assurance that we will do everything we possibly can to present as effective a case as possible. However, I would be doing you a great disservice if I did not warn you of the potential consequences of failure."

I consider this is a classic summary of the duty of a solicitor who has received, and is relying on, the advice of counsel .

[79] Dr Fennell replied:

> "I refer to the e-mail dated 14 November 2002 in which you have pointed out that counsel has advised that the cases I have embarked upon and which are imminent are weak and that I stand to lose a substantial amount of money if I am unsuccessful. I acknowledge that Counsel has advised, and that you have confirmed, that it is not sensible to put such high sums at risk. I have carefully considered your advice but, nevertheless, my instructions remain that I wish you and Mr McBrien to proceed with all litigation."

Counsel crystallised the weakness of the case in a lengthy opinion on 31 October 2002, in the course of a consultation on the same date lasting 3 hours 20 minutes, in a letter of 22 April 2003, in a letter of 14 June 2003 and finally in his direction of proofs of the 21 October 2003.

[80] Counsel essentially summarised the reasons why I have come to the conclusion that this litigation was doomed from the start. First, a contractual remedy was inconceivable given the lack of certainty as to the terms and the consideration moving from both the plaintiff and the deceased. I am satisfied no court could have come to the conclusion that there had been an intention to create legal relations.

[81] Secondly, a remedy based on proprietary estoppel had no real or substantial chance of success. Counsel properly adverted to Gillett v Holt (2001) CH 210 and subsequently to Jennings v Rice (2002) EWCA Civ 159. The distinction between the facts of Gillett v Holt and the plaintiff's case were all too obvious. In that case the successful plaintiff's evidence of assurances by his benefactor were repeated over a long period of time before witnesses and included assurances that were clearly unambiguous. The plaintiff had established that he suffered detriment in the form of selling his own home, incurring considerable expenditure on the farmhouse he lived in owned by H's company, setting up his own business on the land, depriving himself of the opportunity to better himself elsewhere and subordinating on many occasions his wishes to those of his benefactor. He had been summarily excluded from any will. In contrast the plaintiff's case in the present instance, as Mr Thompson QC properly pointed out, was "woolly" non-specific, uncorroborated and uncertain as to the nature of obligation upon which she was relying. The words used were too vague and imprecise to ground a claim.

[82] Thirdly, counsel properly considered the possibility of a quantum meruit claim. He had consulted Halsbury's Laws of England at paragraph 1160 Volume 9(1) (1996) Reissue. Mr McBrien opined that acceptance of the benefit of another's work does not of itself give rise to an implied promise to pay for it and in general no remuneration can be claimed for work done voluntarily without request even though the defendant has accepted the benefit of it and subsequently agreed to pay for it. Where an express or implied request by a defendant for the services to be rendered to him by the plaintiff has been made it may be possible to imply a contract under which the defendant promises to pay a quantum meruit for those services. However once again the plaintiff met the problem here of the uncorroborated, non-specific and vague nature of the evidence which she was attempting to produce.

[83] Fourthly counsel considered a claim pursuant to the Inheritance (Provisions for Family and Dependents) (NI) Order 1979("the 1979 Order") as amended and the authority of Bouette v Rose (2000) CH 662. Drawing attention to the well known factors set out in Article 5 of the 1979 Order, counsel properly drew attention to the following facts:

(a) The plaintiff is already a one third beneficiary.

(b) She knew of the will at all times and never asked the deceased or the Master to amend the same in her favour.

(c) She never asked for payment from the deceased or the Master.

(d) She received a carer's allowance from the State.

(e) She lived rent free in the house with household bills being paid out of the household account.

[84] Finally counsel investigated the possibility of basing her case on part performance rather than proprietary estoppel. He drew attention to Wakeham v MacKenzie (1986) 2 AER 783. Properly however Mr McBrien immediately identified the inherent dangers in the continuing uncertainty as to the plaintiff's case. Was the undertaking to provide the house for her or to set up a charitable trust or was the plaintiff's aim simply to purchase the property as part of the will. Properly counsel posed the question at paragraph 5 of his letter of 21 October 2003:

> "It would therefore be of some assistance if the plaintiff would at some point in the very near future commit herself to an irrevocable target at which I could aim."

This served to summarise well the non-specific and uncertain ambit of the plaintiff's case. Mr Thompson in my view properly described it as a "vague aspiration".

[85] In my view she was prudently advised to adopt the "high road strategy". I am satisfied that she accepted this advice at the time it was given although she failed to adhere to its implementation thereafter. This strategy confined the approach in the litigation to the issue of determining the strength of her case that the deceased had suggested he would look after her. It defined the nature of the documentation that was relevant and therefore rendered the documentation that the plaintiff now complains she was deprived of seeing or discussing superfluous to the needs of her case. The evidence the plaintiff submitted before me that she had wished to adduce in the litigation would have had no effect whatsoever on the inherent flaws in her case and would have been quite contrary to the strategy that had been determined. The alleged misbehaviour of her siblings, the suggested improper conduct of the Northern Bank, the alleged improprieties on the part of the OCP, two High Court Masters, her previous advisers and the administrator to name but some of the issues that Dr Fennell wanted to invoke, all singularly failed to address in any relevant or telling manner the essential flaws in her case. Despite the earnest endeavours of the defendants and Mr McBrien, the plaintiff refused to grasp the essential nature of the litigation upon which she had embarked.

[86] Insofar as the plaintiff challenges the outcome to the interlocutory hearings in October and November 2002 on the basis that her case was not properly put forward, once again I have concluded that there was no basis in law for her to resist the applications by the administrator Mr Tinman and she had no prospect of success in so resisting these interlocutory applications. It is inconceivable that any court would have justified her failure to accede to the administrator's reasonable request for the deeds simply on the grounds that she was unrepresented during the early discussions with the administrator, that her valuation of the house may have found some support from a valuer retained by the administrator or that the administrator had not dealt adequately in her view with the various ancillary queries she continued to raise in connection with his performance of his duties . The fact of the matter is that the administrator was entitled to the deeds and was anxious to complete the distribution of the estate. He was being wrongly delayed in carrying out that task. The queries that the plaintiff was raising with him could all have been dealt with quite separately and without impeding his duty to administer the matter. The matter of the handing over of the deeds was a narrow point and one that confined the issues which the judge would have considered relevant. Her instructions of 22 October 2002, recorded in an attendance note with Mr Leitch, indicated that:

> "She does not want to retain the house and sell it but she won't meet the personal representative's requirements of moving out of the house within six weeks to allow them to sell."

Prior to the court hearing on 25 October 2002 she had been expressly told that the proceedings were on a very restricted point and that many of the points which she wished to discuss were not relevant to the particular issue. The fact of the matter is that whilst by the time the hearing for the interlocutory application came on 25 October 2002, the deeds had been handed over, at the time the proceedings had been issued they had not and thus costs had been incurred.

[87] A judge in such circumstances, exercising his discretion on accepted legal principles, would have felt constrained to make an order of costs against the plaintiff. I find nothing in the points which she indicated ought to have been raised at that hearing which would have deflected the judge from the conclusion that he arrived at. The material that the plaintiff relied on in file D2 illustrating the exchanges between Mr Tinman and the plaintiff over a period of time and in particular the conduct of Mr Tinman which the plaintiff attacked, would in my view not have altered at all the basic principle that these proceedings had been instituted by the executor solely because the plaintiff had refused to hand over title deeds to which he was properly entitled. Whilst ultimately the question of costs is within the discretion of the judge, he must act

reasonably in exercising that discretion. Where proceedings have been brought because, as in this instance, one party has refused to accede to a reasonable request from an executor, I could conceive of no basis upon which the order for costs would not have been made.

A Binding Settlement Freely Entered Into

[88] The first reason therefore why I have dismissed the plaintiff's case is that I have determined that there was no basis in law upon which she could have succeeded and no prospect of success on the facts. The second reason why I have dismissed the plaintiff's case is because even if I am wrong in my first conclusion, I have concluded that she freely entered into an agreement to settle the litigation in circumstances where that agreement was binding in law upon her. I am satisfied that it was her intention to put an end to the proceedings after having had appropriate advice and that the agreement was drawn up in proper legal form. I have no doubt that the plaintiff had full knowledge of the contents and intended to create a legally binding agreement. My reasons for so concluding are as follows.

