

THE HIGH COURT

[2023] IEHC 468

2016 No. 3750P

BETWEEN

NICHOLAS FITZHENRY

PLAINTIFF

AND

JAMES MURPHY

DEFENDANT

JUDGMENT of Ms. Justice Eileen Roberts delivered on 27 July 2023

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Introduction

1. Farming in Ireland is dominated by and built on the tradition of intergenerational family farms. In 2020, of approximately 140,000 farm holdings in Ireland, family farms (operated as family-based enterprises) made up over 96% of those holdings.¹ Intergenerational family farm transfer is an essential aspect of the maintenance and survival of these farms as they pass from one generation to the next. This case concerns the intergenerational transfer of one such family farm by the plaintiff to his nephew, the defendant.
2. In these proceedings the plaintiff seeks to set aside the deed of transfer he entered into with the defendant on 5 December 2012 (the “**Transfer**”) on the grounds that the Transfer is an unconscionable bargain and/or is an improvident transaction. The plaintiff issued these proceedings on 27 April 2016. On 28 April 2016 he applied to register a *lis pendens* on the lands the subject of the Transfer (the “**Transferred Lands**”), which was registered on 3 May 2016 and remains in place. The plaintiff seeks declarations and ancillary orders that he is the full legal and beneficial owner in fee simple of the Transferred Lands and that the defendant be directed to vacate the Transferred Lands and be permanently restrained from trespassing on the Transferred Lands. He also seeks a declaration that the defendant holds on trust for the plaintiff all livestock, machinery, feed and silage which was transferred by the plaintiff to the defendant as well as all income, single farm payments and other monies which the defendant received following the Transfer. Finally, he seeks damages against the defendant for trespass, nuisance, conversion and/or detinue and unjust enrichment. A full defence was filed by the defendant to this claim and the defendant counterclaims

¹ Central Statistics Office - Census of Agriculture (2020).

for a declaration that he is entitled to the entire beneficial interest in the Transferred Lands and all livestock, machinery, feed and silage transferred to him by the plaintiff. The defendant also seeks to restrain the plaintiff from interfering with the defendant's use and occupation of the Transferred Lands and seeks damages against the plaintiff for nuisance, slander of title and unlawful interference in business relations (although a claim for special damages was not pursued at the hearing).

3. It is readily apparent that the net issue before this court is whether, in all the circumstances, the Transfer should be set aside by this court as an unconscionable bargain and/or an improvident transaction.
4. The trial of this matter commenced on 2 May 2023 and ran over a period of six days with the submissions on evidence being heard on 12 May 2023. In total, 12 witnesses gave evidence including two expert witnesses – both independent conveyancing solicitors. The material evidence tendered by witnesses, including the parties themselves, will be addressed in detail in this judgment. There were three parties who had tendered witness statements but who did not give evidence at the trial. There was no agreement that the witness statements of two of those parties be admitted into evidence and accordingly I have not considered those witness statements in determining this matter. By agreement of the parties, the court considered the property valuations of WFC Properties Ltd dated 14 April 2023 tendered on behalf of the plaintiff, although the author Mr Harrington did not give oral evidence.
5. It is worth highlighting that there is no claim in these proceedings of duress or undue influence (actual or presumed). Neither is there any claim of fraud or deceit nor any plea that the plaintiff lacked mental capacity to enter into legal transactions. Rather, the plaintiff's claim is that he was under a material disadvantage relative to the defendant and that the defendant took inequitable and unconscionable advantage of the plaintiff in

the matter of the Transfer, particularly in relation to the plaintiff's anxiety to be relieved of the burden of full time responsibility for the Fitzhenry family farming enterprise. It is pleaded that the Transfer was manifestly improvident on its face and/or manifestly disadvantageous on its face to the plaintiff.² It is accepted that the Transfer did not comprise the entirety of the plaintiff's land holding and it is not suggested that the plaintiff was left impoverished as a result of the Transfer. It is also pleaded that the defendant did not honour the representations he made and/or the assurances he had given to the plaintiff as to how the defendant would deal with the lands and with the plaintiff if the plaintiff transferred the farm to the defendant.

6. Another aspect of this dispute which is worth highlighting at this point is that the plaintiff is also engaged in litigation with the solicitors who were instructed in relation to the Transfer. The solicitor who dealt with the matter in that firm has, by coincidence, the same name as the defendant. A different firm of solicitors are on record for the plaintiff in those legal proceedings which are ongoing. The court did not have sight of the pleadings in those proceedings. The court had the benefit of the solicitors' conveyancing file but the solicitor who advised in relation to the Transfer not did give evidence at the trial. This was less than ideal in circumstances where much of the plaintiff's claim revolves around the allegedly inadequate legal advice he received in relation to the Transfer. The conveyancing file contained attendance notes and other documentation which was commented upon by independent expert conveyancing solicitors and in respect of which the parties suggested differing interpretations or conclusions to the court. Ultimately, I have had to draw some conclusions on this material based on the conveyancing file itself and the evidence tendered by the parties. There is however no substitute for the far more reliable evidence that would usually be

² Para 7(g) of the statement of claim dated 25 July 2016

obtainable from the author of a document, and I am conscious that the question of the negligence or otherwise of the solicitor concerned is not a matter before this court in these proceedings. In those circumstances, this court must be careful regarding inferences it draws in the absence of evidence from the solicitor concerned.

7. It is also worth noting that there was a significant time gap of over ten years between the date of the Transfer and the date of the trial. One of the main reasons is that these proceedings did not issue until 2016, almost four years following the Transfer. The plaintiff is now 86 years old. All the evidence tendered by the factual witnesses addressed matters arising some considerable time ago and there was in most cases little documentation to substantiate or assist their recollections. What documentation was available on the solicitors' conveyancing file was subject to the constraints outlined above. In addition, this is a family dispute which brings its own challenges in terms of testimony and relationships. A number of the witnesses, or proposed witnesses, were family members or neighbours who knew the parties and would, I believe, have preferred not to be involved in these proceedings. Despite those challenges, the court notes and commends the respectful attitude displayed by the witnesses and the parties towards each other at the trial.
8. Because the parties did not engage a stenographer for the trial (also less than ideal from the court's perspective), there is no transcript of the evidence. I have therefore, where relevant, identified key evidence by reference to the timing of the exchanges in court, footnoted by reference to the digital audio recording ("**DAR**") of the court hearing.

The factual matters not in controversy

9. The following matters are not in controversy. It is useful to outline them in some detail as they form an important backdrop to the relationship between the parties and the

circumstances of the Transfer. This judgment will later focus on the factual matters that are disputed and I will consider them in some detail by reference to the evidence adduced at the trial and the relevant legal principles. The matters which are agreed are as follows:

- The plaintiff is a farmer. At the date of the Transfer he was 75 years old. The plaintiff is a lifelong bachelor who has lived on his own on the Fitzhenry family farm for all of his adult life. He has no dependents.
- The plaintiff is one of nine siblings (two of whom died in infancy). The plaintiff is the third eldest of those nine siblings. Of the seven siblings who survived, four are still alive.
- The plaintiff attended national school but did not attend secondary school. He left school when he was 12 years old to work on the family farm. The plaintiff has no further formal education beyond national school and did not sit any State examinations. There is a dispute regarding the level of the plaintiff's literacy and numeracy and his ability to understand documentation, which I will deal with later.
- A number of the plaintiff's siblings live locally to the plaintiff (including the defendant's family). Other siblings live or lived abroad. The plaintiff has a large extended family. He has 20 nephews and nieces (12 nephews and 8 nieces), including the defendant. Apart from the defendant, only one other of those nieces/nephews is a farmer. That is the defendant's cousin, John Doran who gave evidence on behalf of the defendant. Mr Doran farms his own farm (which he inherited from his parents) which is approximately 20 km from the Transferred Lands.

- The defendant is a qualified quantity surveyor as well as a farmer. He is a nephew of the plaintiff (being a son of the plaintiff's youngest sister). At the date of the Transfer he was 31 years old. The defendant completed his secondary school education and thereafter attended Waterford Institute of Technology and college in Cardiff and obtained a degree in quantity surveying, finishing his studies in 2004. There is a dispute regarding how much work the defendant did on the plaintiff's farm over the years and I will outline the competing evidence on this later. The defendant lives with his parents on his grandmother's farm approximately 18 km from the Transferred Lands.
- The plaintiff inherited approximately 100 acres of land from his parents. His late mother (who died in December 1966) bequeathed her half share of approximately 50 acres to the plaintiff on her death,³ when the plaintiff was 29 years old. His late father (who died in September 1974) bequeathed his remaining half share of approximately 50 acres to the plaintiff on his death,⁴ when the plaintiff was 37 years old. The plaintiff continued farming the lands after he inherited them and was the only sibling to do so. The plaintiff later purchased approximately 110 acres of land so that, as at the date of the Transfer, he was farming approximately 210 acres of land.
- The Fitzhenry family had been involved in dairy farming for several generations. The plaintiff was also involved in dairy farming but left dairy farming gradually over a period of time after milk quotas were introduced. By around 1999 the plaintiff had completely left dairy farming. There is a dispute as to what assurances were given by the defendant to the plaintiff regarding the defendant applying to get

³ Para 7 of plaintiff's witness statement.

⁴ Para 8 of plaintiff's witness statement.

back the milk quota and getting into dairy farming once the farm was transferred to him. It is agreed however that the defendant did apply for the milk quota but that he later withdrew this application (as confirmed by a letter from the Department of Agriculture, Food and the Marine dated 27 November 2013 which also returned the defendant's milk quota purchase cheque of €4,432.11).

- On 18 November 2001, the plaintiff suffered a mild stroke, aged 64. It was accepted by the plaintiff in evidence that he had made a good recovery.⁵ The plaintiff continued to actively farm his land after his stroke.
- In October 2009 the defendant left Ireland to work in Canada on a one-year working visa. He returned to Ireland in October 2010.
- Prior to the Transfer, the defendant borrowed €9,000 from the plaintiff. There is a dispute as to whether any of that sum was repaid to the plaintiff by way of farming and building services provided by the defendant to the plaintiff. It is agreed that the plaintiff paid the fees of €2,090 for the defendant to qualify as a Young Trained Farmer which the defendant did in 2012. The plaintiff suggests in his witness statement that that was a loan. The defendant completed his studies for the "Green Cert" (which is a level 6 Advanced Certificate in Agriculture) at Kildalton Agricultural College between April 2011 and April 2012 and received his Certificate in November 2012. By completing this course, the defendant was entitled to claim Agricultural Relief if he ever acquired land. There is a dispute as to how much encouragement the defendant got from the plaintiff to complete this qualification. The defendant also completed a milk machine technician course.

⁵ The plaintiff in his witness statement confirms that "I was in good shape and had no lasting effects from the health scare".

- In April 2012 the defendant went to Australia where he worked for a number of months for a mining company. The defendant returned to Ireland in September 2012. There is a dispute regarding the circumstances leading to the plaintiff's return, which I will deal with later.
- While there is considerable dispute regarding the extent of the legal advice received by the parties prior to the Transfer, it is agreed that both the plaintiff and defendant attended the offices of Huggard Brennan & Murphy Solicitors together on 22 November 2012 and again on 5 December 2012. It is also agreed that only that one firm provided legal advice to the parties in relation to the Transfer and that no other firm was instructed. While there is disagreement regarding how long the plaintiff spent with Mr Murphy solicitor on his own, it is accepted that on each occasion the plaintiff spent some time alone with Mr Murphy solicitor. It is also accepted that Mr Murphy solicitor had previously acted for the plaintiff in unrelated matters, including purchasing a property for him and advising him in respect of compulsory purchase acquisitions of certain lands by the local county council. Mr Murphy was not however the only solicitor who had previously acted for the plaintiff. Mr Murphy had never previously advised the defendant, nor did he know him.
- The Transfer was a voluntary transfer made in consideration of the natural love and affection of the plaintiff for the defendant. The evidence from all witnesses was that no one in the wider family was told about the proposed transfer in advance of it happening. All parties learned of the Transfer after it was executed. No other member of the wider Fitzhenry family is challenging the Transfer.
- The Transfer was executed by the plaintiff and the defendant on 5 December 2012 in the offices of Huggard Brennan & Murphy Solicitors. The Transfer related to approximately 155 acres of land representing approximately three quarters of the

plaintiff's total landholding at that date. The open market value of the Transferred Lands was valued at €1,050,000. Farm machinery and stock with an estimated value of €54,500 was also transferred to the defendant.⁶ The defendant also obtained the benefit of farm payments for the Transferred Lands. The single farm payment subsidy was approximately €24,000 per annum.

- The plaintiff retained a full right of residence for his lifetime in the farmhouse located in the centre of the Transferred Lands. In addition, the plaintiff retained approximately one quarter of his lands and houses for his own use and benefit (the “**Retained Lands**”), comprising approximately 58 acres. The plaintiff continued, after the Transfer, to earn rental income (said by the plaintiff to be €2000 per month) from two residential properties located on the Retained Lands, (there was also the half built house relating to the dispute with his niece Maresa, as explained later) and the plaintiff, from time to time, obtained income from leasing the Retained Lands to third parties. There is a dispute regarding the level of engagement between the plaintiff and the defendant regarding the Retained Lands following the Transfer. The plaintiff also retained his pension and other capital sums which will be detailed later in this judgment.
- On 6 December 2012 budget changes announced for the 2013 budget came into effect. These changes included (1) Capital Acquisitions Tax for inheritance/gifts increased from 30% to 33% on or after 6 December 2012; and (2) the group B threshold, which is normally applicable to nieces and nephews, was reduced from €33,550 to €30,150. The group A threshold (for children of a disposer or those entitled to claim favourite nephew relief) was reduced from €250,000 to €225,000.

⁶ Auctioneers Valuation contained on Huggard Brennan & Murphy Solicitors' conveyancing file.