[89] I watched this plaintiff very carefully during the course of the trial which went on for 16 days. She was in the witness box for the greater part of the trial. I therefore had a first-hand opportunity to observe her over a lengthy period. She struck me as a highly qualified, articulate and intelligent person well versed in the art of assembling an argument and dealing with objections to it. I took the opportunity to ensure that she had frequent breaks during the course of her evidence, largely because of her years and the stress that I recognise this case must have had upon her. I am bound to say however that I never observed her to drop her guard in any way during the course of cross-examination and although at times she was clearly tired, her mind was ever alert. She often engaged counsel combatively and was never slow to insist on proper explanation where she was unsure of some proposition that was being put to her I found it quite inconceivable that, as alleged by her, she was in such a weakened state at the time of the settlement that she was unable to voice her concerns either as to her state of health or her ability to understand what was being explained to her. She marshalled her regular and lengthy submissions throughout with professorial authority. She did not strike me as a person who would be easily pressurised into agreement with something which she did not fully understand or support. Although I consider that she manifested a crippling lack of insight into the salient issues which were relevant to this litigation nonetheless I am satisfied that she fully understood the terms of the agreement against the background of the weaknesses in her case and the cross-examination which she had undergone. Whilst lay persons may often have difficulty understanding legal agreements even if it is explained to them, I do not believe this plaintiff laboured under such a disability. She is a woman firm of purpose and resilient in adversity who delivered her evidence in a direct and assured style well able to meet and

effectively deal with points raised by experienced senior counsel in cross-examination.

[90] I recognise that it is never an easy experience to be subjected to cross-examination by experienced counsel. Nonetheless, I am equally convinced that had she felt that she was in such a weakened condition as she alleges she would have brought this to the attention of her lawyers or it would have been evident to those advising her.

[91] The plaintiff further alleged that pressure was applied to her by virtue of counsel referring to the experience of Oscar Wilde in the context of the cross-examination to which she had been subjected. She also alleged that counsel had informed her that the opposition had indicated their determination to destroy her reputation among research colleagues. Counsel would have been failing in his duty had he not firmly warned her of the dangers that lay in her wake in the event of the judge not believing her. That is not to say that counsel was stating that this would be the inevitable conclusion but rather that she should recognise the danger of that possibility. It is the duty of counsel to make sure that a client is fully aware of all the possible vicissitudes of litigation. Such events must clearly cause some pressure on any client but in my view it is the one of the burdens of litigation and does not serve to sap the will of the recipient of such advice.

[92] In terms of the manner in which settlement was conducted, the plaintiff alleged to me that she did not know if she had an option to ask for a break or to get respite. Once again I found this very difficult to accept given the manner in which this plaintiff conducted herself during the entirety of this case. I do not accept that this woman would have hesitated for one moment to have told her lawyers that she felt unable to continue or that she needed respite.

[93] I thus find no evidence upon which I could conclude that the plaintiff was treated improperly by her legal advisors. I dismiss her suggestion that she was physically or mentally unable to enter into an agreement and I see no basis upon which either her solicitor or counsel should have made such an assumption.

[94] I have closely considered the terms of the settlement and I believe that they have been well drafted and are unequivocal in their content. Paragraph 1 of the Schedule states:

> "1. The plaintiff shall give up possession of 420 Upper Newtownards Road, Belfast on or before Friday 20 February 2004 (time being of the essence).
>
> 2. If the plaintiff does not give up possession as aforesaid then the defendant shall be entitled to

> obtain an Order for possession by consent together with such additional costs as may be incurred in relation thereto before the Chancery Judge on/after Monday 23 February 2004 without the need to involve the plaintiff.
>
> 3. In consideration of these terms the plaintiff shall remove the household contents of 420 Upper Newtownards Road, Belfast on/before Thursday 19 February 2004 (time being of the essence).
>
> 4. The plaintiff thereby acknowledges and accepts that these terms are in satisfaction of her claims against the estate in these proceedings."

[95] These terms are so clear that I do not accept that the plaintiff still considered that the house would still be hers as part of her share and that she did not need to give up possession of it as set out. I do not believe that she thought that the despite the clear wording, she did not have to give up the house for the period of one year that she felt was necessary to disengage. I have no doubt that a woman of her intelligence fully understood it. Her suggestion that she had in mind Mr Leitch's emails to her and the administrator of November 22 2002 and her discussions with the administrator is without any credibility in circumstances where she did not raise them at all at the time this agreement was being explained to her .What conceivable reason could she have had for withholding such comment in light of the terms before her? I also reject the plaintiff's suggestion that she did not consider whether the agreement was binding or not. Paragraph 2 unequivocally asserted that if she did not give up the possession then an order for possession by consent would be obtained from the court. The agreement is commendably short, succinct and comprehensive. I am fully satisfied that had she intended it to be part of the agreement that the house would come to her as part of her share that would have been included in the agreement. Alternatively, at the very least, she would have raised the omission with her solicitor and counsel. There is of course a duty on a solicitor to consult with his client before a settlement and he must exercise reasonable care in the conduct of settlement negotiations. I find no evidence to suggest that the defendant fell down in his duty in this regard.

[96] Similarly, the plaintiff now takes objection to paragraph 5 which read:

> "The plaintiff agrees that the defendants costs of this litigation in respect of the plaintiff's claim shall be borne by her, such costs to be taxed in default of agreement on the indemnity basis."

Once again I have no hesitation in recognising that a woman of her intelligence, and who had been ever ready in the course of these lengthy proceedings to clarify that which she did not understand, would have sought clarification if there was anything that she did not understand. In any event such was the nature of the straits in which she found herself at that stage of the litigation, I doubt that she would ever have allowed the issue of the administrator's costs to have broken the agreement.

[97] With the benefit of hindsight and a lengthy time to reflect, the plaintiff has now sought to highlight certain of the minutiae of the agreement which she was perfectly prepared to accept at the time. For example paragraph 3 made clear to her that she could remove the household contents. Now she is alleging that it was not made clear to her that the contents were coming to her as part of the settlement and that this induced her to make an error in deducting the value of the contents from the sum arrived at in respect of outlays. I believe this was a simple oversight on her part and that she was well aware that the contents were coming to her. I also consider that she was under no misapprehension as to the meaning of paragraph 2 which was to the effect that if she did not give up possession then the defendant would be entitled to obtain an order for possession by consent. For her now to suggest that she was unaware that the administrator might move to evict her by court order is disingenuous. Finally, paragraph 3 makes it unequivocally clear that not only is she to remove the household items on or before 19 February 2004 but that time was to be of the essence. Clearing a house is not the herculean task that the plaintiff now alleges it to be and I have no reason to believe that she or anybody else could possibly have thought that a two month time lapse (the agreement being on 19 December 2003) would have been inadequate.

[98] The information which she alleges arrived in documentation during the hearing, whilst it may have been of interest to her in her continuing disagreement with her siblings and the other persons with whom she has disagreed, it would not have materially altered the course of this case or the settlement. The fact of the matter is that she had been strongly advised throughout that the case was weak, , the course of the evidence had not gone well for her(see paragraphs later in this judgment), and an application for the dismissal of her case was pending before the judge . I believe that the plaintiff came to realise that the case was going to be lost. In those circumstances a settlement was not only a prudent course, but in practice her only way of achieving a resolution short of her case being dismissed.

[99] The post settlement correspondence between the plaintiff and the defendants is revealing and serves to confirm the conclusions at which I have arrived .On 23 December 2003, the plaintiff e-mailed Ms McIlvenna of the defendants raising concerns about the settlement. Inter alia she said:

> "I am really in need for the review that I have asked for. I regret I allowed myself to be persuaded to settle. So much of the material was totally new and I had so many unanswered questions. I am realising that it is possible I won't be able to have the review I asked for till the New Year. It's too distant. Quite frankly, what is bothering me a lot is my counsel putting such pressure on me and the nature of the pressure he used, which suggested there was great plausibility in the appearance of criminal activity on my part. ….."

As I will indicate when I come to deal with the trial itself, it is clear that a number of serious allegations were raised with the plaintiff during her cross-examination at the trial. These included suggestions that she had taken assets from the estate and that there was a possibility of forgery of the deceased's signature by the applicant to the extent that the trial judge Girvan J had warned her as to the dangers of the incriminating herself. The fact of the matter is that counsel would have been failing in his duty if he had not advised the plaintiff, that the course of the trial was presenting difficulties if there was an adverse finding. It was counsel's duty to indicate that there was a risk, however large or small, that there might be further ramifications in the event of adverse findings being made against the plaintiff on such matters. It would have been quite wrong of counsel to have kept these concerns to himself without confiding in the plaintiff as to the dangers. I consider that it was these matters that weighed on the plaintiff and that it is highly significant that in this e-mail of 23 December 2003 she does not refer to either her physical or mental state or to her inability to understand the content of the settlement. I have no doubt that these allegations and their possible ramifications did create a measure of pressure on the plaintiff but that is the outcome that emerges in many cases leading to settlement. Advice from counsel, properly couched and thoughtfully delivered, is often unpalatable but is nonetheless necessary. That it creates a pressure on the client is inevitable. I consider that is what has happened in this instance. Once the pressure of imminent court proceedings were withdrawn, as often happens, the client has reflected upon her decision and sought to change it.

[100] In the event of course this plaintiff lent her imprimatur to the settlement even after this period of reflection and discussion. In correspondence of 29 December 2003 the defendants had written referring to her regret about the settlement. The second paragraph recorded:

> "In view of the regret you have expressed in allowing yourself to be persuaded to settle, we contacted the defendants' solicitors and asked them to put the proposed terms of settlement on hold. They have

replied to us this morning stating that the settlement is binding and that it is not open to you to go back on its terms. If we do not confirm your agreement on this by close of business tomorrow they intend to apply to the court for a formal order in the terms of the settlement.

The legal representatives present from our office do not believe that counsel's conduct was inappropriate in any way. In their opinion he fully explained the position to you and informed you of the opinions that were available. Both he and our representatives emphasised that they did not want you to settle against your will. There is however nothing wrong with counsel urging you to settle the case if he believes (as he clearly does in this instance) that it is in your best interests to settle, nor is there any inconsistency.

The claim against your late uncle's estate depends almost entirely upon your oral testimony. When the case was adjourned on Friday 19 December, after your having had five days in the witness box, counsel felt he had to draw to your attention that in his opinion the oral evidence given by you would have created a negative impression with the court and would have been unlikely to lead to a successful outcome to your claim.

Senior counsel for the defendant based his preliminary submissions to the court on your oral evidence. In Mr McBrien's view the defendants' counsel was able to make the case fairly easily that in various instances your version of the events was improbable. As there are no surviving witnesses to your conversations with your late uncle the defendants' counsel was entitled to comment on how he saw your dealings with third parties such as bank managers, solicitors and court officials. It is Mr McBrien's assessment of this evidence and of the points made by opposing counsel that the court will likely have formed a view that is unfavourable to you.

Notwithstanding the view that Mr McBrien took of the oral evidence he argued strongly that the court should refuse the defendants' application for a

> direction that the defendant had no case to answer. The legal representatives from our office heard you compliment counsel on the submissions he made to the court on your behalf.
>
> As regards the terms of settlement, our representatives also understood you to compliment Mr McBrien on the manner in which he conducted the negotiations on your behalf. …..
>
> If you decide to proceed further with the case the first hurdle which has now to be overcome is that the settlement may already be binding upon you. If we succeed on this point the next is the possibility that the court, in response to the submissions put by defendant's Senior counsel, will direct on your evidence the defendant has no case to answer. The consequence of this is that your claim will be dismissed with all costs awarded to the defendant and there would be no further opportunity to negotiate terms. The defendant's counterclaim would also proceed against you.
>
> If however you were also to succeed on the second point and the case proceeds Mr McBrien has advised that it could last for another two weeks by the time all the other witnesses give their evidence. In those circumstances we would need a further substantial payment from you so that we will be in a position to pay counsel when the case is over."

[101] In cross-examination before me the plaintiff admitted that she did recall complimenting Mr McBrien once on his submissions although she did not recall complimenting him on the negotiations. In any event it was the plaintiff's case that subsequent to this letter, she had discussed the matter further with Mr Leitch during which she had asked him if she had lost her chance for the new information to be put before the court and he told her that the moment had now passed. What is clear is that on 31 December 2003, the defendant wrote to the defendant's solicitors, inter alia, in the following terms:

> "We can confirm that our client is willing to agree to be bound by the terms of the settlement reached on 19 December 2003 and accepts that the condition precedent has now been fulfilled in that Rosemary Fennell has signed the terms and that you have

> authority as Desmond Fennell's attorney to sign on his behalf."

[102] Whilst the plaintiff said that she had no recollection of this letter she did agree the settlement despite being offered the alternative course of proceeding on. Interestingly, the final paragraph of that letter recorded:

> "The above is on your undertaking to provide us with a copy of the deceased's request to the Isle of Man dated 4 February 1994 for our records in accordance with our telephone conversation earlier today."

This clearly indicated to me that a discussion had taken place between the plaintiff and the defendant on which she agreed to be bound by the terms of the settlement on the basis that the documentation of 4 February 1994 would be returned. Once again this decision was clearly taken at a time when she had every opportunity to press the case that she is now making that she was unfit mentally or physically to engage in the settlement and that she had been improperly pressurised into so doing.

[103] If further confirmation of her determination to conclude this litigation was missing, it is provided in correspondence of 2 January 2004 written by the plaintiff to the defendants' solicitors. In the course of that letter in the second paragraph she stated:

> "As plaintiff, I would like to say that I would prefer the case to continue, because the events that my case comprises raise important issues of public interest, some of which have become apparent. It is regrettable not to have the yet more complete picture that would emerge, given likely witnesses to come. If costs were not an issue, it would be my choice to continue the case to its conclusion. If there is a forum where all the circumstances can be investigated in the public interest, I am ready to participate."

That letter is clear indication that the costs were a vital factor in her decision to settle. I have no doubt that that was a perfectly proper consideration to arrive at given the path that the case had followed and the advice she was being given about the outcome.

[104] Thereafter correspondence was exchanged between the plaintiff and Mr Leitch/Ms McIlvenna in which the events of the court case and the allegations made by Senior counsel for the defendant were raked over yet again.

[105] On 16 January 2004 Mr Leitch e-mailed the respondent again making clear the terms of the settlement. Explicitly he said in the second paragraph:

> "By the settlement it was agreed that you would give up possession of the house to the personal representative. His reason for acquiring possession was that the house was an asset of the estate and had to be sold for the purpose of administering the estate in accordance with the terms of the will. You would not have agreed to give up possession if you were still intent on pursuing a claim to legal ownership of the house, a claim which Counsel was obviously satisfied could not possibly succeed in law on the evidence available, albeit that you had a moral claim to an interest in the property."

[106] By an e-mail of 2 February 2004 the plaintiff followed up further exchanges indicating now that one of the options she wished to consider was "continuing, or re-negotiating a settlement of the case on grounds that I was pressured and not fully informed; given what is now plain about my siblings' conduct, I should not have agreed to the settlement as it was thrust on me, including paying costs at indemnity rate, whose implications weren't explained to me."

[107] In cross-examination she indicated that the new information to which she was referring included the report that she had seen of Dr Herrick on her late uncle's condition at the time the OCP intervened, the revelations that had emerged about what her siblings had been saying about her uncle's lucidity and the discussions the deceased uncle had had with the Northern Bank. She claimed this was all new information which she did not have before. Answering counsel, she said that this new information meant that instead of going in "as the accused", she could have been composed and handled things better. It was her case now that Mr McBrien should have asked for the case to be adjourned to allow her to consider these documents. Mr Thompson pressed the plaintiff as to what possible difference this would have made to the thrust of her case. Her response was that she would have discussed these matters with her legal team and this would have given her an opportunity to discredit her accusers. These answers displayed an alarming lack of insight on the part of the plaintiff into the real issues that were before the court in this case. It was to be a recurring theme in the case that she was overwhelmed by her sense of injustice against her siblings which blinded her the real issues that were to be determined in the litigation. The evidence before me was that she wished now that she had been given the opportunity to express her criticisms not only of the administrator, but also Master Redpath whom she accused of using the word "stealing" in the context of her uncle's assets, Master Hall whom she accused of "changing the goal posts", the Northern Bank whose involvement

she allegedly now understood, the Office of Care and Protection who had taken control over her deceased's uncle's affairs, the solicitor Mr Bell who allegedly had charged fees improperly she alleged and given negligent advice in the past and of course her siblings.

[108] In correspondence of 2 February 2004 Mr Leitch again confirmed that the action was now settled and denied that any pressure had been applied to her. He also again drew her attention to the futility of her complaints against the various persons mentioned in paragraph 106 above.

[109] Thus having read all this correspondence, I became ever more firmly convinced that the case which the plaintiff now makes that she did not understand the agreement however plain the words were, and that she was mentally and physically unfit, constitute clear examples of post event rationalisation of a decision to settle which she now regretted. I am fully satisfied that the settlement made in this case was freely entered into to and is legally binding. I see not a scintilla of evidence of negligence on the part of the solicitor, or for that matter counsel, in the circumstances leading up this settlement.

Negligence and Breach of Contract

[110] The third broad reason why I dismiss this case is because I find no evidence of negligence or breach of contract at any time on the part of the defendants during the course of these proceedings. Although I have touched on this aspect of the case in the earlier paragraphs, I shall now summarise my conclusions on the lack of any negligence or breach of contract throughout the various aspects of the claim.

[111] Wisely the defendants in this instance had obtained the advice of counsel throughout the proceedings and had arranged a lengthy and detailed consultation with him at the outset. This advice had come in appropriately reasoned form and the defendants were properly satisfied that it was tenable. In so far as the defendants have been guided by experienced counsel, as I hold they have, they have not acted negligently or in breach of contract .It has served to afford ample protection against the thrust of this case.

[112] The strategy that was adopted in this case on the advice of solicitor and counsel has been termed the "high ground" strategy in this hearing. It was to adopt the high ground by confining the issue to one of determining the strength of the plaintiff's argument that the deceased had suggested he would look after her in consideration of the caring years. This strategy obviated the need to visit the details of the family quarrels and disagreements, and the minutiae of her disputes with the Northern Bank, the Office of Care and Protection, social workers and all the solicitors to whom the plaintiff had taken objection in various forms. It rendered such steps irrelevant and unnecessary

to the task in hand. It allowed her to grasp the moral high ground of presenting the case on the basis of the caring years that she had spent looking after the deceased. Not only does this strategy avoid the necessity of challenging the veracity and professionalism of a large of number of witnesses, which in itself might have triggered them being called to give evidence against her, but it narrowed the issue down to a net point with an attendant saving on costs and length of the trial should she prove unsuccessful. Apart from being strategically a prudent course to adopt, it was frankly the only reasonable course so as to afford her any opportunity to establish her case that her uncle had agreed to recompense her for the caring years. The other extraneous matters were wholly irrelevant to this strategy.