There is a dispute between the parties as to the level of discussion between them prior to the Transfer regarding these proposed tax changes. It is accepted however that the tax changes had no impact for the plaintiff's tax liability on the Transfer (which was nil) and had only minimal impact on the defendant's tax liability (estimated to be increased by approximately €2,500).

- Following the Transfer, the plaintiff purchased two additional landholdings comprising in total approximately 43 acres (the “**Additional Lands**”) for his own use and benefit namely: (1) 21 acres purchased at auction in 2017 for €230,000, and (2) 22.14 acres purchased in 2019 for a sum believed to be in the region of €220,000. The Additional Lands are currently leased by third-party farmers who pay rental income to the plaintiff.
- There was no stamp duty payable on the Deed of Transfer as the defendant was qualified as a Young Trained Farmer and satisfied the other requirements for exemption. As a Young Trained Farmer, the defendant was entitled to claim Agricultural Relief meaning that 90% of the market value of the Transferred Lands was discounted for capital acquisitions tax purposes. The defendant did not have the requisite five year working period to establish his entitlement to favourite nephew relief and therefore he paid capital acquisitions tax in respect of the remaining market value of the Transferred Lands. No tax was payable by the plaintiff in respect of the Transfer.
- The defendant was registered as full owner of the Transferred Lands on 18 January 2013 and in May 2013.
- The relationship between the plaintiff and the defendant deteriorated rapidly following the Transfer. While there is a dispute regarding the circumstances in

which this deterioration occurred, it is accepted that by February 2013 (a mere two months post the Transfer), there were already significant issues between the parties. These issues will be discussed later in this judgment.

- On 7 March 2013 the plaintiff settled Circuit Court proceedings which had been issued against him by one of his nieces, Maresa Fitzhenry. Those proceedings arose in circumstances where the plaintiff had sought the return to him of a site he had transferred to his niece in 2001 on which she had commenced building a residential property. The court order provided, on consent of the parties, that the transfer would be set aside in consideration of the payment of the sum of €85,000 by the plaintiff to Maresa Fitzhenry in agreed instalments (by no later than 1 May 2013). That settlement was implemented by the plaintiff. He thereafter engaged contractors to build on the foundations put in place by Maresa Fitzhenry, part completing the house up to roof level but not fully completing it. This remains the current status of the house. Planning permission has been retained on it due to the extent of the completed building work. To the extent that there is a dispute regarding the circumstances of that transfer it is dealt with later in this judgment. The relevant folio shows that Maresa Fitzhenry was registered as full owner of the site on 4 January 2010. The plaintiff was registered as full owner of it on 19 December 2014.
- On 10 October 2013 the plaintiff wrote to Mr Murphy solicitor in which he stated “...as things are not going well I want my farm back and my stock and fodder (sic) and maching (sic)...”.

- In 2014 the plaintiff wrote to a local farmer who had agreed a leasing arrangement with the defendant in respect of the Transferred lands. That farmer did not proceed with the arrangement as he did not wish to get involved in a family dispute.⁷
- In June 2014 there was an incident on the farm which involved a hammer being thrown by the defendant. There is a considerable dispute as to what happened and whether the hammer was thrown at the plaintiff or away from him (to put it out of his reach). The evidence on this is described later in this judgment. It is agreed however that an incident occurred and this appears to be the high point of tensions between the parties, who thereafter tried to avoid each other's company as much as possible.
- In September 2015 the defendant offered a derelict dwellinghouse and some surrounding lands for sale (being part of the Transferred Lands). The plaintiff consulted solicitors with a view to stopping any attempt by the defendant to sell this property. The property was withdrawn from sale.
- On 27 April 2016 the current proceedings were issued by the plaintiff and a *lis pendens* was also registered by him over the Transferred Lands.

The legal principles relevant to establishing an unconscionable bargain/improvident transaction.

- 10.** Before addressing the conflicts on the evidence adduced by the parties at trial, it is useful to consider the legal framework which applies to determine if a transaction is an unconscionable bargain/improvident transaction, such as would require this court, in the exercise of its equitable jurisdiction, to set aside that transaction. Obviously, it is

⁷ Defendant's replies to particulars dated 1 September 2021 and appendix to question 7.

important that there be legal certainty in relation to transactions, such as land transfers, entered into by parties. This certainty is required not just for the parties to the transaction but also for all other entities who deal with those parties whether they be, for example, purchasers who acquire property, lenders who fund property or lessees who lease property. However, it has long been established that the courts have an equitable jurisdiction to set aside a transaction

*“where one party is at a serious disadvantage by reason of poverty, ignorance and some other factors such as old age, so that unfair advantage may be taken of that party. The court will intervene particularly where a transfer of property is made for no consideration at all or where the consideration represents an undervalue and where the transferee acts without the benefit of independent legal advice ”.*⁸

This statement of the law was approved by McDonald J in his recent judgment in *In the matter of John Richard Cox Deceased* [2023] IEHC 100, at para 33.

11. McDonald J in *Cox*, at para 34 of his judgment also cited with approval the comments by Kitto J in *Blomley v Ryan* (1956) 99 CLR 362 at page 415 where he said that intervention by the court would be warranted: –

“whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands”.

⁸ Professor Biehler-Equity and the Law of Trusts in Ireland , 7th ed (2020 at page 913.

- 12.** *Cox* was an action by the personal representative of a deceased who sought to set aside a deed of transfer of a house and lands from the sole name of the deceased to joint names with his wife. As in the present case, the transfer was a voluntary conveyance where the same solicitor acted for both parties. However, unlike the present case, *Cox* involved a claim of duress and undue influence. Ultimately, the court set aside the transfer on the grounds that it had been procured through the presumed undue influence of Mrs Cox. The case also involved a challenge to a will and codicil in circumstances where there was a conflict between those documents and the transfer which predated it. Unlike in the present case, the court in *Cox* had the benefit of evidence from the solicitor who acted for the parties. Important aspects of the court's finding in *Cox* based on the evidence was that the donee was terminally ill and had a high level of dependence on his spouse. The transfer comprised virtually all of his assets at a time when their value had increased substantially. The donee had other dependents (children) who challenged the transfer. There was also evidence that the donor did not understand the legal effect of the transfer. The court in *Cox* did not address the question as to whether the transaction was unconscionable as it determined the outcome based on its finding of presumed undue influence. No such plea or evidence of undue influence arises in the present case.
- 13.** In *Caroll v Caroll* [1999] IESC 11, [1999] 4.IR 241, the donor transferred his public house/family home to his son reserving to himself a right of residence. The transfer was, as in the present case, made in consideration of natural love and affection. The donor was in his late 70s. He had a number of health complaints and suffered from depression although there was no evidence to suggest that his mind was impaired. In addition to his son, the donor had two daughters. There was evidence that the donor continued to tell his daughters that they would have a right to reside in the property for

their lifetime even though, unknown to them, he had conveyed the property to his son. The same solicitor had acted both for the donor and his son. The evidence was that the solicitor had made no enquiries of the donor as to whether he had any assets apart from the property, the subject of the conveyance. Nor did the solicitor ask any questions concerning any other children of the donor. Following the donor's death, his daughters challenged the conveyance both on the grounds of presumed undue influence and on the grounds that it represented an unconscionable transaction. The High Court held that the solicitor who acted for both parties was not aware of the family circumstances, the position of the other members of the family, the totality of the assets held by the family members or the assurances which had been given by the donor to the daughters as to their right to use the property during their lifetime. The High Court concluded that this was a case where its equitable jurisdiction should be invoked with a view to setting the transaction aside on the grounds of its improvidence. This finding was upheld by the Supreme Court. Denham J (as she then was) held at p. 259 that

“[i]n light of the evidence, of the omissions in relation to the legal advice given, the fact that there was no evidence that the transfer was read over to Thomas Carroll senior, his frail health, his lack of practically any other assets, his relationship with his daughters and all the circumstances, there was clear evidence upon which the learned trial judge could come to the determination [...] which he did”.

14. In *Keating v Keating* [2009] IEHC 405 and in *Secured Property Loans Ltd v Floyd* [2011] IEHC 189, [2011] 2 IR 652 at 661, Laffoy J adopted the following passage from the judgment of Millet J (as he then was) in *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1983] 1 WLR 87 at 94-95:

“First, one party has been at a serious disadvantage to the other, whether through poverty, or ignorance, or lack of advice, or otherwise, so that circumstances existed of which unfair advantage could be taken...secondly, this weakness of the one party has been exploited by the other in some morally culpable manner...and thirdly, the resulting transaction has been, not merely hard or improvident, but overreaching and oppressive... In short, there must, in my judgment, be some impropriety, both in the conduct of the stronger party and in the terms of the transaction itself...which in the traditional phrase “shocks the conscience of the court,” and makes it against equity and good conscience of the stronger party to retain the benefit of a transaction he has unfairly obtained”.

15. Counsel in the present case were not in agreement as to whether the element of moral turpitude was an essential component of an improvident transaction. While there are some conflicting dicta between various High Court decisions, the matter was most recently considered by the Court of Appeal in *Allied Irish Banks plc v DX and TX* [2020] IECA 308. In that case the defendants provided letters of guarantee to the plaintiff bank for their son’s borrowings of €400,000. The son defaulted on his loan and the bank sought summary judgment against his parents. The evidence established that the son was suffering from depression and may have lacked capacity to enter into the loan transaction. A defence was raised that the loan agreement with the son constituted an improvident transaction. The High Court refused summary judgment and referred the matter to plenary hearing on the basis of an arguable defence in relation to the son’s capacity (but not in relation to the improvidence of the transaction). The bank appealed and the parents cross appealed on the finding that the loan was not improvident.
16. The Court of Appeal found no evidence that the son lacked capacity at the time of the loan or that the plaintiff bank did or could have any awareness of this even if it were so.

The Court of Appeal also considered whether the transaction was improvident or unconscionable, finding on the evidence before it that the transaction was not unconscionable or improvident. In determining the criteria which would warrant intervention by the court, the judgment of Noonan J provides a very useful summary of the legal authorities and the applicable criteria in the following terms (at para 27):

“It seems to me that as an analysis of these authorities suggests that the court may set aside a transaction on the basis that it is improvident or unconscionable where the following factors are present;

- (1) The parties do not meet on equal terms, such that one is vulnerable to being taken unfair advantage of by the other. The categories of vulnerability are not closed and must depend on the facts of each case.*
- (2) There is an inherent unfairness in the transaction, be it described as undervalue, or inadequacy of consideration, or otherwise.*
- (3) There is an element of impropriety or moral culpability in the conduct of the party seeking to retain the benefit of the transaction.*
- (4) The latter party knew, or ought to have known, of the other party’s vulnerability.*
- (5) There is an absence of appropriate independent advice, be it legal or otherwise.”*

- 17.** The date on which the court should assess whether a transaction is an unconscionable bargain and/ or an improvident transaction is the date on which the transaction was entered into. This is clear from the decision of the High Court in *Secured Property* where Laffoy J held at p. 666 of her judgment that

“[i]n relation to the broader equitable jurisdiction under which the court may set aside an unconscionable bargain, compliance with the preconditions to the courts intervention falls to be established by reference to the point in time at which the... transaction was entered into...”.

The Transfer was entered into in December 2012. While there was significant evidence given at the trial of matters post-dating the Transfer, the limited probative value of that evidence in relation to the improvidence of the Transfer must clearly be borne in mind and assessed primarily by reference to what it establishes was actually or likely to have been the position as at the date of the Transfer.

18. Cases of this nature will turn on their individual facts as applied to the applicable criteria. I will now summarise the key evidence of the parties and their witnesses at the trial.

The evidence adduced at the trial by the plaintiff and his witnesses

The plaintiff's evidence

19. Mr. Fitzhenry is now 86 years old. He travelled to court for each day of the hearing and remained in court throughout. He was assisted and supported by neighbours and friends and it is clear that he is well integrated into his local community and is a well-respected farmer and neighbour. For a man of his age, he presented as a fit and healthy person. He was able to access the witness stand without difficulty and displayed no obvious physical impediments. He displayed a very good understanding of farming matters generally and was able to engage with counsel's questioning and cross examination. The plaintiff gave evidence of his limited formal education confirming that he started school aged 7 and left aged 12 with no further education. I was satisfied that he

understood precisely what was involved in these proceedings and why he was giving evidence. He did not however present as articulately as in his written witness statement.

- 20.** In evidence, he confirmed that the original Fitzhenry farm he inherited was approximately 100 acres. Over the years since he inherited the family farm the plaintiff purchased almost the same amount of land again immediately adjacent to or across the road from the original Fitzhenry farm so that he had expanded the farm to over 200 acres by the time of the Transfer. A map of the farm was produced in court which very helpfully coloured (in red) the 155 acres which were transferred to the defendant on 5 December 2012. That same map also showed the Retained Lands (coloured green). The plaintiff confirmed that he has, since the date of Transfer, purchased additional lands (shown in yellow) on the same map. The Additional Lands are in two tranches – one immediately adjacent to the northern tip of the Transferred Lands. The other lands are immediately adjacent to the east of the Retained Lands facing the main road. The plaintiff was very familiar with the map and was able to clearly identify and speak to the various fields and boundaries shown on it.
- 21.** The plaintiff confirmed that he was a dairy farmer for most of his farming life, carrying out this activity until 1999. He had a milk quota but was required to give up dairy farming largely due to his health. He suffered a stroke in 2001 which he said affected his short-term memory. Otherwise, however, he made a good recovery. After that time his farming practices changed so that he became involved with suckler herds and breeding livestock on the farm where he would sell calves at 12 to 18 months old. He said his lands were never empty of cattle and that he had a stock bull for breeding purposes.
- 22.** The plaintiff said in evidence that he had the same relationship with all of his nieces and nephews – in particular he did not have any closer relationship with the defendant.