[113] In this context it is important to note that a solicitor's duty is to exercise his professional judgment on how to set up and conduct his client's case on the basis of the instructions he has been given. Of course if the advice of the solicitor is disregarded, the solicitor must carry out his client's instructions or else determine the retainer if circumstances justify him doing so. I reject the plaintiff's assertion that she never received a definition of this strategy. I have no doubt that it was explained fully to her by counsel and that she was prepared to authorise it from the outset. Principle and pragmatism could not have demanded otherwise. The fact of the matter is that irrespective of the strategy her case as it appeared in the pleadings rendered all of this extraneous material irrelevant. I find nothing that is negligent about the advice given to adopt this strategy and in my view it was well within the parameters of reasonable and prudent advice given to her by both solicitor and counsel.

[114] Why then has this plaintiff sought so earnestly to accuse them of negligence and breach of contract? Sadly, throughout the previous proceedings and the instant case, this intelligent woman has allowed herself to be overwhelmed by the sense of injustice which she harbours against her siblings and other professionals who either took their part or who did not agree with her. Her e-mails, her letters and her evidence have been regularly punctuated with her inability to grasp the realities of the litigation upon which she had embarked, to concentrate on the issues which the court was to determine and to set aside her obsession with her belief that she was an accused wronged at the hands of the her siblings, social workers, doctors who had examined her uncle manly years ago at the time of the OCP intervention, Master Hall, Master McIlwrath then the Official solicitor ,the Northern Bank, various solicitors and the administrator. The current defendants have been the last in a long line of people who have felt the weight of her opprobrium. This reference to her being the "accused" surfaced regularly throughout the case not least in her final notes of the summary of her case made as late as 24 May 2007. It has served to cloud her judgment throughout the entirety of these proceedings and to blind her to the issues which required focused consideration.

[115] On numerous occasions her correspondence betrayed what amounted to a virtual obsession with the historical injustice she felt that her siblings had imposed on her. One illustration will suffice. In an e-mail 4 April 2003 to David Leitch she wrote:

> "I would like to address two topics here:
>
> 1. My concern about how we can address prejudicial views that are likely to present WRT myself;
>
> 2. Specifically to ask if there isn't any way to formalise/draw attention to/seek redress for my siblings' over the top campaign of vilification waged against me, the injustice done to B as a result, their apparent success in enlisting OCP on their behalf to secure their ends, and deprive me of fair return for my assistance to B.
>
> I remain troubled about prejudicial views of women, carers and me. Women – possibly viewed as under occupied, living off some man, available for useful work in the form of looking after someone who needs looking after. Carer, someone whose services are available for free to do unchallenging and/or menial tasks as needed, such as sitting by someone's bedside watching for unspecified signs and symptoms to be relayed to medical personnel. Me, as a result of constant campaigning by my siblings, someone up to no good, foisting herself on an uncle who didn't want her and didn't anyone living with him.
>
> I want to find some way directly or indirectly to combat such views."

[116] Later in that same correspondence the nub of her difficulty in understanding the true nature of the proceedings in this case was summarised when she said:

> "2. Highlight my siblings' groundless attack on me. I am greatly troubled by the apparent success of my siblings' effort to put me in the wrong with everyone involved in this situation. I am looking to this litigation to present an affirmative view of my role as carer, and the carer role in general. I don't want to appear to beg for recompense, but to take

> every opportunity to put forward the affirmative case that underlies respect for the carer's contribution, and to call attention to the outrage that my siblings perpetrated on my uncle and on me, enlisting the system to help them to do so.
>
> Overall I'm depressed and tired at always being made to be in the wrong. I don't understand why my siblings outrageous conduct is irrelevant. They succeeded in making it impossible for B to change his will to give expression to the changed circumstances. They tried to prevent the circumstances changing, and they failed in that. But they succeeded – at least up to now – in ensuring that the changed circumstances wouldn't interfere with their designs on B's estate. It is their role in ensuring that the will wouldn't be changed that I see as relevant."

[117] I am satisfied on the evidence before me that on numerous occasions Mr Leitch and Ms McIlvenna, carefully and skilfully , explained to the plaintiff the necessity to focus her attention on proving her case and not on the irrelevancies that arose out of the unhappy past from her point of view. But all to no avail. I consider that she was so immersed in the past that even the passage of time has failed to lend focus to her understanding of the key issues in the litigation. I therefore find no negligence in the strategy that was advocated by the defendants and which, in my judgment, was clearly accepted by the plaintiff at the outset of the case but which she failed to come to terms with thereafter.

<u>The interlocutory hearings</u>

[118] I find no negligence in the conduct of the interlocutory hearings of 25 October 2002 and 15 November 2002 either in terms of the preparation for the hearings, the advice given concerning the hearings or the conduct of the hearing . Once again the plaintiff betrayed an inability to grasp the salient legal issues under scrutiny in these matters. No representation on her behalf was going to change the fact that she had wrongly refused to transfer to the administrator the deeds of the property in question and had thereby impeded his administration of the estate. The case was simply unanswerable. I have no doubt that she failed completely to understand that the mere fact that she was unrepresented did not justify her impeding the path of the administrator. In any event given that much of the correspondence, which was before the judge at the interlocutory hearing , had been addressed to her home, he in all probability was aware that she was unrepresented during part of the period. She was entitled to argue that MT had imposed an unreasonable timescale for handing the deeds over and that she had been seeking information from him before delivering possession up provided the information sought was relevant

to the issue. However the fact of the matter was that such points in this case were not telling, were never going to be influential and the court was perfectly entitled to come to the conclusion that it did.

[119] These matters were clearly pointed out to her. For example in the e-mail of 7 November 2002 from Mr Leitch to Dr Fennell, dealing with the first interlocutory hearing, Mr Leitch recorded in the third paragraph:

> "You had no right to retain possession of the deeds. However we will draw the court's attention to the fact that Tinman imposed an unreasonable timescale for handing them over and that if he had given you the information you required the need to bring proceedings for possession of the deeds might not have arisen because you would then have handed them over to him."

[120] On 28 November 2002, again Mr Leitch e-mailed Dr Fennell setting out in unequivocal terms precisely why the proceedings for the deeds had been properly brought and the costs to date incurred. The e-mail records:

> "Tinman wrote to you on 1 March 2002 (a copy of the letter was before the court) stating that he intended to make an interim distribution. You replied on 4 March informing him that you were contemplating making a claim against the estate and that you had taken legal advice about it. You did not make the grounds of your claim known to Tinman. He could not therefore judge whether the claim might succeed and if so what provision he should make for it. Faced with an unspecified claim for an unascertainable amount Tinman could only distribute and not be at risk from action if he acted with the court's authority. He therefore wrote to you on 17 April 2002 giving you seven days to let him have details of your claim and warning that if you didn't do it he would bring proceedings and seek to recover the costs from you. He had to do this to bring matters to a head. You replied on 21 April asking for an extension of four weeks. Tinman agreed and by letter dated 28 May he again renewed the threat of court action and eventually issued proceedings on 20 June 2002.
>
> Mr Justice Girvan decided that the proceedings were properly brought. They were not premature.

> Consequently he made the order for costs against you as the unsuccessful defendant."

[121] I regard this as a full and proper summary of the events in question. The fact that she was unrepresented during part of the discussions with Tinman, the failure in her mind to receive appropriate answers to the questions (which were not connected with the question of the deeds of the house), the issue of whether or not an unless order had been made by Girvan J at some stage, the delay of Tinman for a period in answering her letters , the incorrect suggestion in court before Girvan J by the administrator's counsel that the executor had been trying to get her out of the house and that she was resisting giving up possession, the agreement between her and Tinman to sell the house to the plaintiff once a price had been agreed, were all wholly irrelevant to the essential point that by virtue of her failure to hand over the deeds of the house when properly requested to do so by the administrator, she had precipitated the issue of proceedings which had incurred costs. That the value of the property had apparently changed because of some damage that had occurred (and where the valuer on behalf of the administrator had indicated a reduced value) may have been relevant to the dispute between the administrator and Dr Fennell as to what was the appropriate valuation of the house, but it still did not justify her refusal to hand over the deeds of the house in the absence of a properly drawn up and legally binding agreement that she should be given the house.

[122] In what I consider to be an exemplary instance of a patient and conscientious solicitor giving of his time and expertise to ensure that a client fully understands a situation that she appears not to have grasped, he repeated an explanation of the situation again in a draft e-mail of 26 November 2002 couched, inter alia, in the following terms:

> "Dear Dr Fennell
>
> I will try to deal first of all with the matter of the costs awarded to Mr Tinman which you must pay once the amount has been agreed or in default of agreement determined by the Taxing Master.
>
> All of the facts were placed before the court. It is clear from Mr Tinman's letter to you of 13 September 2001 that he was seeking the deeds for the purposes of the administration of the estate. As personal representative the deeds belong to him, like any other assets of the estate, and it was unlawful to deny him possession of the deeds. I can understand that you wanted to hold on to the deeds in order to use them as a lever to obtain information and advice from

> Mr Tinman but even if he failed to answer you this did not make your unlawful retention of the deeds lawful. You may have had other means of dealing with Mr Tinman, perhaps through the courts, but you ought not to have retained possession of the deeds.
>
> Mr Tinman wrote to you on 17 April 2002 (a copy of the letter was before the court) giving you seven days to deliver the deeds to him and warning that if you did not do so he would bring proceedings and seek to recover the costs of the proceedings from you.
>
> You replied to this letter on 21 April asking for an extension of the seven day period to four weeks. Mr Tinman agreed and by letter dated 28 May attempted to reply to your queries. By the same letter he renewed the threat of court action to recover the deeds and to fix you with the cost. You replied on 31 May asking for a further extension of time. Mr Tinman replied on 6 June 2002 saying in effect that you had had ample time to comply with his request for the deeds and that he was going to issue the proceedings. He eventually issued them on 20 June 2002.
>
> The court was aware of all of this and had copies of the correspondence between Mr Tinman and yourself exhibited to it. Mr Justice Girvan concluded that the proceedings had been properly issued and that as the deeds were only delivered to him after the issue of the Summons Mr Tinman was entitled to an order of costs. Obviously he concluded that you could and ought to have handed over the deeds much sooner and if you had sooner the proceedings would have been unnecessary. The estate should not therefore be penalised by bearing the costs of the action."

[123] Despite the clarity of this explanation, to this date and certainly during the course of the instant proceedings, Dr Fennell has refused to accept this analysis of the law. Sadly it reflected an attitude of mind that was impervious to an argument that was contrary to her own emotional commitment to the sense of injustice that she feels she has suffered over the years.

[124] A similar impasse arose over the question of Dr Fennell's insistence that the house should come to her irrespective of the fact that no binding agreement had been made between herself and the administrator that this should happen.

No agreement had been arrived at between the two of them as to price. Dr Fennell seemed to believe that if the unreasonableness of Tinman's approach, as she deemed it to be, was drawn to the attention of the judge it would have altered his view on costs. Once more she failed to understand that it was not the role of the court to make MT accede to her views on the valuation of the house. It was clearly explained to her by Mr Leitch in a draft e-mail of 26 November 2002 in the following terms:

> "I will now try to clarify the position regarding the ejectment proceedings. As I recall it, the most you are prepared to offer for the property was £72,500 before the threat of ejectment proceedings was made. When I asked you to confirm that you were not prepared to increase your offer I was trying to ascertain that this was your final offer. I am not a valuer and I do not know the property. I do not know therefore what it is worth and consequently I cannot make any recommendation as to the price you should offer. I would agree with you that simply confirming your offer at £72,500 will not stop the issue of ejectment proceedings. An offer of £80,000 might if you proceed promptly with the contract. I had hoped at one time to negotiate something in between £72,500 and £80,000 but I am afraid this is unlikely now unless it is part of an overall settlement. An negotiated settlement would only be possible if you were to forego your claim against the estate or at least reduce it to a fairly nominal sum.
>
> Mr Justice Girvan is equally not a valuer and will have no idea what the property is worth. He will not even be interested in prompting a rational discussion between Mr Tinman and yourself as to the value of the property. The court has a supervisory role in relation to administration of estates and the personal representative holds a document (a grant of administration) bearing the seal of the court which constitutes the authority of the court to act. What Mr Justice Girvan was in fact saying to Mr Tinman was 'if you cannot sell to Dr Fennell at a price you are prepared to take for the property then you ought to obtain vacant possession and sell on the open market, but do not hang about any longer'.
>
> The fact of the matter is that Mr Tinman has no obligation whatsoever to sell the property to you and

> you have no right whatsoever to buy it. Indeed Tinman knows that however much he is disposed to do it he cannot sell to you without first clearing the price with your brother and sister. Unless he does this he leaves himself open to an action by them that he had not realised the property at the best property. If he goes to the open market he knows, whatever the price, that his sale is most unlikely ever to be successfully challenged by any of the residuary beneficiaries, yourself included."

[125] I consider that this is a competent and crystal clear analysis of the situation but once again, even at the date of the instant hearing, I do not believe that Dr Fennell was prepared to either accept or understand his advice because it runs contrary to her feeling of injustice as to what has happened. I am satisfied that these interlocutory proceedings were properly conducted by the defendants who it must be remembered had only lately come into the case and who mustered on behalf of the plaintiff all reasonable arguments that were relevant to the issues before the court .

[126] The plaintiff ,in order to prove part of the financial part of her case, called Mr Tinman to give evidence before me. It is unnecessary for me to go into the detail of to his evidence, particularly in cross examination by Mr Thompson, save to say that it served to underline the conclusions I have reached about the justifiable reasons why he had been obliged to issue proceedings to recover the deeds .

[127] I find therefore no evidence of any negligence or breach of contract on the part of the defendants in the course of any matter relevant to the interlocutory hearings of 25 October 2002 and 15 November 2002.

<u>The hearing 15 December 2003-19 December 2003</u>

[128] I have determined that there was no negligence or breach of contract on the part of the defendants in this aspect of the case. A note had been kept of the hearing by Colette McIlvanna. This formed the basis of the cross-examination of Dr Fennell by Mr Thompson in the instant case. It is necessary for me to deal at some length with the contents of this hearing given the detailed criticism of the proceedings made by the plaintiff. Having heard Dr Fennell's evidence I drew the following conclusions:

[129] Dr Fennell made a general criticism of the preparation, opening and conduct of this hearing by Mr McBrien. She felt a case could have been made more strongly concerning her allegation that the two beneficiaries had "ganged up" on her to prevent her getting her due returns. She indicated that she

would have liked to have had his opinion also whether the case in this form could have been pursued. She could not recall if she had raised this with him at the consultations which had taken place prior to the trial but she was certain that she had raised it at least with her solicitors.

[130] Inter alia, the notes record Mr McBrien opening the case on the basis that one third provision of the estate, as per the will, was unfair because it took no account of the fact that Rosemary and David "did nothing of a caring nature whereas Dr Fennell had made personal sacrifices". She was not satisfied that the debt had been met by the legacy of one third. When the judge had intervened to indicate that for her to succeed there had to be some legal basis, Mr McBrien had put forward the tripartite approach of proprietary estoppel, contract and quantum meruit. He emphasised that the will bequeathing her one third of the estate had predated the care carried out. Dr Fennell said that that case was in the narrowest sense her own case. In my view this was a perfectly appropriate manner in which to present her case given the strategy that had been agreed.

[131] In the course of her evidence-in-chief before Girvan J Mr McBrien had elicited, inter alia, all the tasks that the plaintiff had carried out for her uncle, the build up to her moving in to stay with him in 1991, and the use of phrases "doing the right thing by her" and "ensuring her he would see her right".

[132] Evidence had emerged during the hearing about the proposal to set up a research trust. The plaintiff had said that she was pleased about this and considered that that was "doing right by her." Originally the idea about the trust had been that the money in the Isle of Man account namely £500,000 was to set up a chair endowing buildings. The deceased had not liked the buildings idea. He preferred an addition to knowledge. Dr Fennell had made the point that in the early days Master Hall had indicated that there would be more control if this was a trust rather than an endowment and that the deceased had seen the sense of this. From then on he had spoken in terms of a trust. The discussion about this had occurred prior to the intervention of the OCP. When the judge had asked the plaintiff about getting something out of this, she had replied that she was pleased that a fund would be available to support the research. In terms of benefit of herself, she saw that her role would have been to announce the idea and the proposals and thereafter vet the proposals and the grants. The trust was to be called the Carolan Trust.

[133] At the hearing the judge had discussed the nature of the representation made to Dr Fennell and had questioned her as to whether it was a "vague and imprecise concept". According to the note Dr Fennell had accepted this proposition from the judge.

[134] On the opening of the second day, the judge had again engaged Mr McBrien on the legal basis for the claim. Legal principles had been discussed

including the concept of "equity does not perfect an imperfect gift". Mr McBrien had indicated that reasonable recompense would be on a quantum meruit basis. Mr McBrien made it clear that the plaintiff had had a professional life which had to be adapted and that she had suffered a true commercial loss. The plaintiff was seeking to do better therefore than the one third which she was entitled to under the will. The judge had raised the question of the power of the OCP to have granted money to the plaintiff. Counsel had accepted that no claim had been set out in the statement of claim but the report of Jackson Andrews financial adviser was introduced with a figure of approximately £300,000.These judicial interventions were early indications of the uphill struggle this plaintiff was facing and I am sure they would not have been lost on someone as astute as this plaintiff.