He confirmed that the defendant had built a wall on the farm before he went to Australia in early 2012. He said the defendant did some farm work with him from time to time but that he was always paid weekly for that. He said he gave the defendant €9,000 which the defendant asked him for but he was unable to put a date on this. He conceded in evidence that the defendant had not been paid for the work on the wall and that this work was in part repayment of the €9,000 loan that the plaintiff had given him. The plaintiff said that the defendant never paid him back money, but he acknowledged that the defendant paid some of it back by working.

- 23.** He denied that the defendant had helped out on the farm from an early age. When pressed on this, he said that his neighbours had looked after the farm when he was in hospital in 2001. He later conceded that the defendant had helped out while the plaintiff was recuperating from his stroke in 2001. It was put to him that it was not correct that the defendant did no more work on the farm than any other nephews or nieces. He was referred to the phrase in the solicitor's attendance note of the second meeting that "*Jim is the only one who comes near me*". The plaintiff said that this meant the defendant was the only one who came near him "*looking for a loan*",⁹ "*looking for assistance*"¹⁰ or "*interested in the land*".¹¹
- 24.** He said that he knew the defendant went to Australia but couldn't be sure of the timing. He denied being in any contact with the defendant at that time. He denied that he had telephoned him in Australia as the defendant said in his witness statement. The plaintiff said he never asked the defendant not to go to Australia and said that he "*never asked him to come near the place*".¹² It was put to him that he wanted the defendant to take

⁹ At 14.56 on 02/05/2023.

¹⁰ At 14.57 on 02/05/2023.

¹¹ At 15.46 on 02/05/2023.

¹² At 15.38 on 02/05/2023.

over, as the defendant was the only one in the family who could. The plaintiff replied that he did not persuade the defendant of anything. It was put to the plaintiff that he had encouraged the defendant to undergo formal farm training to get his Green Cert and that this was part of the plaintiff's succession plan for the farm to be kept in the Fitzhenry family. The plaintiff denied this. He conceded that he had paid the fees but continued to say that he had not encouraged the defendant to do this training. It was put to the plaintiff that the only reason the defendant would do this training is if he would be running the farm, having received this assurance from the plaintiff. The plaintiff said that this qualification would have been good for the defendant for any other job, and he did not agree that it was undertaken by the defendant in preparation for him taking over the farm.

25. He remembered that the defendant was on the farm in October 2012. He said that the defendant was talking about milk quotas and taxes. The defendant was explaining that he could get an extra milk quota as a young, trained farmer. He said the defendant told him inheritance tax was changing and that this might require land to be sold to pay that tax. Mr. Fitzhenry said he didn't have any reason to doubt the defendant.
26. He recalled that he and the defendant twice went to see James A. Murphy Solicitor. The plaintiff said that he went along with the defendant "*to learn about all what was going on*".¹³ He said he was keen to discuss getting the dairy farming going again and he said he had a very clear agreement with the defendant that this was what would happen with the farm. He conceded in evidence that the defendant was "*out in the corridor*" while Mr. Fitzhenry spoke alone to the solicitor.¹⁴ The plaintiff said he had been with the solicitor on his own for about five minutes. Generally, there was a lack of recall by the

¹³ At 14.08 on 02/05/2023.

¹⁴ At 14.09 on 02/05/2023; Similar statement also at 15.05 on 02/05/2023.

plaintiff on the specifics of the visits to the solicitor's offices and the plaintiff said that he didn't remember the details. He was not clear on how he had communicated instructions about what lands were to be transferred or what he told the solicitor in relation to that.

27. The plaintiff said he signed what he thought was a "*lease*" on 5 December 2012.¹⁵ He said he didn't read it and it was not read over to him by the solicitor. He said he should not have signed it. He thought the defendant was trustworthy and that their interests were going to be the same. He said he thought the arrangement was intended to enable the defendant to obtain a milk quota and "*get the dairy production going*" but that the defendant instead tried to dispose of waste on the land and set it in grass and then took hay off it and sold it.¹⁶ The defendant also sold the cattle. The plaintiff thought the defendant was going to get into dairy farming but that didn't happen. The plaintiff admitted that he did not mind the sale of the cows if they were going to be replaced with dairy cows, but this never happened, and he said the defendant never even tried it.
28. The plaintiff confirmed that in 2012 he had kept some lands for himself, about 58 acres, and a right of residence in the house he had built in the 1980s on the land, where he still lives. He confirmed that he had received approximately €400,000 in compensation for CPO's imposed by the County Council around 1997. This was invested for him by Mr. Power from FBD, but the plaintiff said he was not well up on these things, but the money had been kept safe. He said he did not spend money on anything except land.
29. He said that in 2015 the defendant had tried to sell part of the lands but following the plaintiff's intervention the lands were withdrawn from sale. The plaintiff said that he

¹⁵ At 14.08 on 02/05/2023; 15.43 on 02/05/2023; 15.48 on 02/05/2023.

¹⁶ At 14.08 on 02/05/2023.

would not sell land unless it was to buy other land. He had a very strong sense of keeping the Fitzhenry land intact.

30. On cross examination the plaintiff pointing to his forehead said that the land was “*imprinted*”.¹⁷ He said that he has two houses on the Retained Lands, a four bed now rented for €1,000 per month and a five bed also now rented out at €1,000 per month. He confirmed that he owned a partly finished house which was the property the subject of the dispute with his niece. When asked as to how he had selected the land to retain from the Transfer the plaintiff was unclear. However, he conceded that the specific location of fields bordering roads was an important aspect of what he retained. He also said it was important that the holding being transferred was not split across different sides of the road so that cattle could be moved within the farm without the need for traversing the public roadway. When asked why he would keep those lands he responded, “*Why would I give away everything?*”¹⁸ The plaintiff said that if he would have “*got proper advice, [he’d have] leased the land*”.¹⁹ It was suggested to the plaintiff that he well knew the difference between sales/purchases (i.e. transfers) and leases and that he had been involved in several purchase transactions and lease arrangements over the years. It was put to him that there was no reference anywhere on the solicitors’ conveyancing file to a lease arrangement and that the plaintiff never thought he was entering into a lease with the defendant – but was only now introducing that suggestion. The plaintiff repeated that if his nephew had not come looking, the plaintiff would have leased the land and would not have had the last ten years of misery. He said he would have given the land to an auctioneer to lease on a commercial basis instead.

¹⁷ At 14:25 on 02/05/2023.

¹⁸ At 14:34 on 02/05/2023.

¹⁹ At 14.35 on 02/05/2023.

- 31.** Counsel put it to the plaintiff that he retained assets worth about €1.5 million after the Transfer comprising lands, houses, prize bonds, cash deposits, investments and shares. He had used his cash deposits to buy the Additional Lands since the Transfer which lands had since increased in value, so that the plaintiff now retained assets in the region of €2million. The plaintiff replied that he wouldn't spend money. The evidence confirms that the plaintiff is a frugal man who lives modestly but would, and has, spent significant money on acquiring land.
- 32.** The plaintiff said he recounted a time (but couldn't put a date on it) when he met the defendant on the lane in the farm and the defendant was jeering and laughing at him about property laws in Ireland. He said he knew then he had made an "error" and said that the last eleven years had been extremely stressful for him, and he had had no relationship with the defendant.²⁰ He said the defendant had attacked him by throwing a hammer at him.
- 33.** It was suggested to the plaintiff that the incident with the hammer did not happen and that the plaintiff would have involved the gardaí if it had happened. I am of the view, based on the evidence, that there was an incident involving a hammer in July 2014 which did not cause any physical injury to the plaintiff (and the hammer may not have been thrown *at* the plaintiff) but which did frighten the plaintiff. I do not believe on the evidence that this was a deliberate attack by the defendant, but it represented an unfortunate deterioration in relations between the parties. There was no suggestion of any repeat incident.
- 34.** The plaintiff denied that he had given the stock or tractors or farm machinery to the defendant and denied he had given the land to him. He referred to the forms he signed

²⁰ At 14.10 on 02/05/2023.

on 23 January 2013 when he said he ticked a box indicating he did not wish to transfer a farm payment. He did however sign a form shortly afterwards on the 6 February 2013 agreeing to the transfer of that entitlement to the defendant noting that there was a “gift” involved. His counsel suggested to the court that this was evidence of confusion on the plaintiff’s part as to what the plaintiff understood was happening. I do not however accept this.

- 35.** The plaintiff’s position on cross examination was that he understood the arrangement was a lease and that he would continue to retain control over how the farm would be run. The plaintiff said he had not been properly advised and he should never have signed the document he signed. Referring to a note on the solicitors’ file, the plaintiff denied that he had ever been asked about a revocation clause and said he’d never heard that question if the solicitor had asked it. When it was suggested to the plaintiff that even if it had been a long lease, he would not have had control of the land anyway, he responded that he would have had some control. He said he had no recollection of receiving invoices for legal outlays that mentioned a “transfer” but said that he recalled that he had paid thousands of euro to the solicitor.
- 36.** When questioned about why valuations were obtained (which would clearly not have been necessary for a lease) the plaintiff said he never dealt with Mr. O’Leary, valuer, and if his solicitor dealt with him, the plaintiff was unaware of it. He denied ever seeing any valuer or auctioneer coming out to his farm to value anything. He was asked about the declaration of solvency which he signed and why that would have been necessary if the arrangement was for a lease. The plaintiff said that was his signature, but he was not advised properly in relation to the document.
- 37.** The plaintiff confirmed that he issued legal proceedings against his former solicitors in 2018 for negligence and he is claiming damages on the basis that he was ill advised. He

said that if the solicitor had told him that the defendant could sell any part of the land that would have been a “*red rag*”, but he said that the solicitor never told him that.²¹ The plaintiff acknowledged that he had stopped the sale of a site by the defendant of part of the lands comprising a derelict house and four acres. He said that if he “*had known [the defendant] could sell any of the land, [he] wouldn’t have given it to him*”.²² The plaintiff said that his own conscience wouldn’t allow him to sell family lands. He agreed that he had stopped the sale and put a *lis pendens* on the entire farm to prevent the defendant dealing with the land.

- 38.** Counsel asked the plaintiff if his former solicitor had advised the plaintiff that there should be another solicitor involved. The plaintiff appeared to know in his evidence that the law was changing in January 2013 to require separate solicitors to be engaged by each party involved in a voluntary transfer. It was put to him that Mary Doran, his sister, was told by the plaintiff that he had been advised to get two solicitors but that he was not going to do that and incur the extra cost. The plaintiff denied ever saying this. On this point the court preferred the evidence of Mary Doran who was able to provide some specifics to the court on that conversation..
- 39.** The plaintiff said that the defendant had not treated neighbours properly. The plaintiff denied that he had abused the defendant in any way. When asked about blocking access to the fields and locking gates, he said it was the defendant who had locked the gates. It was put to him about blocking access to fields with his tractor, and photographs were shown. The plaintiff responded that it appeared that the tractor had broken down in that spot and had only been there for a short period.

²¹ At 11:23 on 03/05/2023.

²² At 11:34 on 03/05/2023.

- 40.** On cross examination it was put to the plaintiff that the dispute with his niece Maresa was another occasion where he gave away property and then later changed his mind. The plaintiff said the site he had given to Maresa was a different site to the one she built on. He said he didn't sign a form for that transfer. It was put to him however that the Court Order referred to setting aside a deed of transfer, so he must have signed one. The plaintiff confirmed that he had part completed the house after the settlement. It was suggested that he did so only to keep the planning permission alive on the site. He was asked why he did not complete the house and have it available for rental income. He said he did not wish to borrow funds to do that. It was put to him that he had spent lots of money on buying more property (€220,000 and €230,000 on separate lots). He then said that he didn't want to complete the house because he was busy farming. It was put to him that he was not farming. The plaintiff also said that he did not recall showing that site to Maresa's in-laws before her wedding. Generally, this part of the plaintiff's evidence was not particularly convincing. On this aspect the court preferred the evidence of Maresa Fitzhenry and Mary Doran. Given the plaintiff's intimate knowledge of the farm, I do not find it credible that he thought another site was involved. Maresa Fitzhenry gave evidence that planning permission signage was put up on the site and there were considerable groundworks carried out on it. The plaintiff must have been aware precisely what site was involved.
- 41.** On re-examination the plaintiff was asked to read out parts of his letter dated 10 October 2013 which he had sent to his former solicitor. The plaintiff performed poorly on this exercise, indicating a definite deficit in terms of literacy skills, as indeed was apparent from the text of the letters themselves. I will return to this point later.

The evidence of Barry Kirwan

42. Mr Barry Kirwan grew up approximately one mile from plaintiff's farm. He is a dairy farmer who inherited 150 acres approximately and now farms that land. He and the plaintiff are good neighbours, and he has known the plaintiff all his life.. Mr Kirwan confirmed that the plaintiff still helps him out with farm work and said the plaintiff was a very good neighbour. Mr Kirwan confirmed in evidence that he didn't know about the Transfer before it happened.²³ He confirmed the sale of stock by the defendant in the Spring of 2013. He had attended that sale and recalled that both the plaintiff and the defendant were there, although they did not appear to be together or engaging with each other. He said that he got on well with the defendant initially but there has been less contact between them in later years. He also knew the defendant from sport. He provided evidence of having been on a day trip with the plaintiff in June 2014 and said that the plaintiff came back approximately half an hour after he had driven home from Mr. Kirwan's farm looking shaken and the plaintiff told Mr. Kirwan that the defendant had thrown a hammer at him. There was an objection to that evidence as hearsay and I have treated aspects of it as such. When asked about the use to which the lands had been put by the defendant after the Transfer, Mr Kirwan said

“...the stock was dispersed in 2013 in – again, to the best of my knowledge, I was there when the bulls were sold, and to the best of my knowledge the older stock were sold in the fall of that year – and, there was for a long time after that there was crops of hay and fodder taken off it and then there were stock on it at various

²³ He gave evidence at 14.07 on 03/05/2023 that he found out about the Transfer “Around the time it happened, or just after it.”