[135] Part of the plaintiff's claim, both in the hearing in 2003 and before me, arose out of the circumstances in which her uncle had come to allegedly authorise a letter from King and Gowdy solicitors to her of 10 April 1992 in the following terms:

> "Dear Dr Fennell
>
> Mr Carolan expresses his thanks and appreciation for the help and care you have provided during the past three months.
>
> However, as he told you in mid-February, he would prefer to live on his own and he believes that this would be feasible. Since you did not act on his request to you to leave, he now wishes to make clear that he desires you to leave the house, with all your effects, by 6 pm Monday 13 April 1992.
>
> Furthermore he wishes you to return to him through myself all documents belonging to him and any copies which you may have made. You should deliver them to my office not later than noon on Monday 13 April 1992. We enclose Mr Carolan's letter of authority.
>
> Mr Carolan regrets that he has found it necessary to communicate the above in this matter. Your co-operation would be appreciated as he does not wish the matter to develop into formal proceedings."

[136] It was the plaintiff's case that she had not seen all of the King and Gowdy file which contained references to a meeting at the Drumkeen Hotel on 10 April 1992 between her Uncle Desmond and Rosemary Fennell and Ms Anderson an assistant solicitor from King and Gowdy. That note recorded:

> "I spoke privately to Mr Carolan. He wants Geraldine Fennell out of his house and has told her so. He wants a letter from us delivered at noon on 10 April telling her to get out. The terms of the letter were agreed with Mr Carolan, also terms of letter instructing Geraldine to deliver papers to us.
>
> Dr Rosemary offered to take Mr Carolan to Oxford for a few days from tonight or tomorrow leaving Oisin to hold the fort at 420, but Mr Carolan was thinking of staying himself to supervise the eviction."

[137] Dr Fennell described this as "new and startling information". She claimed that she was surprised to hear Mr McBrien introduce snatches of this matter on the first day of the hearing. She only saw the entire file post 19 December 2003 when a settlement had been entered into. She drew attention to the fact that there was present on the file a draft by Mr Desmond Fennell of the letter that was to be sent to her allegedly emanating from the instructions of her uncle.

[138] I pressed Dr Fennell as to the significance of the King and Gowdy file and its contents on her case. Her claim was that had the strategy for the case been different, and had appropriate use been made in her case of the circumstances contained in the King and Gowdy file, this would have added to the context of harassment by her of her siblings which she wished to put forward. She claimed that this supported the case she was making, that her siblings were determined to get her out of the house. Her argument was that given that she had no witnesses to the undertakings by her uncle and had no documentary evidence, this material would have shown that her siblings were aware that the uncle was just and fair. It would have illustrated the lengths to which they were prepared to go to get her out of the house to ensure that she was not in a position to achieve a just and fair recompense from such a man as her uncle. This approach again betrayed her determination to put the conduct of her siblings to the fore irrespective of the legal issues which surrounded her case.

[139] Evidence was given during the December hearing directly about her allegation that subsequent to this letter being delivered, her nephew had come to the house at 420, and ushered her brother into the living room. The nephew then had lifted her and "dumped her in the drive". In the afternoon the plaintiff had spoken to Ms Anderson at King and Gowdy, was told that she had had handwritten wishes of her uncle and that this was source of the message. The police had subsequently become involved in the situation at the house when she had returned when she saw her brother and nephew taking equipment apart and putting it into flimsy cartons. She went on to relate how

she had started to go to Dublin but had then gone back accompanied by the police to collect some documents. As events unfolded, she subsequently returned to the house after about two weeks.

[140] The essential point that Dr Fennell continued to make on this matter was that the judge had not been informed about the events that had occurred in the Drumkeen Hotel. Accordingly it was Dr Fennell's case that the judge was missing vital information namely, about her brother drafting the letter, and the subsequent use that the brother made of that letter including showing it to police officers and social workers to promote his cause at the expense of the plaintiff. In her view had that evidence been mounted before the judge, it could have led to a different view of the siblings and the lengths to which they would go to establish their case and thus frustrated their attempt to minimise her role.

[141] I do not consider that further reference to this file would have materially advanced her case and solicitor and counsel clearly made an informed decision about the extent of its relevance .The notes of the trial make it clear that the judge intervened on a number of occasions to indicate his view that the issue of the plaintiff and the siblings was a side issue to the trial and that the fine detail was irrelevant. Dr Fennell stressed that whilst this might have been a high road strategy – she claimed she never got a precise definition of this but conceded that" it was a narrow form" of her case – it amounted to a pale shadow of what should have been said at the hearing. I concluded that apart altogether from her almost wilful refusal to acknowledge the wisdom of the advice of her solicitor and counsel as to the relevance of this issue she also refused to recognise the clear indications from the judge that it was not the matter that he was there to determine.

[142] It is clear from the notes of the hearing, that the judge intervened to ascertain some more details of the services that the plaintiff carried out for the deceased including a typical day etc. The judge has clearly been interested in how the household account had been set up and the manner in which the OCP had related to these issues, mentioning the possibility of recompense from the OCP. The judge questioned the relevance of the plaintiff's criticisms of members of the OCP and Master Redpath. Girvan J had pursued the role that the OCP could have played in relation to the finances. He queried the plaintiff as to whether she knew that the OCP dealt with finances, that her uncle could not set up a trust without the OCP and that if she needed provision the OCP needed to clear that. He also evinced interest in the question as to whether or not she had discussed the changing of the will of the deceased in the circumstances. The plaintiff had informed him that she had not discussed that with the deceased. These are all the issues that counsel and solicitor had in terms anticipated prior to trial and had raised them with the client .These judicial interventions illustrate how assiduous and prescient her advisors had been in preparation for this trial. The judge was focusing on the issue directly

connected to the matters before the court and was anxious not to be deflected from the key issues. Hence again he intervened to ask about provision for food, heating, accommodation, full use of the car (taxed and insured) all of which of course were very relevant to any question of recompense for the plaintiff given the benefits that she was receiving in these terms. The plaintiff seemed oblivious to the crucial importance of these matters, wishing at all times to return to the issue of the sibling behaviour.

[143] The notes reveal that the cross-examination by the plaintiff of Mr Stephens QC for the administrator was trenchant and searching. The plaintiff took grave exception to the tenor and content. I observe at this stage that I saw nothing in the notes before me that suggested that the cross-examination was other than professional and permissible. Moreover neither counsel on behalf of the plaintiff nor the highly experienced judge saw cause to intervene in any material way. For my own part I could see no basis upon which they could have acted otherwise.

[144] It was the plaintiff's case that she was inadequately prepared for the cross-examination. It was her belief that if she had been taken through the whole history of the matter with her solicitor and counsel it would have jogged her memory about a number of material matters and she would have been better prepared to meet the cross-examination. I reject this argument. In the first place it is impossible to anticipate every line of cross-examination that will occur. This is partly because the instructions to the defendants may well be different to the instructions given by the plaintiff and self-evidently counsel for the plaintiff is not privy in advance to the line to be adopted by defending counsel. In any event I found it surprising that the plaintiff herself had not anticipated most of the cross-examination. The attack on her credibility was based on material well within her provenance and which she alone could have answered. No preparation by counsel or solicitor was necessary or appropriate. In advance of the trial she had several hours of consultation with counsel and solicitor. During this period she could have raised with counsel any matter on which she sought proper guidance. I found her to be disingenuous when she indicated to me that she felt unable to raise certain matters with counsel during these hours. On the contrary I found this plaintiff singularly ready and able to put her point of view during this case at all stages. She did not strike me as someone who would be reticent about raising matters that concerned her or that she would be overawed by counsel or solicitor. She is an astute and perceptive woman well versed in assembling arguments and forcefully asserting her point of view. Over a lengthy and searching cross-examination by Mr Thompson in this case, she was rarely lost for words or unable to stoutly defend the position that she had adopted. She exhibited at times extremely impressive powers of recall and a ready ability to marshal arguments on her behalf in any given situation. She presented as a very formidable witness indeed. Consequently I concluded that many of the difficulties that she encountered in her cross-examination by Mr Stephens were

a product of the difficult circumstances in which she found herself in the witness box arising out of the factual matrix of the subjects upon which she was being questioned. I found no instance in which negligent or inadequate preparation by solicitor or counsel was manifest in the difficulty that confronted her in the witness box.