*times – cattle – intermittently or whatever. And then common enterprise on it was to rent it after that in the autumn to store lambs. A lot of people do that.*²⁴

On cross-examination he described the plaintiff as “*unbelievably accommodating*”²⁵ in relation to the ongoing lease arrangements he has with him for the plaintiff’s lands. Mr Kirwan said that he is leasing land at a lower-than-average price for the five-year rental agreement currently in place. He said that he signed a lease with the plaintiff for the current arrangements and that the lease was drawn up by agricultural consultants using an IFA standard template. He acknowledged that farming is difficult on your own and that he was glad of the help he had with his own family. Mr Kirwan gave evidence that the defendant had done some work on the plaintiff’s farm over the years and that Mr. Kirwan would have met him at the plaintiff’s farm “*occasionally*”.²⁶

The evidence of Pat Kirwan

- 43.** Mr Pat Kirwan is a brother of Mr Barry Kirwan. He acknowledged that he had a good relationship with the plaintiff and that they had worked together over the years as neighbouring farmers. Mr. Pat Kirwan is a dry stock farmer and farms lands bordering the plaintiff’s lands. He found out about the Transfer shortly after it occurred and did not know about it beforehand.²⁷ He described his relations with the defendant as cordial. He confirmed he had witnessed the plaintiff’s signature on the herd transfer form in January 2013 (probably in the plaintiff’s kitchen) but couldn’t recall any discussion about it. He said:

²⁴ At 14.19 on 03/05/2023

²⁵ At 14.22 on 03/05/2023

²⁶ At 14.30 on 03/05/2023

²⁷ At 14.33 on 03/05/2023

*“I had nothing to do with this transfer until the day I sat at the kitchen table to do that herd number transfer where they needed a third witness. And ehm everything was cordial so.”*²⁸

44. He said that it was always his understanding from the plaintiff that the farm would be returned to a dairy farm. He gave evidence that:

“James Murphy once said to me and it was probably while I was helping repair some piece of machinery or something – I can’t – it was in the yard – I can’t remember what we were doing at the time but I distinctly remember the phrase: ‘Do you think Nicky would be disappointed if I didn’t go into dairying?’”

*“...I said, ‘I’m not going to be the person to tell him that.’ And I didn’t have any other discussion on the issue.”*²⁹

45. Mr Kirwan was unable to put a date on that engagement although he said that he believed it was still while the parties were talking to each other. He was not sure on that point however. He acknowledged that the parties were not on good terms when the first lot of stock was sold in Spring 2013 and agreed that the relationship between the parties had appeared to deteriorate soon after the Transfer. In light of that fact (corroborated by several witnesses including the parties themselves) I believe it is more likely that this conversation took place later in 2013 by which time the relationship between the parties had broken down.
46. He said from his knowledge when the first lot of stock was sold the parties were not on good terms and they did not appear to be speaking at all when the second lot of stock was sold later in 2013. Mr. Pat Kirwan was vague on his recall of discussions he had

²⁸ At 14.57 on 03/05/2023

²⁹ At 14.41 on 03/05/2023

with the defendant regarding the alleged hammer incident (despite the clear statement made in his witness statement). He denied any involvement in the tractor incident blocking the gateways, but he said that he may have seen the tractor there. He had worked on the walls on the plaintiff's farm with the defendant and had provided the shuttering. He acknowledged that the defendant had assisted him in laying concrete paths at Mr Kirwan's own property. He conceded that it was very difficult to farm alone. He said, "...*there was a lot of work to be done down there. The – a man of Nicky's age was not able to put the physical effort into the upkeep of that farm and it needed a younger man to do it.*"³⁰

The evidence of Robert Stamp

- 47.** Mr Stamp confirmed that he was a practising accountant and that he had provided accountancy and tax advisory services to the plaintiff since 2001, although he had known him and the extended Fitzhenry family all his life. He said that he regarded the plaintiff as a friend as well as a client. His witness statement (which he approved in his oral testimony) notes that the plaintiff "*provides me with the relevant information on time, takes instruction well and always meets his financial obligations. My personal and professional respect for Nicholas is significant*".³¹
- 48.** Mr Stamp said that he would often discuss matters of a general nature with the plaintiff. However, the plaintiff did not discuss the Transfer with Mr Stamp who only found out about it sometime in 2013. Mr Stamp said that he understood from discussions he had had years earlier with the plaintiff that the plaintiff was thinking of leasing the land. He did not recall the plaintiff ever mentioning the defendant to him. Mr Stamp said that he

³⁰ At 14.58 on 03/05/2023.

³¹ Witness statement dated 19 Dec 2022 at para 6.

was surprised that the plaintiff had transferred the lands so quickly and said he would have expected the plaintiff to seek advice from Mr Stamp, but he did not. He said that he knew the plaintiff loved his land and was surprised for this reason that the plaintiff had transferred it to someone else:

*“Well, I know his nature, I know how much he loves his land, and it seemed to be – I suppose – it was a surprise to me that he handed it over. And you know I know he loves land and all to do with it so I would have been surprised he handed it over.”*³²

- 49.** Mr Stamp said he was disappointed the plaintiff had not consulted him in advance of transferring his land and that it appeared the plaintiff had proceeded without financial advice. Mr Stamp prepared a calculation which was handed into court showing the difference in the defendant’s capital acquisitions tax liability based on the position pre and post 6 December 2012 (when the announced Budget 2013 tax increases took effect). He said that the difference between the two regimes was marginal. The calculations show a difference in tax liability for the defendant of €2,548.50 between the two time periods (assuming, as was the case, that the defendant qualified as a “farmer” in that, not less than 80% of his assets, after taking the gift, consisted of agricultural property, as defined on the valuation date of the gift).
- 50.** Mr Stamp gave evidence regarding the financial accounts he had prepared for the plaintiff’s farming operations in the years leading up to the transfer. These accounts show a net loss of €4848 for year ended 31/12/2009; a loss €6208 for year ended 31/12/2010; a profit of €3393 for year ended 31/12/2011 and a profit of €813 for the year ended 31/12/2012. These accounts related to the farming activities only and were

³² At 15:36 on 03/05/2023.

separate to rental or other investment income or pension entitlements of the plaintiff.

Mr Stamp was asked to comment on figures prepared by Mr Quigley, the defendant's accountant, regarding the value of the assets retained by the plaintiff following the Transfer and he generally agreed with the value range suggested by Mr Quigley on that matter.

51. In his witness statement, Mr Stamp stated that

*“Nicholas has limited ability when it comes to matters that are complex or complicated, either of an accountancy or legal or any other nature. He would need considerable guidance in these areas. He would have some difficulty with reading and writing and numbers and would not understand complicated situations”.*³³

When questioned by the court, Mr Stamp acknowledged that he had been able to obtain clear instructions from the plaintiff for the preparation of his accounts.

52. Mr Stamp in his witness statement made the following observations: –

*“...I believe that ownership and control of his land is vital to Nicholas' mental and emotional well-being. Nicholas had accumulated his landholdings over the years. I know Nicholas' ownership and control of his farmlands give to Nicholas a large degree of his emotional well-being and self-confidence. Nicholas' ownership and control of his farmlands gave Nicholas his own sense of self-respect and standing within his farming community”.*³⁴

³³ Witness statement dated 19 Dec 2022 at para 6.

³⁴ Witness statement dated 19 December 2022 at para 13.

53. On cross examination Mr Stamp agreed that there was a strong farming tradition of passing land within families. He also agreed that the plaintiff did not consult with him before the plaintiff bought the Additional Lands following the Transfer.

The evidence adduced at the trial by the defendant and his witnesses

The evidence of the defendant

54. The defendant confirmed that he is the third of four children and that he is from a family farm where his father farms (although does not own the farm which is owned by the defendant's grandmother). He continues to live at home, now aged 41 and is not married. His mother is the youngest in the Fitzhenry family. He said that his uncle over the years would call to their house for Sunday dinner and the defendant would have called to see him over the years, particularly when he himself was able to drive as the plaintiff's farm was a distance of approximately 16 kilometres away. He outlined that when he was younger, he carried out work on the plaintiff's farm including power washing, painting, topping fields every year, assisting with animal TB testing and other tasks. He recalled that the plaintiff had a stroke in 2001 and the defendant was at that point 19 years old. He said he looked after the farm while his uncle was in hospital and that he had had some engagement with the Kirwans during that time. He said he would have milked the cows twice a day perhaps for two to three months at that time. His uncle had made a very good recovery.
55. The defendant said he always enjoyed farming. After he left school, he went to Waterford IT for three years. He conceded that there was not much opportunity at that point to assist the plaintiff and he had been away for summers but did have one year where he had work experience and that was a time when he would have worked more

frequently on the farm. He said he did his fourth year of studies in Cardiff and finished his studies around 2004.

- 56.** In 2005, he went to Australia and southeast Asia where he travelled for five to six months. In 2006, he was working and playing sport (GAA) and didn't have that much contact with the plaintiff. He would, however, carry out work on the farm where required. He was establishing his own carpentry and concrete business around that time. He confirmed that he had received a loan of €9,000 from the plaintiff at one stage which arose when he was not paid by a creditor while he was self-employed. He had asked his mother for half and the plaintiff for half, and the plaintiff gave him €9,000. The defendant said he repaid €3,000 in cash, did work to the value of €3,000 on building a wall for the plaintiff before he left for Canada and when he had offered the last €3,000 back to the plaintiff, he had said to keep it as the defendant might need it. The plaintiff never mentioned it again until relations between the parties deteriorated badly in February 2013.
- 57.** In October 2009 when the recession hit the construction industry, the defendant decided to move to Canada on a one-year working visa. He worked in Canada and returned in October 2010. He said that he worked with the plaintiff intermittently after that. The plaintiff did not pay him a regular wage but did help him out financially. He said that he did carpentry work though was not a qualified carpenter. He did a milk technology course and also did his Green Cert (Level 6) young farmer training which he started in 2011 with the encouragement of the plaintiff who paid the fees. He said that in or around 2011 he was working on the plaintiff's farm. The defendant confirmed that he received his Green Cert in November 2012 (although he had completed it in April

2012). He said his uncle “*wanted to pay for it so that [he’d] do the course*”.³⁵ The defendant said he would not have done the training otherwise. He knew that this was a course which would entitle him to claim agricultural relief if he ever acquired land. He said that ever since he was young his uncle would regularly tell him how things should be done and say that he should do things this way when the farm was his.

- 58.** The defendant said that two to three months before he had decided to go to Australia in 2012, he had mentioned that he might go to his uncle. He thought that perhaps this might be an opportunity for his uncle to ask him to work full time on the farm, but he did not. The defendant booked his flights, and when the plaintiff heard this, he was not happy. The plaintiff went to Australia in April 2012, returning to Ireland in September 2012. While there, he worked as a carpenter on a mine site earning in the region of AUS \$3,000 net per week. He said he was able to save quite a bit because his food and accommodation were paid for, and he worked three weeks at a time intensively.
- 59.** He gave evidence that before he left for Australia, he had said to his uncle (who was not happy he was leaving) that he would keep in touch with him. He said that he phoned his uncle from Australia. At that point he had the option to extend his visa in Australia, and he asked his uncle had he any interest in him farming his uncle’s land. The plaintiff said that he did. He said the plaintiff had indicated that he would like the defendant to come home to start farming the farm. The defendant said that when he was going to Australia the plaintiff told him that he had no one else to give the farm to except the defendant and John Doran and that he would not be giving it to John Doran (another nephew who had his own farm).

³⁵ At 15:45 on 04/05/2023.

60. The defendant said that he then returned to Ireland in September 2012. He immediately started to work on the plaintiff's farm as there was hay in the fields that needed to be urgently taken in (having been baled the previous June). That perhaps took two weeks. He continued working full-time on the farm and the plaintiff paid him sporadically. He said that they were working very well together and enjoying the farming at that stage.
61. The defendant confirmed that he had discussed the possibility of getting back his uncle's old milk quota and his uncle was interested in that. The defendant said that he had looked into it, and he needed either a long-term lease or to own land in order to get the milk quota back. He had told his uncle this, but his uncle was not happy initially and they simply left it. The defendant agreed that his uncle had a vision of returning the farm to a dairy enterprise. He, the defendant, was also keen to do this.
62. The parties were aware from the Farmer's Journal that changes were being proposed to the tax regime in the 2013 Budget.
63. The defendant said that in the lead up to the first meeting with the solicitor in November 2012 he asked the plaintiff was he, the defendant, going to work long term on the farm. They were getting on well at that stage. The plaintiff wanted him to work full time. The defendant said that he would need some form of security if he was to commit to the farm long term. He said the plaintiff made no comment on this. Later, the plaintiff told him he wanted to transfer some land to the defendant, but the defendant did not know how much or which land. He said the plaintiff told him to "*keep quiet and say nothing to neighbours, friends or family*".³⁶
64. The plaintiff then asked the defendant to ring the plaintiff's solicitor (he gave him the number) and the defendant made the initial call to Mr Murphy solicitor from the

³⁶ At 11:13 on 05/05/2023.

plaintiff's kitchen while the plaintiff was there. He said it must have been in November 2012 but couldn't be sure.

- 65.** He said he travelled to the solicitor's office with the plaintiff, who drove. The plaintiff had gathered together some paperwork which he asked the defendant to carry for him to the meeting although the defendant did not know exactly what it contained. When they arrived the defendant sat in the waiting room for what he believed was about 20 minutes while the plaintiff went in on his own to the solicitor. The defendant was then asked to come in. The solicitor asked him some general information about his details and there was a short period of small talk regarding farming. He said it was at that meeting that he first realised that the plaintiff's plans were to give him 156 acres. He said he was astonished and had not expected that much.
- 66.** The defendant said there was a general discussion with the solicitor regarding what needed to happen for the transfer to be done and the solicitor mentioned the need for a valuation. The defendant said he understood that the plaintiff had identified to the solicitor the exact lands to be transferred but he could not recall if a map was produced at that meeting. He said however that from a general description provided it was clear to him what lands were involved – it was essentially the original Fitzhenry holding with some additional land the plaintiff had later acquired. The defendant was asked whether there was any suggestion made to him that he should get his own solicitor. The defendant said he could not remember any talk about a second solicitor. He said that his uncle wanted to pay the legal fees for transferring the land and he thought his uncle would be unlikely to want to pay for a second solicitor.
- 67.** The defendant recalled that some point after that meeting with the solicitor a valuation of the lands was done. He said he did not remember anyone being on the farm, but he did recall that after the valuation was done the valuer called his uncle on the phone and

then both he and his uncle went to see the valuer in his office. He said that the valuer, Michael O'Leary, knew what he had to value. He recalled that Michael O'Leary asked him at the end of the meeting if he could take on the defendant's business as an accountant and in fact the defendant did give him that business. The defendant did not recall seeing a map at that time, nor was he sure exactly when that meeting took place, but he believed it was before 5 December 2012, when the Transfer was signed.

- 68.** The defendant did not recall how the second meeting with the solicitor was arranged. He remembered however again going to the solicitor's office with his uncle and staying outside for another 15 to 20 minutes while the plaintiff met with the solicitor alone and the defendant was then brought in. He said there was a discussion about the details with both of them. The solicitor asked him to read the document that had been prepared and he did that. Both he and his uncle signed the document there. He could not recall if either of them took a copy.
- 69.** He recalled that the following month, January 2013, they applied for the herd number to be changed into the defendant's name and that the Teagasc advisor gave them the document to fill out. There was no difficulty with the plaintiff signing at that point and he recalled Pat Kirwan coming in and signing as a witness in the plaintiff's kitchen.
- 70.** The defendant said that from about late January/early February 2013 things started to change and they did so quite abruptly. He used to call in to see his uncle in the mornings before the day's work. He said his uncle suddenly started to accuse him of stealing the farm. His uncle alleged that the defendant had signed over the farm to himself. The defendant was in deep shock. He kept doing the farm work, but after a while the defendant stopped calling in on his uncle as he said the plaintiff was so erratic and abusive. The defendant said that the plaintiff's behaviour at that time fluctuated and

alternated between threats and then normal talk about farming. The defendant said he never knew how things were going to be and this was very stressful for him.

71. By 14 May 2013, relations had continued to deteriorate. The cattle were due to be sold at the mart as they were 12-18 months old at that stage. He said his uncle had no objection to this as it would have been the plan in any event, but it was very hard to communicate with him and the defendant ended up going to the mart on his own as did his uncle, and they stood apart from each other.
72. By the summer of 2013, with cattle in the fields, the relationship was now very poor, and this phase was lasting. For a time, his uncle's behaviour seemed to improve a little after April 2013 and he asked the defendant to farm some of the Retained Lands. There was a discussion about continuing the farm R.E.P.S. scheme and a new contract was drawn up which needed to be in by the middle of May. He recalled that there were two parcels of land and that he would probably need a one-year lease so that he could close out the R.E.P.S. scheme for the plaintiff. However, his uncle would only agree to one parcel of land – the defendant did not know why. He said that very soon the accusations of stealing resumed.
73. He said that the solicitors drew up a document to lease one of the fields and the plaintiff signed it in 2013. He said he had to farm the other field so that his uncle would not have to repay the R.E.P.S. payments but there was no agreement in relation to it. He said out of nowhere he was then told to get off the land by his uncle and had to withdraw out of the second field. He said that he had originally included it in his single farm payment and then needed to amend his return to exclude it. He said that the R.E.P.S. section of the Department of Agriculture sent him a letter questioning him about it.

- 74.** The defendant's evidence was that he was unable to keep animals as his uncle was simply too difficult to deal with and if he was to overwinter the animals he would have to be in close contact with his uncle as the sheds were in the farmyard beside the house where his uncle lived. He sold the remaining cattle in late 2013 and confirmed he did not discuss that with the plaintiff. He used the proceeds to buy farm equipment (including a new tractor) and also to improve the land with fencing posts. He also used some of the money to pay his Gift Tax. He did not seek favourite nephew relief as he did not satisfy the 5-year working requirement. He said his uncle knew this and had threatened to report him.
- 75.** The defendant confirmed that he made arrangements to buy back his uncle's milk quota in 2013 and had sent a cheque on 10 October 2013. However, he withdrew the application in November 2013 because he did not see that he could start dairy farming the way relations were with the plaintiff. The Department of Agriculture returned the defendant's cheque to him on 27 November 2013 noting that the defendant had withdrawn his application to purchase quota in the 2014/2015 Milk Quota Trading Scheme. The milking parlour was in the yard and at that point he simply could not be near his uncle. He said his uncle was complaining that he was not starting the dairy farming, but the defendant was avoiding confrontation with him.
- 76.** The defendant said he had to keep away from his uncle for his own mental health. He said he had lost so much weight and was so stressed by that point that, at the insistence of his family, he had had to undergo counselling in 2014.
- 77.** In 2014, he was again asked by his uncle to rent some of the Retained Lands. He said he was willing to do it to try to mend bridges but that he did not want to enter into another agreement given his experience the previous year. He said that he was making hay with his uncle and out of nowhere he was then told by his uncle to get off the land.

This was the occasion on which he was fixing the hay machine. He said his uncle became extremely irate, was shouting at him and the defendant then wanted to get away from him. He said he was using his phone pretending he was phoning his mother so that the plaintiff would stop. He said his uncle was laughing at him and trying to provoke him. There were tools lying around including a hammer. The defendant said he was afraid that his uncle would get the hammer and that is why he threw it into the ditch. He denied that he threw it at the plaintiff. The defendant gave evidence in relation to his uncle blocking access to fields with the tractor to prevent the defendant accessing fields and making it very clear that the plaintiff wanted him off the land.

- 78.** The defendant gave evidence that he bought stock in spring 2014 (35 animals) but said that he did not feel that he could overwinter the animals because he did not wish to have close contact with his uncle. He therefore sold the cattle later that year. He said that as a strategy this was not a wise one. Young farmers had a 100% stock relief for the first four years so usually they would use this time to build up their stock, rather than selling it. He said the farm had room for about 100 cows, but he could not deal with the stress of having animals over winter while trying to manage the close proximity this would bring him into with his uncle. In 2014, the defendant had attempted to rent the land. The defendant said he was not managing well at that stage because of the stress of the situation. He agreed a price with a third party, but his uncle wrote to that party and the lease deal then didn't progress.
- 79.** In 2015 the defendant contracted to rear third party's livestock. He was also engaged in some farm relief services (milking cows for other farmers, etc.). He also worked during those periods as a quantity surveyor. He said that it was possible to do both and that this was not unusual for farmers. He said that at one point when he was working on someone else's farm his uncle rang him and said that he should be on his farm. The

defendant thought this might be a change and went to visit his uncle, but he said that it was immediately clear when he arrived that nothing had changed.

- 80.** The defendant gave evidence regarding his attempts to sell a site including land and a derelict house at the end of the farm which had been used to house animals over winter. He said it was too close to his uncle's house and what he wanted to do was sell it and buy somewhere else for the animals. It had a value in the region of €200,000 to €250,000. He did not communicate this proposed sale to his uncle. His uncle objected strongly and stopped the sale. He believed this was what prompted these proceedings to issue in 2016.
- 81.** The defendant said that in 2017 and in 2018 he had tried to establish the dairy business again and had bought some dairy cows but that it was simply too much for him to manage this and deal with the plaintiff and so he had not followed through in those years.
- 82.** On cross-examination, counsel focused on the relatively limited opportunities or evidence of assistance provided by the defendant to the plaintiff while the defendant was in college and travelling. The defendant agreed that nothing was said to him by the plaintiff while he was in Canada which caused him to come home. The defendant said that his uncle had asked him to complete a Green Cert when he came home from Canada and that he completed this. The defendant said he would not have done the Green Cert unless he was going to be a full-time farmer as he already had plenty of other qualifications. He said that he needed his Green Cert to claim Agricultural Relief from gift tax liability. He was asked if that was the motivation. He said it was if he was going to be a full-time farmer. He was asked why he left for Australia in 2012 and he said this was to save money. It was put to the defendant that he had gone to Australia because he could not have earned that money in Ireland at the time and it was suggested

to him that he was merely working on his uncle's farm because he had nothing better to do and no other options. He disagreed. The defendant reiterated that he had contact with his uncle when in Australia and that the plaintiff told him he wanted the defendant to farm the lands.

- 83.** The defendant agreed that he had discussions about dairy farming with his uncle and that traditionally the farm was a dairy farm. He conceded that his uncle was attracted to the idea of returning the farm to a dairy farm and it was suggested by counsel that this in fact was at the very heart of what the plaintiff wanted, and that the defendant had fed the plaintiff what he wanted to hear by agreeing that he would take back the milk quota. The defendant acknowledged that this was important to the plaintiff, but he said it was also what he wanted at the time and believed it would be possible.
- 84.** When asked what he meant by "*security*" it was suggested that it would not have been enough for the plaintiff to have left land to the defendant in the plaintiff's will because the plaintiff could have changed his mind before he died. The defendant agreed. It was suggested that the security the defendant really wanted with an outright transfer of land. The defendant agreed that this was the best security. Counsel suggested the defendant knew he was going to get a substantial transfer and suggested that the defendant was looking at maps with his uncle beforehand. The defendant said the two often looked at maps, but he steadfastly maintained the position that he did not know what was going to be transferred to him until he got to the solicitor's office. Counsel suggested that the urgency in the short period from October to December 2012 came from the defendant. The defendant denied this and said the plaintiff drove the timetable. He said that he would have read the Irish Farmer's Journal to his uncle but he denied that he was constantly telling his uncle about changes in the tax regime or that he ever said land might have to be sold to pay the increased gift tax that was being introduced.

- 85.** It was suggested to the defendant that the meeting at the solicitor's office was extremely short and that the timing suggested by the plaintiff was more accurate. The defendant agreed that the comment on the solicitors' file that the defendant had been helping for over five years must have come from him and that it was not factually correct. Counsel said it is not in the defendant's witness statement that he was told by his uncle to stay quiet about not qualifying for the favourite nephew relief and he suggested to the defendant that this evidence he gave was untrue.
- 86.** The defendant was challenged on his evidence as to why he didn't purchase the milk quota or house livestock over the winter. It was suggested that the defendant had decided not to go into dairying long before withdrawing his application for the quota. This, it was suggested, was because the defendant wanted to save himself some work, rather than because he was trying to avoid his uncle. The defendant said that his health was deteriorating due to the breakdown of his relationship with his uncle. It was suggested that since the Transfer the defendant has run the farm in a way that limits the amount of actual farm work he has to do and allows him to work elsewhere and that he knows this is activity that his uncle would never do and did not want to be done on the farm.
- 87.** The defendant said that he bought dairy heifers in 2016 but was not able to deal with his uncle then. The defendant also purchased more livestock in 2017 but sold them in early 2018 as it got too much for him. He said that by that point his uncle was stalking him in the farmyard, shouting abuse and threats. It was suggested this was a fabrication and did not appear in his witness statement.
- 88.** It was put to the defendant that he had no moral entitlement to the land; that he had never made significant sacrifices before he got the land; that he had his own career; that he trained as he wanted and travelled, and that he only helped out the plaintiff when he

had nothing better to do and that he was paid for the work he did. It was suggested to the defendant that he got the farm on false pretences by holding himself out as a person who would return the farm to a dairy farm. The defendant said he wanted to be a dairy farmer too and had fully intended to do that full time and wished he could have done so.

The evidence of Robert Fitzhenry

- 89.** Robert Fitzhenry is a brother of the plaintiff and the defendant's uncle. He has lived and worked in Brussels since 1978. He is now retired but prior to that he worked for a period with the Department of Agriculture and with the European Commission as an agricultural expert. He holds a degree in Agriculture Science. He described his relations with the plaintiff as good and said that he had maintained contact with the plaintiff over the years. When questioned about the plaintiff's acumen he said that his impression was that the plaintiff was a successful farmer and businessman. He said this was self-evidently so as the plaintiff had doubled the size of his farm over his lifetime. He said that the plaintiff had written letters to him personally. He said that he thought the plaintiff was numerate and said that the plaintiff often wrote letters – if not in the best English. He said however that the plaintiff was able to make his intentions clear in a letter despite this bad spelling and grammar. This was a matter challenged on cross examination.
- 90.** Robert Fitzhenry confirmed that he was not aware of the Transfer before it happened and believed he learned of it in early 2013. He said that he was surprised when he heard although he knew it was going to happen at some stage. He said that he had generally been aware over the years that the plaintiff had been thinking of giving the land to the defendant and he knew the defendant had an interest in farming.

91. He confirmed that at aged 75, the plaintiff was very fit physically and agile mentally. He said there was nothing to suggest the plaintiff was weak in any respect. He said that he had never had any financial dealings with the plaintiff at any stage.
92. Robert Fitzhenry gave evidence that when he returned for a visit to Ireland in late 2013 he had been shocked at the defendant's appearance. He said that the defendant had become very thin and gaunt and that, when he saw him, Robert thought that the defendant had a serious illness. He discussed his concerns with the wider family and had a discussion with the plaintiff. He said the plaintiff was "*non-committal*".³⁷ Robert said that he had asked the plaintiff to be kinder to his nephew. He said that he had also tried to stop the proceedings or resolve them, but he had been unsuccessful. He agreed when asked if his brother had expressed "*unhappiness about how things had turned out*".³⁸
93. On cross examination he agreed that his brother's success as a farmer had dwindled over time, and that he had become a low intensity farmer. Robert Fitzhenry was challenged on his attitude to the plaintiff's literacy skills. Robert insisted that the plaintiff wrote to him a lot. He said that he himself was dyslexic and thought the plaintiff might be too. He insisted however that with respect to his brothers' letters, "*the message – the communication aspect, which is the essential aspect – at least the letters I've received, I've always known what he wanted to tell me*".³⁹ He agreed that the plaintiff's spelling and grammar was poor.