[145] Some illustrations of the points I have raised in the paragraph above are as follows:

[146] The plaintiff was cross-examined about the finances of her aunt and her financial resources. These were events that had occurred as far back as 1991 and 1992. The judge specifically indicated that he felt this was a relevant issue when the plaintiff protested that cross-examination about it was unfair. I can well see why the judge did consider it relevant. Counsel was entitled to suggest, as he did, that the plaintiff had sought to obtain a power of attorney in order to gain access to monies in the Isle of Man, that the aunt was wealthy in her own right and that the plaintiff had attempted to get access to this. Moreover she was also pressed about the possibility that she and her uncle had conspired to undertake the administration of her aunt's estate when she died and represented it as a small estate for the Inland Revenue. It was a valid line of cross-examination to query how it came about that her uncle, at his age, ie then close to 90 years of age was conducting the probate of his aunt's will without assistance from the plaintiff who was living in the house with him. The plaintiff's answer was that she did the leg work for him obtaining the necessary forms etc. but he made all the decisions. She claimed not to know anything of the content of the probate or the suggestion that the estate had been vastly undervalued for the purposes of the Inland Revenue. Irrespective of the accuracy or inaccuracy of these allegations, the fact remains that they were an appropriate and proper line of cross-examination for counsel to adopt. Whilst the plaintiff may have found it very uncomfortable it was a legitimate line of cross-examination which the plaintiff was obliged to endure. Rather than recognise that it was a circumstance which was bound to throw up difficulties for her, she chose to blame solicitor and counsel for not adequately preparing her. I see no basis for that allegation. This is a line of cross-examination which may well have been difficult to anticipate and in any event it is not the role of solicitor or counsel to suggest answers to a client in advance of cross-examination.

[147] The judge pressed the plaintiff about her source of income. She told the judge she did not know what it was and this clearly aroused more interest on the part of the judge. I do not accept that the plaintiff did not appreciate that her own sources of income were certain to be matters that would be tested in this case. It was one of the most obvious lines to be adopted by counsel for the defendant or the judge. Failure to provide this information could well lead to the conclusion that she had something to hide and for my own part, I have great difficulty understanding why she was not able to make at the very least a

fairly informed guestimate of all her sources of income at that stage. On the contrary the plaintiff indicated to me that she could not understand why her finances should have been relevant and that if she had been known she would be asked this she would have taken time to research her income, savings and interest given at that time she lived in three jurisdictions. It is incomprehensible why she had not done this prior to the hearing. Commonsense, not the advice of counsel, ought to have been enough to have informed her in advance that this was clearly going to be raised. Failure to deal with it would clearly attract judicial disapproval.

[148] The vagueness of the undertaking which she alleged her uncle had given to her was also clearly a source of difficulty both in cross-examination and from the questions of the judge. This was a fact which had been highlighted to her prior to the hearing and nothing more could have been done by way of preparation to have eased her difficulties in dealing with it. The judge attempted to keep her to the point indicating to her that she could not open again the past controllership (when she clearly wanted to do) and that he could only treat this as a legal claim where the social service issues were not relevant. The plaintiff faced two main difficulties. First that of the vagueness of the undertaking. Secondly her expectation that somehow money was going to be left to the trust without identifying what sum that would be in circumstances where she indicated she did not expect any money for herself personally. Her danger throughout this case was that she was seeking from the court something that the court simply could not give her. These were problems that had been frequently highlighted for her prior to trial

[149] Properly the judge drew to her attention during the course of the hearing – at a stage when Mr Stephens had attempted to submit that the proceedings should be stopped on the basis of the authority in Ashmore v Lloyds –that whilst the case would continue the spiralling costs were a factor that ought to be taken into account.

[150] In the course of the trial before Girvan J the plaintiff was confronted by further problems in circumstances where I am satisfied she had not told Mr Tinman the full content of the assets in the estate. In particular she had not mentioned the Bloxam shares and money in the Northern Irish Bank. Although the administrator MT had requested her assistance in this regard in correspondence, her evidence was that she had simply overlooked replying because she was deflected by other matters. She claimed that she had told the Office of Care and Protection and in particular Master Hall, although it is clear from a memorandum that he firmly denies this. She was obviously cross-examined about the Tinman failure not only by counsel but also questioned by the judge. Her answer that she simply forgot about the request was clearly deemed inadequate. Similarly her failure to inform the bank in the Republic of Ireland that her uncle was dead although she continued to apply for dividends to his account was difficult to explain. Understandably the judge sought an

explanation for this. Similarly she had not informed her aunt's bank when she had died. This was an obvious attack on her credibility which her advisers could neither have anticipated nor dealt with in advance.

[151] Her difficulties continued to accumulate as the trial progressed. The issue of the relationship between her uncle and the Northern Bank raised its head in cross-examination by Mr Stephens. Mr McIlwrath, the manager who had taken over from Mr Lewis, was asserting the case that over eight months he had been making efforts to see the deceased but had been frustrated in doing so. He had claimed that he had been given excuses such as that her uncle was out for a walk, that he was unwell or that he did not wish to speak to Mr McIlwrath. The suggestion was that she was attempting to keep the deceased away from contact with the bank. The plaintiff claimed before me that her solicitor had failed to provide her with documentation which would have shown the bank was, in her words "up to no good". It was her case that the documentation revealed that the bank had meetings with her brother and sister. In particular on one occasion her sister had "kidnapped" her uncle whilst out on a walk and had taken them to the Northern Bank where he had been prevailed upon to sign a letter which froze the household account and attracted the yearly sum which was given for his maintenance. It was her case that the failure on the part of her solicitor to appraise her of this information had restricted her ability to deal with questioning on this matter. I reject this argument entirely. It is but one more example of the plaintiff failing to confine her focus to the issue at hand. I find no basis for her assertion that the Northern Bank was "up to no good". She claimed that the motivation of the bank was the desire to keep the account of her uncle and prevent him transferring money to another bank. In order to do this the bank was prepared to resort to the subterfuge that she alleged. This seems highly improbable and her speculation in this regard would in my view have had no material effect upon the trial other perhaps than to further damage her credibility. The evidence of Mr McIlwrath, if he had been called, would in my view have been damaging to her.

[152] A further assertion that the plaintiff made against he bank was that it had negligently failed to transfer money from the Isle of Man to an Anglo Irish bond which was paying far greater interest than the money in the Northern Bank. Again she asserted that the bank officials had refused to do this or carry out the instruction of the deceased simply because they were anxious to keep the large sum of money in the account within the bank. The plaintiff was questioned about the value of her own Anglo Irish bond which was worth £250,000. She was asked as to whether any money from her brother or aunt had made up that investment. The plaintiff indicated that this was a very hurtful gratuitous allegation. It was a line of attack that was difficult to anticipate and in any event there was nothing that could have been done to protect the plaintiff from it. However the fact of the matter was that this was a legitimate avenue for defence counsel to explore in a case where they were

alleging that the plaintiff had been looking after the deceased solely for her own ends. She had been seeking a power of attorney on behalf of the deceased and accordingly that fuelled the line of cross-examination that was adopted.

[153] Similarly the plaintiff indicated to me that she took exception to the failure of the judge to restrain Mr Stephens from questioning her as to whether or not it was intended that the transfer would be in joint names, an allegation which she asserted was groundless. She claimed she had not been prepared for such questions and that if the full picture had been presented to her in terms of the documentary evidence she would have been much better prepared. I do not consider that this is a sustainable argument. I can conceive of no way in which counsel or solicitor could have "prepared" her for this line of attack. To think otherwise is to misconceive the proper role of solicitor and counsel. In my view there was no negligence on the part of either solicitor or counsel in dealing with these matters and there was no basis upon which she could have been more adequately prepared to answer them. I came to the conclusion that whenever she faced a searching cross-examination which she either found difficulty in answering or objected to, she sought refuge in allegations of inadequate preparation on the part of her lawyers.

[154] I have no doubt that by the end of the cross-examination, on the fifth day of this trial, the plaintiff was well aware of the difficulties that she confronted. Experience reveals that the discipline of the witness box often serves to concentrate the mind of litigants. I am satisfied that this plaintiff had come to appreciate the profound difficulties that lay in her case. The assertions upon which she was relying to found her case were vague and she had no witness or document to fortify it. The comments of the judge must have made this abundantly clear to her. In addition I have no doubt that the course of the cross-examination, and the serious allegations that were laid at her door, had not only served to underline the weakness of her case but had perhaps unnerved her in the terms of the seriousness of her plight. Any counsel who had failed to explain the dangers that now lay in her wake, not the least being serious cost implications, would have been failing in his professional duty. Similarly it was the job of her solicitor to underline such concerns. In the event that is precisely what happened in my view. It is not the duty of counsel or solicitor to be faltering echoes .They must be candid and firm advisors. It was this combination of events that led to the settlement that occurred after Mr Stephens had applied to the judge to stop the case at the end of her evidence.

[155] In the circumstances I find no negligence on the part of the defendants in the conduct of or preparation of the trial.

Coming off the record

[156] The plaintiff impugned the decision of the defendants to come off record for her prior to a further mention of the case before Weir J on 23 February 2004.