³⁷ At 15:15 on 04/05/2023.

³⁸ At 15:16 on 04/05/2023.

³⁹ At 15:08 on 04/05/2023.

The evidence of John Doran

94. John Doran is a nephew of the plaintiff and the defendant's first cousin. His mother, Mary Doran, is the plaintiff's sister. He is a tillage and beef farmer and farms locally.
95. He gave evidence that he did not hear about the Transfer until after it had happened. When he heard of it, he said he was glad to see things moving on to the next generation. He said that 99 per cent of farms end up in the family and it is normal to inherit (as he had from his own parents) and he noted that there would be plenty of transfers to nephews from bachelor farmers. He said he knew the defendant was very interested in farming.⁴⁰ The plaintiff, in his experience, was not a man to look out or seek advice and would have made his own farming decisions. Specifically, he said, "...*I've never seen a situation where he has got advice about any major business decisions he's made.*"⁴¹
96. He said that he became aware of issues between his uncle and the defendant at some point after the Transfer. He phoned the plaintiff to try to assist but the plaintiff would not engage with him and simply returned one question with another question.
97. On cross examination, Mr Doran confirmed that he knew the plaintiff did not write well but said, nevertheless, that the defendant "*has written a lot of letters*".⁴² He reiterated that in his view that "*as regards his day-to-day farming he would have made his own decisions on his own*".⁴³ He confirmed that he had seen visible farming activity over the years after the Transfer and that it appeared that hay was being made and sheep were grazing. He said he was aware the defendant was occasionally working outside the farm

⁴⁰ At 15:35 on 05/05/2023.

⁴¹ At 15:38 on 05/05/2023.

⁴² At 15:37 on 05/05/2023.

⁴³ At 15:38 on 05/05/2023.

but said that a lot of farmers did that and there was nothing particularly unusual about it.

The evidence of Maresa Fitzhenry

- 98.** Marissa Fitzhenry is a niece of the plaintiff and a first cousin of the defendant. She gave evidence regarding her previous engagement with the plaintiff involving land. She said that in 1998, she was promised a site by the plaintiff as a gift. There had been discussions between her father and her uncle, and the plaintiff showed them sites. They agreed on one site and Maresa applied for planning permission to build a house on it in November 1999. The plaintiff signed a deed of transfer for the site to her on 20 January 2001. She said the plaintiff had walked her down the aisle at her wedding (as her father died in 1999) and that the plaintiff had brought some wedding guests to see the site around that time. She said she and her husband had moved back from the UK later in 2001 and, as they had sold a property there, they had some cash which they used to start the groundworks on their house. She said when they went to draw down their mortgage (all parties using the same solicitor – although a different one to the present case), there was another document which was needed for the purposes of the mortgage drawdown. The plaintiff refused to engage at that point and said he wanted the land back.
- 99.** Maresa eventually issued Circuit Court proceedings against the plaintiff which were ultimately settled on 7 March 2013 on the basis that the deed of transfer would be set aside and that the plaintiff would pay Marissa €85,000 which, she said, was to reimburse her for the monies expended on planning permission and groundworks. She confirmed that further work had been carried out by her uncle on the building, but the house remained half built to this day.

- 100.** Noting the plaintiff's evidence, the court enquired if the plaintiff had ever said to Maresa that she had built on the wrong site. She confirmed "*No, I never heard that*".⁴⁴

The evidence of Mary Doran

- 101.** Mary Doran is the plaintiff's sister (being six years younger than him) and she is the defendant's aunt. She trained in the UK as a nurse and since 1999 she has owned and (until recently) operated a nursing home which she built on part of the Fitzhenry lands on a site she was given by the plaintiff in 1997. She said there was no issue in the family when the plaintiff had inherited the original family farm in 1974 and that all the siblings were pleased about that.

- 102.** She confirmed that there were only two nieces/nephews interested in farming, namely her son John Doran (who inherited their family farm), and the defendant. The other nieces and nephews were all pursuing different careers and none had an interest in farming.

- 103.** In relation to hearing about the Transfer, she gave evidence that:

"Nicky himself told me when I was chatting to him once in the nursing home where he called frequently to see me at one stage. And ehm he just told me that he had transferred the land across the road to James Murphy".⁴⁵

- 104.** She said she was pleased about the news of the Transfer, bearing in mind the plaintiff's age and his need for help with the farm. She described the defendant as "*adaptable*" and said he could do most things on a farm and that she knew he was interested in farming and had worked on his grandmother's farm. .⁴⁶

⁴⁴ At 15.56 on 05/03/2023

⁴⁵ At 11.30 on 09/05/2023

⁴⁶ At 11.33 on 09/05/2023

105. She said that up to the time of the Transfer the plaintiff was still calling to see her regularly and that he would often do jobs around the nursing home and call in for a cup of tea. She said that everyone in the family tried to look after the plaintiff who was living alone. She recalled seeing the defendant working on the farm before the Transfer and said that the two men seemed to be getting on well with each other. She did not know about the Transfer in advance of it happening. She said she was not aware until sometime after the Transfer of the change in relations between the parties. She said that she first observed at the defendant's sister's wedding (sometime in late 2013 or 2014) that the defendant did not appear well. She said:

A: *"I knew there was something wrong with him – physically?"*

Q: *"Why was that? What did you observe, like?"*

A: *"He looked pale and very thin."*⁴⁷

106. She also gave evidence regarding a conversation she had with the plaintiff about the specifics of the Transfer, and in particular the suggestion that a second solicitor be involved. It is worth setting out the full exchange:

Q: *"And – ehm – what I wanted to ask you is did you ever have any discussion between yourself and your brother Nicky about the specifics of the transfer itself? I'm only talking about face to face or indeed on the telephone but –"*

A: *"Oh yes, that when I knew first that he had done it. He told me that he was in with Jimmy Murphy and that he had transferred land to James Murphy and that Jimmy Murphy wanted him to have another solicitor and he said 'No, that will cost money'."*

Q: *"What did you have – another solicitor for whom or for what - ?"*

⁴⁷ At 11.35 on 09/05/2023

A: *“A second solicitor.”*

Q: *“ - for what?”*

A: *“Because – for James Murphy.”*

Q: *“Oh I see. Okay.”*

A: *“But – ehm – he said – he said that would cost more money.”*

Q: *“I take it you’re saying your brother said?”*

A: *“Yes. And he said that, ‘Sure that’d cost more money’ and he said to James Murphy, ‘Are you going to do the job or not?’.”*

Q: *“To who?”*

A: *“He said to the solicitor - ”*

Q: *“Right.”*

A: *“ – ‘Are you going to do this job or not?’.”*

Q: *“Okay.”*

A: *“I just – I specifically remember that.”*

11:37 Q: *“And was there any question that – as to any doubt as to what had been done in your brother Nicky’s – in other words that it was a transfer or some other form of –”*

A: *“No, there was no doubt.”*

Mrs Doran in fact doubled down on this evidence in cross- examination as evident from the following exchange⁴⁸:

Q: *“And you told us that during this conversation when he told you about the transfer he mentioned the question of a second solicitor.”*

A: *“Yes.”*

⁴⁸ At 11.57 on 09/0502023

Q: *“Alright. Now, ehm, you mention this in your witness statement.”*

A: *“Yes.”*

Q: *“And ehm before I come to that I have to put it to you that that is not something that Mr Fitzhenry accepts as having been said by him. Do you understand?”*

A: *“I would understand, yeah, but – ”*

Q: *“He denies that he told you that.”*

A: *“But I am definite he said it.”*

Q: *“Alright you’re very definite?”*

A: *“I’m very definite. I’m under oath. I understand I’m under oath. I’m very definite.”*

...

A: *“...It was a bit of a surprise because I was very disappointed that he would have said to Jimmy Murphy, ‘Do you want to do the job or not?’ Because Jimmy Murphy was well known to Nicky for years.”*

107. Mary Doran confirmed that on the day of Maresa’s wedding she had visited with others the site the plaintiff had given to Maresa to build her house on. She said that the plaintiff showed them all the site and they were delighted to see it. Some ground works had already commenced at that stage.⁴⁹ She said relations were very good that day and that the plaintiff had given Maresa away at her wedding. She confirmed the plaintiff had later said to her that Maresa had taken the wrong site: *“ I would have maybe said to him, ‘What’s wrong?’ or, you know, ‘What’s going on?’ and he said to me ‘Oh it’s the wrong site she took.’ But that was much later.”*⁵⁰

⁴⁹ At 11.39 on 09/05/2023

⁵⁰ At 11.41 on 09/05/2023

108. With regards to the plaintiff's literacy skills, she said that she had received many letters from the plaintiff and that she was able to understand them or that between herself and her other sister they could generally work out what he had written.⁵¹ When asked whether she considered the plaintiff was a vulnerable person at the time of the Transfer, Mary Doran answered "no".⁵² Her witness statement (which she approved when giving her evidence) states her view that "*I do not agree with the picture being painted that he was vulnerable and illiterate etc. Nicky is very sharp when it comes to finances and farming matters*".⁵³

The evidence of Ruairi Quigley

109. Mr Quigley is an accountant who provided evidence to the court following his review of the financial information provided by the plaintiff on discovery. He has been the defendant's accountant for the last 18 months. Much of the evidence contained in Mr Quigley's witness statement relates to the income generated by the defendant from farming the lands between 2013 and 2019 and a comparison as to what might have been earned by him in that period had he carried on dairy activity without interference from the plaintiff. It was accepted at the hearing that a counterclaim for specific special damages is not being pursued by the defendant on this basis (and was not originally pleaded by him). This court does not therefore need to outline this aspect of Mr Quigley's evidence.

110. Mr Quigley provided a table outlining the assets retained by the plaintiff at the time of the Transfer. He provided an approximate valuation of those assets (excluding the right of residence in the farmhouse) of €1,532,100 at the date of Transfer and a current

⁵¹ At 11.52 on 09/05/2023

⁵² At 11.51 on 09/05/2023

⁵³ Witness statement 30 March 2023 at para 6

valuation of €1,989, 352 (although this latter figure could be increased to reflect increased property prices of the land acquired by the plaintiff with cash deposits since 2012). Mr Quigley's report concludes that the plaintiff remains in a strong financial position in his retirement given the level of capital assets he retained, his income from rental and pension and his residential life interest in the farmhouse. His report concludes that "*the amount of assets retained in this case are significantly in excess of what would normally be retained by retiring farmer in my experience*".⁵⁴

The solicitors' conveyancing file

111. The parties agreed that the Solicitors' conveyancing file would be put into evidence without objection, although the solicitor in question was not, for the reasons previously outlined, available to give evidence either orally to the court or by way of written witness statement. Given the importance of independent advice in the overall consideration of whether a transaction may be unconscionable or improvident, it is necessary for me to set out the key documents contained on this file. Obviously, in the absence of evidence from the author of the documents, there is a risk in this court interpreting them which I have remained mindful of. By way of general comment, the file contains some relatively short handwritten attendance notes which, in an ideal world, would have been typed out in a more extensive manner or followed up with written advices. There are however some notes to work with. It is worth noting that the absence of information from those attendances on some matters does not prove that no advice was given on those aspects, although an inference may be drawn on the absence of essential matters. Equally, the inclusion of certain information does not prove the extent of the advice provided on that matter although I have assumed that where a

⁵⁴ Report dated 31 March 2023

matter is referenced in the attendance notes it is more likely than not that it was explained to at least some reasonable degree by the solicitor concerned. I make no finding one way or the other with regard to the alleged negligence of the solicitor, which issue will be determined by the trial judge in those proceedings.

- 112.** The first document on the file is a single page handwritten attendance docket dated 22 November 2012. It has a line drawn vertically through the centre and it was generally accepted by the parties that the likelihood is that the information provided by the plaintiff and the defendant is separately recorded on either side of that line. On what is likely to be the plaintiff's "side", there are some personal details for the plaintiff including his name, phone number and PPS number. There is a note that says "4/5 *folios*". Four townlands are set out and beside one of them is noted "*rt of residence*". There is reference to "*M O'Leary valuation*" and some numbers beside that which may refer to a date. The note also states "*€7000/€7500 per acre?*". The final entries on this side of the page are "*area 150 acres approx. No mortgages*". This side of the page seems to identify the lands to be transferred by reference to separate folios, townlands and acreage. The retained right of residence is also clearly identified. These instructions appear to come solely from the plaintiff.
- 113.** The other side of the page contains the defendant's name, date of birth and PPS number. It notes "*qualified trained farmer April 2012*". It says "*my mother is Nicky's sister*". The next entry is "*helping over 5 years there*". These enquiries would have been relevant to the tax treatment of the transfer (including stamp duty and capital acquisitions tax for the defendant).
- 114.** The next document is a receipt dated 27 November 2012 for a payment on account of outlay in respect of "*Transfer of land to James Murphy*". This reflects a payment for outlay received from the plaintiff.

- 115.** The next document is a letter from Michael O’Leary, valuer, to the solicitors dated 4 December 2012 enclosing valuations of the residential farm and livestock and machinery. Those valuations are dated 4 December 2012 and confirm that Mr O’Leary had inspected the residential farm holding consisting of 156 acres, with a view to assessing the market value as at 3 December 2012. The valuation describes the property and values it at €1,050,000. A separate valuation of livestock and machinery also said to have been inspected by Mr O’Leary places a value on the livestock (separately listed) of €47,000 and on the machinery (also listed) of €7500 (totalling €54,500).
- 116.** The next document is another handwritten attendance docket which relates to the meeting with the solicitor on 5 December 2012. This is a two-page document. The first page and half of the second page appear to relate to that part of the meeting where the plaintiff alone attended. There is a horizontal line halfway across the second page and the entries below that line appear to have been made once the defendant joined the meeting. This note references lands in a named townland which were noted to be “*not the lands being transferred*”. Other townlands are mentioned by name, and it appears the plaintiff discussed how he himself had acquired those lands noting “*before 1974 from mother + father*”. The next entry states “*no voluntary transfer*” – this could either mean that the plaintiff had not entered into a previous voluntary transfer of lands, or it could relate to the fact that he had inherited the lands on his own parents death, rather than by way of voluntary transfer from them. The note then continues that “*fences + boundary ditches are party? + No disputes*”. There is then a note regarding the entry to the house and laneway. These entries appear to show the solicitor’s enquiries regarding whether the lands being transferred were subject to any third-party disputes or had access issues. The next entry is interesting in that it states “*dispute with Niece over*”. In fact, this was not correct as that dispute did not resolve until approximately three

months later at the commencement of the Circuit Court hearing. The note goes on to confirm that there is “*no river to fish in*”, and “*no right of way*”. These appear to show further enquiries by the solicitor to identify whether there were any specific issues that needed to be addressed in the Transfer. There is a note that says “*Stat Declaration*”. No further particulars are provided around that. However, it appears to relate to the statutory declaration of solvency which is required to be prepared by a party engaging in a voluntary transfer to ensure that there is no fraud on that party’s creditors. That declaration was later signed by the plaintiff. I believe there must have been some discussion at the meeting with the plaintiff regarding the need for and effect of this document. There are then some notes regarding the payment of a county council mortgage – this matter appears relevant to closing out a burden on one of the folios being transferred, which was later done. The next entry notes the plaintiff’s age and that he has eight nephews and twelve nieces. There are then three important entries which state “*Jim is the only one who comes near me. No influence on me. Don’t want revocation clause inserted in Deed*”. I believe these entries address the rationale for choosing “*Jim*” out of the 20 nieces/nephews identified. I believe they also illustrate that the solicitor enquired from the plaintiff about any duress or undue influence and was told there was none. The entry also strongly suggests that the solicitor enquired if the plaintiff wished to include an ability to undo the transfer at some point in the future by including a revocation clause and that the plaintiff declined that.

- 117.** The second half of that page states as follows “*James read Transfer before signing it and was satisfied with it & both signed.*” The last entry states “*other papers to be drawn up ASAP*”.

- 118.** A copy the deed of Transfer is included in the file. The plaintiff's signature is witnessed by Mr James A Murphy solicitor. The signature of the defendant is witnessed by another person who appears to be a legal secretary.
- 119.** The conveyancing file also includes a stamp duty return on the transaction (nil stamp duty payable as a transfer to a young trained farmer). It contains receipts to the plaintiff for outlay with the narrative on those receipts being the "*Transfer of land to James*". The file contains correspondence with the plaintiff enclosing the declaration of solvency for his signature. Although the plaintiff could not recall signing this document, it is signed by him. The declaration is also signed by a peace commissioner and dated 5 December 2012 although it appears the declaration was not sent to the plaintiff for signing until 4 January 2013. The file contains correspondence with the land registry, and it appears clear that the same solicitor acted for the defendant in relation to the registration of the Transfer. The solicitors also acted to remove a burden in favour of the local county council that remained on one folio. A copy of the Transfer was sent to the defendant on 16 January 2013 and at that stage the registrations were pending in the land registry. The birth certificate and agricultural certificate was returned to him on 24 January 2013, so it appears he had given this documentation at some point to the solicitors. The original folios and file plans were sent to the defendant on 14 February 2013 and on 17 May 2013. There is also correspondence to the plaintiff on 19 March 2013 asking for confirmation as to whether the plaintiff had "*got your accountant to make the Gift Tax Returns of the Transfer to James*".
- 120.** The conveyancing file contains a number of handwritten letters which appear to have been sent by the plaintiff. While dates are not clear on these letters they appear to commence in June 2014. The letters contain reference to the incident alleged by the plaintiff regarding the hammer. It is clear from this correspondence that the plaintiff did

not feel respected or appreciated by the defendant and that their relationship was not good. In one letter dated 21 June 2014, he refers to “*a rush before budght and the new rules for haven to seper solisors*” – which I read as “a rush before the budget and having to have separate solicitors”. The file then contains a letter from Mr Murphy solicitor dated 25 June 2014 to the plaintiff in which he says “*Dear Nick, I am in receipt of your correspondence and I am very sorry to see the way matters have turned out. Would you please arrange an appointment to come and see me as quickly as possible and see what we can do in the matter*”. This is followed up with a second letter dated 8 July 2014 asking the plaintiff to make an appointment to come and see the solicitor regarding the land. There is a handwritten file note dated 18 July 2014 which appears to be a meeting between the plaintiff and the solicitor. While it is hard to decipher in full, it contains details of the plaintiff’s complaints regarding the defendant. Mr Murphy solicitor sends another letter to the plaintiff on 11 August 2014 looking for the plaintiff to make an appointment to come and see him as the plaintiff was “*to see some family members at a party and then come back to me*”. This appears to be the end of the solicitor’s involvement as far as is evident from the file.

The evidence of the expert conveyancing solicitors

- 121.** Two independent solicitors gave evidence to the court in relation to conveyancing matters and in particular the relevant considerations for a solicitor acting for a party or parties to a voluntary conveyance. Ms Suzanne Bainton, solicitor, gave evidence on behalf of the plaintiff. Mr Michael O’Grady, solicitor, gave evidence on behalf of the defendant. Both solicitors were very clear and helpful in their evidence to the court.
- 122.** Ms Bainton gave evidence in line with her report dated 7 August 2019 and addendum dated 11 November 2019. Ms Bainton said that she was originally instructed in the

context of the professional negligence proceedings issued by the plaintiff against his former solicitor. She did not prepare a separate report for these proceedings. She confirmed that voluntary dispositions created a particular duty of care on a solicitor to ensure that the donor could continue to meet his debts without access to the property being disposed of. She said that there was no evidence on the file that such discussions or assessment had taken place. She said that there would be a particular duty on a solicitor to understand the motivation for entering into such a transaction and that this motivation should be documented. She said that it would often be the case that such disposals would include an express right of maintenance and support for the donor. There was no such right reserved in this case. She said it was clear from the conveyancing file that the solicitor in question had acted for both parties. She was critical of the fact that there was no reference on the file to any discussion regarding whether the parties needed to take separate legal advice. She said that since 1 January 2013, a solicitor cannot act on behalf of both parties to a conveyancing transaction. This is a matter of regulation and it is now professional misconduct for a solicitor so to act. Prior to that time, however, there was no prohibition on a solicitor acting for both parties to a transaction provided there was no conflict of interest. However as a matter of general principle, the Law Society advised that solicitors should not act for both parties. Her report notes the Law Society Conveyancing Conflicts Task Force Report dated March 2012 which states

“In voluntary transfers, for example, Solicitors are expected to make enquiries into a client’s entire financial affairs, into what assets a client has, into the mental capacity of the client, into what are the circumstances of other family members, into what arrangements the client has made for future maintenance, upkeep, long-term care etc. In cases where the same Solicitor is acting for both

*sides in the conveyancing transaction, it would be essential to alleviate any doubts as to full adherence to the Solicitors fiduciary duty to both clients*⁵⁵

- 123.** Ms Bainton also referenced various Law Society practice notes in place at the relevant time. She referred to the practice note of the Conveyancing Committee regarding Voluntary Transfers⁵⁶ which advises a solicitor to consider whether there is a presumption of undue influence. It also states that a solicitor who has previously acted for the donor should consider advising the donee, in a situation where the transfer will impose obligations on the donee, to be independently advised. That practice note also requires careful attendance notes and full written advice to the parties with an opportunity for them to be given documents in advance for perusal. She said that the conveyancing file as furnished to the court does not contain written advice to the parties and it appears the Transfer was executed on the day it was produced.
- 124.** A second practice note referred to by Ms Bainton was the practice note of the Guidance and Ethics Committee on Gifts: Acting for an Elderly Client⁵⁷ which sets out the importance of the solicitor advising an elderly client who proposes to make a substantial gift to ensure that the donor understands the nature of the transaction and that it is a gift not a loan, the consequence of making the gift and that it may reduce the income or opportunities for the donor because of the loss of capital, the extent of the gift and the moral obligations that the donor has to other family members.
- 125.** The third practice note referred to was the practice note of the Guidance and Ethics Committee that firms should not act on both sides of property transactions where one party is vulnerable.⁵⁸ This practice note confirms that the characteristics of vulnerability

⁵⁵ At page 45.

⁵⁶ Dated 1 December 2001.

⁵⁷ Dated 6 April 2009.

⁵⁸ Dated 4 February 2011.

are not exhaustive and include a person who by reason of age, infirmity, mental illness, mental incapacity or physical disability lacks the ability to make an informed or independent decision regarding the acquisition or disposal of property.

- 126.** The fourth and final practice note referred to by Ms Bainton was the practice note of the Guidance and Ethics Committee on Transactions Involving Vulnerable/Older Adults.⁵⁹ This practice note makes reference to the issue of financial abuse. It also references conflicts of interest. It states:

“If a Solicitor is already the Solicitor for a potential donor (older person) then they should refuse instructions from a donee (family member) and act in the best interest of their client - the older person. Where the client of the Solicitor is the family member, it is imperative that the Solicitor insists that the older person has separate legal representation. The Solicitor in question should not, in any circumstances, act for both parties as there is a conflict-of-interest”.

Where the older person is an existing client, the practice note states the importance of ensuring that any proposal to transfer property or assets is in the best interests of the client and that they have considered not only the benefits but the risks involved.

- 127.** Ms Bainton agreed in her evidence that the plaintiff was the solicitor’s existing client and that he was also the principal moving party in the transaction. She accepted that the transfer of farms to family members was not unusual and that the idea of keeping property in the family was important for elderly farmers. She was however critical of the absence of information on the conveyancing file particularly with regard to the motivation for the Transfer and what benefit there was for the plaintiff in entering into

⁵⁹ Dated 2 March 2012.

it. She believed separate solicitors should have been engaged, albeit at that point in time not strictly required as a matter of regulation.

- 128.** Mr O’Grady gave evidence in line with his written Opinion dated 19 April 2023. He stated his view that the attendance notes appeared to accurately reflect what property was intended to be transferred by the plaintiff and a valuation was obtained from professional valuers following the first meeting. He said this would be a standard approach and necessary for all voluntary transfers. He agreed that the motivation for the transfer would be an important enquiry. He said that the solicitor’s notes were clearly shorthand and were unlikely therefore to reflect the totality of the discussions which took place, but, in his view, the solicitor had asked the question of the plaintiff as to why he wanted to transfer property to the defendant. Mr O’Grady said he believed the phrase “*Jim is the only one who comes near me*” was very likely to be the reason why the defendant was selected as the donee, in addition to being a qualified farmer. Mr O’Grady believed that the fact that the solicitor had previously acted for the plaintiff and knew him (and presumably his circumstances) was a significant factor which, to some extent at least, would explain the absence of certain information on the written file. The file was clear that not all land was being gifted. It also clearly called out the right of residence which Mr O’Grady agreed would be a very important protection for a donor. Mr O’Grady agreed with Ms Bainton that there was no prohibition against a solicitor acting for both sides at the time of the Transfer in December 2012 as SI 375/2012 did not commence until January 2013. Prior to that date solicitors would assess each transaction on a case-by-case basis to determine if another firm should be involved. He said from his own experience as a country solicitor, it was very common for farmers not to want to pay for two solicitors in intergenerational farm transfers when the employment of a second firm of solicitors was suggested.

- 129.** Mr O’Grady said the possibility of a family dispute would often be a significant area of enquiry for voluntary transfers. In the present case there were no other dependents. He agreed with Ms Bainton that a solicitor would have to establish the extent of the assets being retained, the extent of the assets being transferred and the ability of the donor to fund their lifestyle for the remainder of their life. He said the age and mental condition of the donor would be assessed and particular attention would always be given to any evidence of undue influence if the beneficiary appeared to be the party driving the transaction. He noted in this case the evidence that the solicitor involved, quite rightly, took instructions from the plaintiff without the defendant being present.
- 130.** In Mr O’Grady’s view, the Law Society guidance at the time of the Transfer was focused on protecting the interests of an elderly donor to ensure there was no coercion or undue influence from the younger relative. There is no such plea in the present case. The practice notes focused on the donor’s ability to understand the consequences of the transaction and that they were entering into it freely. Mr O’Grady said there are very sound personal and business reasons for farms being transferred from an older farmer to the next generation and that these transactions are not unusual. Farmers would always be very keen to make sure that all relevant tax reliefs were availed of. For these reasons in his view “*a strong-minded older farmer would often be very definitive and assertive about implementing a farm transfer/succession plan once they made the decision on the intended beneficiary*”.⁶⁰ He agreed with Ms Bainton that a right of revocation would be possible, but most unusual, to include in a transfer. In his view such a clause would disincentivise a donee and there would be a clawback on all tax reliefs claimed if it was exercised. Mr O’Grady said that a part transfer was less usual in farm transfers in his

⁶⁰ Ap page 5 of his Opinion

experience. He believed the fact that assets were being retained here was significant in terms of the protection for the plaintiff.

- 131.** Mr O’Grady conceded on cross examination that the phrase “*helping over five years*” on the file likely came from the defendant. He was pressed on any concerns he might have had as a solicitor regarding the plaintiff’s ability to read and understand documents. Mr O’Grady said that a prudent solicitor would focus on their communication with the client and their knowledge of them. He agreed the plaintiff’s literacy skills appeared poor but this did not alter Mr O’Grady’s opinion on how the plaintiff understood the deal and how successful a farmer he was. He agreed it would be important however to read the document over to the client and that there was no clear evidence on the conveyancing file that this had been done for the plaintiff. Mr O’Grady agreed that the solicitor in this case had acted for both parties. He also agreed with Ms Bainton that the conveyancing file was not as well documented as would be prudent.

Analysis

- 132.** The statement of claim at para 6 (g) pleads that having regard to the plaintiff’s “*advanced age*” and “*precarious health*”, he

“was anxious to retire from full time farming and...was anxious to ensure that the Fitzhenry family farmlands would be transferred to a trusted person who would run the Fitzhenry family farming enterprise as theretofore and that the Plaintiff would be relieved of the burden of full time responsibility for the Fitzhenry family farming enterprise but would still have a meaningful input therein”.