The defendants had issued a summons and affidavit duly stamped to allow them to come off record because their professional relationship with the plaintiff had broken down. Weir J acceded to the application. I have no doubt that the defendants were justified in coming to the decision at that stage that the relationship between themselves and the plaintiff had reached a point where they could no longer continue to advise her. It is clear to me that in the aftermath of the settlement of 19 February 2003 the plaintiff was determined to ensure that the carrying out of those terms was to be frustrated. She entered into negotiations with the administrator to purchase the property in question but failed to negotiate an agreed figure. She did not remove the contents from the house or vacate the premises before the date stipulated in the settlement but rather sought extensions of time for a variety of reasons including the absence of packing cases. She engaged in lengthy and extremely detailed correspondence with the defendants inter alia challenging the right of the administrator to refuse to accept her offer for the purchase of the property, arguing against the deadline he had imposed, seeking his removal and justifying her failure to comply with the vacation of the property and the removal of the possessions in the time specified by the settlement. I consider that Mr Leitch was the pattern of patience in attempting to deal with these matters, instanced by his e-mail of 18 February 2004 where he outlined the situation to her in the following terms:

> "1. A vendor has no legal obligation to 'play fair' or be reasonable to a potential purchaser in order to facilitate that purchaser as against any other potential purchaser in entering into contract.
>
> 2. No matter how unreasonable Tinman may have been in frustrating your wish to enter into a contract to buy the property, he has done nothing unlawful and you have no remedy against him.
>
> 3. As the case is due for mention, you have the option of attending court if you wish. I do not think you will be able to influence the outcome and that outcome will be an order for vacant possession and an order that the costs of the action be taxed.
>
> 4. You can still negotiate to buy the house despite the order and Tinman may deal with you to achieve a quick sale. You will however have to meet his conditions which I imagine will be
>
> (i) quickly entering into the contract and a quick completion and

(ii) production of evidence that funds are available to complete.

5. You can still negotiate over his costs. He will have to prepare a detailed bill for taxation and I can ask him to send us a copy of that bill before he actually lodges the papers in the Taxing Master's Office to start that procedure. I would strongly advise you to instruct us to have a cost drawer to represent you but I would need a deposit to cover his costs.

6. Tinman was entitled to deliver a bill in the form in which he did in order to try to agree his costs.

I refer to your e-mail to me of 16 February.

7. As a residuary legatee you are entitled to receive an estate account showing all the assets of the estate, the realisation of those assets, the discharge of all liabilities (including tax) and the distribution of the net estate in accordance with the terms of the Will. You will be entitled to challenge the account on any inaccuracies. …

9. You cannot undo Tinman's appointment as an administrator. In theory you could have him removed by the court and another person appointed administrator in his place. I would advise you that such an application will be a waste of money and time as it would not succeed.

10. You could if you wish bring proceedings against Tinman on the ground that in your opinion he has failed to get in all the assets of the estate and that he has not followed a claim against Northern Bank. Again I would advise you that such a claim would be a waste of time and money because it would not succeed. The evidence shows that the bank did not act contrary to instructions.

11. Tinman could only act in accordance with your uncle's instructions expressed in a testamentary form i.e. the Will. The letter relating to the household account was not in testamentary form. True, Tinman could have sought the agreement of all the three

> residuary legatees to give effect to the letter but there was no obligation on him to do so. Had he done so one would not know what the outcome would have been but it seems to me unlikely that your brother and sister would have agreed."

[157] I regard this as a comprehensive and succinct assessment of the situation as it then stood. Characteristically the plaintiff was not prepared to allow that advice to go without challenge and responded with a detailed critique of the points raised by way of e-mail the following day. In a follow-up of 23 February, the plaintiff yet again attacked the settlement and her legal team in paragraph 8(c) where she said:

> "Given the nature of a 'consent' settlement, why did my legal team ever allow me to enter into such a settlement without adequate explanation of the nature of such a settlement (I refer to your comment quoted above) and, having allowed me, why didn't they educate me from the start to be on the alert for each possibility for the unreasonable conduct (e.g. instantaneous deadlines) that is countenanced by such a settlement."

[158] I have no doubt that the stage was reached where the defendants could not continue to act for the plaintiff. Not only was she obviously challenging the terms of the settlement and not complying with its terms but she was clearly blaming her advisors for bringing about the settlement. She was duly served with the appropriate summons and affidavit to come off record. It is worthy of note that notwithstanding that the defendants came off record prior to the hearing, on 23 February 2004 her solicitor sent a detailed note to the plaintiff indicating the points that she could make on her behalf on that date. Consequently she was unrepresented at the hearing on 23 February 2004 before Weir J. At that hearing Weir J heard the plaintiff. He extended the time for her vacation of the premises to 8 March 2004. It was clear from the terms that she was not to be afforded any further time beyond that within which to have the household effects and personal effects cleared from the property. C & H Jefferson followed up that order with a letter on 23 February 2004 asserting that if she did not comply, then enforcement action against her via the Enforcement of Judgments Office to obtain possession of the property would be instituted. Costs were also awarded against her for that hearing.

[159] I am satisfied that the action taken by the defendants in this matter was timely and justified. There was no negligence or breach of contract in so doing. I cannot conceive of any other solicitor acting in a different way given the circumstances. I consider that the solicitor in this case did determine the retainer and come off record for good reason and upon reasonable notice in all

the circumstances where he clearly outlined the points that she could make on her own behalf if she appeared unrepresented. The court approved the application.

[160] As a footnote to this, the plaintiff then lodged an appeal against the decision of Weir J. I understand this was listed before the Court of Appeal on 2 April 2004 who had adjourned the matter until 26 April to allow her to furnish documents to substantiate the appeal. The plaintiff criticised the defendants for not advising her as to the proper format to launch her appeal. I find no basis for such criticism. That appeal was subsequently dismissed.

[161] I have not found it necessary in this case to deal with the quantum issue and the witness called by the plaintiff on her behalf in this regard. Since I have decided that there is no liability in this case, issues of the recompense which she would have received had she been successful in that aspect of her case do not arise. One aspect of the quantum aspect however does merit comment. It was the plaintiff's case that no appropriate care had been taken to evaluate her case by means of contacting the OCP regarding the range of care stipends that the OCP may have experienced in the past. It is a solicitor's duty to exercise his professional judgment on how best to set up and conduct his client's case on the instructions he has been given. The evaluation of the services that the plaintiff alleged she had carried out during the caring years is a familiar and common aspect of cases of this kind. The OCP was simply one avenue. An entirely plausible alternative was that adopted by the defendants namely to present the case on this aspect through the use of a financial expert. Certainly this is the orthodox approach in evaluating such cases. Evidence of the appropriate stipend by the OCP might well have been regarded as a subjective guestimate and not having the characteristics of an informed and calculated assessment by a professional financial expert. I therefore find no negligence on the part of the defendants in not pursuing this aspect of the case.

[162] Although no claim has been made against the counsel in this case Mr McBrien, I consider that I should not close this judgment without making a comment on the criticisms which has been visited on him by the plaintiff. She has raised objections to his conduct of the case both in terms of presentation and preparation. I found no evidence that counsel had acted in anything other than a thoroughly professional and proper manner throughout this case. Experience reveals that one of the most invidious duties of counsel is to advise a client that what may be a long held perception of the case by her is fatally flawed. Such a task often calls for skill, firmness and candour to deliver what is often unpalatable advice to a client who may be, as I believe is the case in this instance, sadly lacking in insight into her own best interests. In this case, Mr McBrien was duty bound to form an opinion as to the legal strength of the plaintiff's case and to ensure that that opinion was properly researched and thereafter communicated to the plaintiff based on her instructions to him. I have not the slightest doubt that the references which I have already made to

the research carried out by counsel and the legal principles which he set out were entirely appropriate and exhaustive. Moreover as the case progressed, counsel was duty bound to form an opinion as to the development of the case in light of the cross-examination to which the plaintiff had been subjected. Issues of her credibility and the possible consequences e.g. criminal proceedings had to be considered no matter how unpalatable the plaintiff found these matters. In passing I record that Mr McBrien's early view in the aftermath of the interlocutory hearings that there was a danger that the plaintiff was considering suing him was a not unreasonable one to have formed given the colour of the correspondence that was emanating from the plaintiff. The fact that this fear proved at that time misplaced does not render his concern unjustified. In conclusion therefore I have determined that the criticisms made of the plaintiff concerning Mr McBrien are wholly unfounded. The plaintiff has visited upon him similar opprobrium to that which she has manifested in other instances where professional people took a view which did not coincide with her opinion of where the true nature of the problem lay over these years.

[163] The conclusion that I have come to overall in this case is that this plaintiff has become so immersed in the past that she cannot yet find closure on the historical events. The passing of time normally lends distance to such feelings but that has not happened in this case. She has become so overwhelmed with her dispute with her siblings that she has proved unable to take a rational and detached view of what was relevant or irrelevant in any of the litigation on which she has embarked. The spiralling costs of her unsuccessful litigation to date have not deterred her from the path upon which she has set her course. I shall listen to arguments about costs in this case, but if the orthodox approach of costs following the event is my conclusion in this case, then the costs of this lengthy litigation are likely to be very substantial indeed. It may well be that my judgment that her case has been bereft of plausible expectation of success from the very start will similarly have no effect upon her views on the future course that she intends to follow. I trust however that even at this stage she will attempt to stand back and rationalise where her present thinking is leading her.

[164] In all the circumstances I therefore dismiss the entirety of the plaintiff's claim. For the removal of doubt I make it clear that I found no negligence, breach of contract, undue influence, "groundless accusations" or violation of human rights as set out in the plaintiff's writ.