- 133.** In determining whether the Transfer was an unconscionable bargain or an improvident transaction, this court has firstly to consider whether the plaintiff was in a position of

disadvantage compared to the defendant such that the parties were not meeting on equal terms and the plaintiff was vulnerable to being taken unfair advantage of by the defendant. The plaintiff argues that the court must consider vulnerability in a wide sense. I accept that the categories of vulnerability are not closed and must be fully assessed on the facts of each case. The plaintiff relies on dicta from the New Zealand Court of Appeal in *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 at para 30 where the Court stated:

“A qualifying disability or disadvantage does not arise simply from an inequality of bargaining power. Rather, it is a condition or characteristic which significantly diminishes a party’s ability to assess his or her best interests. It is an open-ended concept. Characteristics that are likely to constitute a qualifying disability or disadvantage are ignorance, lack of education, illness, age, mental or physical infirmity, stress or anxiety, but other characteristics may also qualify depending upon the circumstances of the case.”

134. Counsel for the plaintiff rely in particular on the following as evidence of the plaintiff’s vulnerability: –

- The plaintiff was 75 years old at the date of the Transfer and had suffered a stroke in November 2001. The defendant was 31 years old.
- The plaintiff is a lifelong bachelor who lived on the farm all his life. The defendant was widely travelled with a varied work history.
- The plaintiff’s lack of education and severe difficulties with reading and writing can be contrasted with the defendant’s educational achievements.
- The plaintiff had difficulties understanding complex matters and needed greater guidance and advice.

- The plaintiff was anxious to retire from full time farming and to entrust the farm to a person who would take over while still allowing the plaintiff a meaningful input.
- The plaintiff had a very strong wish to see the Fitzhenry farm go back to dairy farming and was willing to entrust the farm to a person who would return it to a dairy farm.

135. Counsel for the defendant argues that the plaintiff was not at any serious disadvantage. He says that being old is not presumptive of vulnerability. He argued that the plaintiff was a shrewd and successful farmer who had doubled the size of his farm and had acquired substantial and income-bearing assets during the course of his life. He wisely retained one quarter of his farm holdings after the Transfer as well as all his investments and he went on to acquire further lands following the Transfer.

136. I do not believe in this case that the plaintiff's age or health rendered him vulnerable at the date of the Transfer. I say this by reference not only to the evidence proffered by witnesses but also by reference to my observations of him at the hearing, eleven years after the Transfer. The factor I believe which deserves some detailed consideration however relates to the plaintiff's education and literacy skills. While it was not unusual for children in 1930s Ireland to leave formal education at 12 years old, it is nevertheless clear to the court that the plaintiff has poorer literacy skills than would be usual for persons with a similar educational history. This is evidenced by letters which the plaintiff wrote to his former solicitor which were disclosed in evidence and the plaintiff's difficulty in reading back parts of those letters when asked to do so by counsel. An unusual feature of this case was the number of witnesses who commented on the frequency with which they received letters from the plaintiff. For example, his siblings gave evidence to this effect. Furthermore, the solicitors' conveyancing file

contained several hand-written letters. It appears that, despite the plaintiff's difficulty with spelling and grammar, he nevertheless wrote many letters and also made diary entries. Witnesses who received letters gave evidence that they could understand what the plaintiff was saying, despite the poor spelling and grammar. Indeed, that was the court's own experience of reading the letters contained on the conveyancing file. I believe therefore that the plaintiff could make himself understood in writing, albeit that his literacy skills were poor. I am less convinced that the plaintiff could read as well as he could write, and it is likely therefore that he would have required matters to be verbally explained to him rather than merely explained in writing. I accept that there is no note in the conveyancing file that the solicitor read over and explained the Transfer to the plaintiff before he signed it. I am satisfied from the evidence and the plaintiff's performance in court that he can very ably understand maps and that he can also understand figures, particularly money and land valuations. The plaintiff could provide his accountant with details to complete his tax returns every year. The plaintiff understands market value for lands he leases out or buys and for residential properties he has rented to third parties. He was described as a man who paid his bills promptly. He bought and sold cattle as well as land. He bought agricultural machinery and understood agricultural payments such as the single farm payment and the REPS payment. He had engaged in many legal transactions over the years including CPO acquisitions of some of his land. His own siblings who have known him all their lives did not agree that he was weak or vulnerable in any way, despite his poor literacy skills.

- 137.** In relation to the other factors identified by the plaintiff's counsel, I agree that the plaintiff was not well travelled and he had lived alone for most of his life, These factors however did not make the plaintiff vulnerable. The plaintiff is, in my view, an independently minded man with a deep attachment to his land. Certainly he was keen to

keep the farm within the wider Fitzhenry family. I also believe that he wanted to return it to a dairy enterprise. I accept the defendant's evidence that he did not know how much land he was going to receive until this was explained to him in the solicitors office. The plaintiff did not suggest that the defendant had any input into deciding how much land would be transferred to him. On the contrary, it appeared to the court that the sole decision maker in that regard was the plaintiff himself. There was some logic applied by the plaintiff as to what lands he would transfer and what lands he would retain. Based on the evidence before the court this was a decision made by the plaintiff without input from the defendant. There is no evidence that the defendant took advantage of the plaintiff or that he was in a stronger or dominant position to the plaintiff in relation to the transfer of land.

- 138.** There is some basis to believe, on the evidence, that the increase in capital acquisitions tax rates and the introduction of a regulatory requirement for two solicitors in voluntary transactions may have been influencing factors for the plaintiff in completing the Transfer just before those changes became effective. This is despite the fact that those tax changes were immaterial in the overall scheme of matters. These factors should not have been a cause of expediting the Transfer but I accept they may have been. To that extent there may have been some additional stress on the plaintiff to finalise the Transfer. It was suggested on cross examination that the defendant placed improper pressure on the plaintiff regarding these matters. The defendant denied this. I do not believe, on the evidence, that the plaintiff has established such improper pressure was applied to him by the defendant. There is also no plea of undue influence or duress in this case.
- 139.** Counsel for the plaintiff argues that this transaction, being a voluntary transfer, was on its face inherently unfair for the plaintiff. The plaintiff received no consideration for the

Transfer. Furthermore, counsel argues that the plaintiff received no other benefit from the Transfer-on the contrary the defendant did not deliver on the representations and assurances he had made to the plaintiff that the farm would be returned to dairy farming and that the defendant would continue to involve the plaintiff in the farm. It is suggested that the defendant knew of the plaintiff's anxiety and wish to retire from full time farming and to return the farm to a dairy farm. This, it is said, induced the plaintiff to enter into the Transfer.

- 140.** Counsel for the defendant says the plaintiff made a clear and calculated decision to transfer a portion of the farm to the defendant. Counsel argues that it is not sufficient to show that there was no monetary consideration (which is accepted in this case). Rather the result of the transaction. must be some impropriety on the part of the stronger party who acted reprehensibly, knowingly exploiting the weaker position of the other party. Unconscionability in this context, counsel says, relates not merely to the terms of the bargain, but to the behaviour of the stronger party which must be characterised by some moral culpability or impropriety.
- 141.** There are many voluntary transfers entered into in the context of intergenerational transfer of family farms. The voluntary nature of those transactions does not, of itself, render them unconscionable or improvident. All the surrounding circumstances must be considered. I believe on the evidence in this case, that the plaintiff wanted to involve the defendant in the farm and he selected the defendant as his successor. This was not because of a particularly close relationship between the two, or because the defendant had worked consistently on the farm (as might often be the case), but because the defendant was the only one of the next generation of the Fitzhenry family who was interested in farming and who did not already have a farm. Securing the viability of the farm for the next generation of Fitzhenry farmers was important to the plaintiff. Just as

he had inherited the farm, he wished to pass it to the next generation as an intact farm. That was, in my view, the motivation for the Transfer. The plaintiff paid the fees for the defendant to qualify as a young trained farmer and thus ensure that the defendant would be able to avail of the tax reliefs on inheritance or a transfer. While the timing at the end was tight for the Transfer, I believe this investment in college fees by the plaintiff was evidence of his longer-term succession plan to transfer land to the defendant.

142. I have no doubt that the vision of a return to dairy farming was also part of the plaintiff's motivation. The defendant did not re-engage as a dairy farmer. However, the evidence clearly shows that the relationship between the parties broke down very soon following the Transfer. The evidence shows that by February 2013 the plaintiff was already accusing the defendant of stealing the farm. This apparent change of mind cannot be explained on the facts by the defendant having failed to engage in dairy activity on the farm. Insufficient time would have passed by that stage for a dairy enterprise to be re-established. I do not believe therefore, on the evidence, that the defendant's failure to resume dairy farming was the reason why the relationship between the parties broke down. This factor certainly contributed to the plaintiff's ongoing disappointment with the defendant, but it was not the reason for the breakdown in the relationship. Ironically, that breakdown itself is likely, on the evidence, to have copper-fastened the situation whereby the farm was not returned to dairy farming. Such an enterprise would have required cooperation and general stability regarding the farm to justify the additional investment and effort that a return to dairy farming would have entailed. The breakdown in the relationship also meant that the parties could not continue to farm together.

143. I do not accept on the evidence that the defendant had no bona fide intention of honouring his promise and assurance to the plaintiff that he would return the farm to a

dairy farm. I accept his evidence that this became impossible for him with the breakdown in his relationship with the plaintiff and the negative impact on his health that this caused.

- 144.** Counsel for the defendant argued that one of the distinctive features of this case is that the Transfer was limited to a portion of the land holding and did not involve handing over the entirety of the plaintiff's farm nor indeed his means of livelihood. This factual scenario distinguishes the present case from other cases where the courts have intervened to protect the donor such as *Carroll v Carroll* [1999] IESC 11, [1999] 4 IR 241 where the evidence established that apart from the demised premises in that case, the donor lacked practically any other assets following the transaction. I do not believe that the retention of assets by the plaintiff would save a transaction that was otherwise improvident and/or unconscionable. However, it does indicate that, following the Transfer, the plaintiff was not in a vulnerable financial position. Furthermore, it illustrates that there was a degree of analysis applied by the plaintiff in determining what lands he would transfer and what he needed to retain in order to secure his own financial independence into the future. This scenario differs from the vast bulk of cases in which the courts have set aside transactions as improvident or unconscionable. In my view it leans towards a calculated and informed decision arrived at by the plaintiff, albeit one that he undoubtedly later regretted.
- 145.** Counsel for plaintiff placed significant emphasis on what he said was an absence of appropriate independent advice, be it legal or otherwise. He submitted that the evidence establishes that the plaintiff did not receive any independent legal or other advice before the Transfer. Looking firstly at advice other than legal advice, it is clear from the evidence that the plaintiff did not discuss matters with anyone (apart from the defendant) prior to the Transfer. Had he done so, he might have made a different

decision. Mr Stamp, for example, gave evidence that he would have advised the plaintiff against the Transfer had he been consulted beforehand. This was not because of financial considerations per se, but rather because Mr Stamp did not believe that the plaintiff would be ready to deal with the emotional and practical reality of having divested himself of his land. As it turned out, I believe that Mr Stamp's observations in that regard are entirely accurate. However, a failure to canvass general advice and counsel, albeit an entirely sensible option, would not justify equity intervening to deem a transaction improvident or unconscionable if the plaintiff was not vulnerable and otherwise understood the transaction he was entering into – in the words of Gilligan J in *Prendergast v Joyce* [2009] IEHC 199, [2009] 3 IR 519 at 541 “... *the focus in this regard is on ensuring that the particular donor fully appreciates the quality of the transaction*”. There was no evidence that the plaintiff ever sought advice on any important transaction before or after the Transfer, nor any evidence that he had a deficiency in concluding such deals on his own account. This brings into focus the quality of the legal advice which he received in relation to the Transfer and, in particular, the independence of it.

- 146.** The plaintiff pleads that at no time prior to the Transfer did he receive independent legal advice, nor was he advised to seek and/or obtain independent legal advice regarding the Transfer.⁶¹ Counsel says that the evidence establishes that the solicitor acted for both the plaintiff and the defendant. He relies on the decisions in *Carroll* and in *Cox* as authority for the proposition that a solicitor who acted for both parties cannot be independent of the donee in fact.

⁶¹ Paras 6(h), 6(i), 7(e) and 7(f) of plaintiff's statement of claim dated 25 July 2016.

- 147.** Counsel for the defendant argued that in *Carroll*, the Supreme Court held that although the parties consulted a solicitor, he was predominantly the son's solicitor. He was engaged by the son and paid by him. The High Court found as a matter of fact that the solicitor in question had made no enquiries of the father as to whether he had any other assets apart from the premises the subject of the transfer and in evidence the solicitor said that he did not believe he had any obligation to satisfy himself that the father had any other assets to support himself. Nor did the solicitor in *Carroll* ask any questions concerning other children of the father. There were no attendance notes of meetings with the parties and all correspondence on the file was directed to the son. That same solicitor acted for the son in the legal proceedings to set aside the transaction. It was held that the solicitor could not advise the father appropriately, nor had he done so.
- 148.** I agree that the solicitor in this case acted for both parties and I accept the expert evidence in that regard. I accept the evidence of Mary Doran regarding her discussion with the plaintiff and, given the plaintiff's knowledge of the change in regulations, I believe it is likely that Mr Murphy solicitor raised the possibility of a second solicitor being instructed although I also accept there is no reference to that on the conveyancing file. The experts were agreed in this case that the plaintiff appeared to be the primary client (at least up to the Transfer). The expert evidence is that if the defendant had gone to another solicitor, it may not have made any material difference in this case as there were no obligations assumed by the defendant in the Transfer which would have created a conflict of interest (such as taking on a right of support or maintenance for the plaintiff). Of course, it would have been preferable if each party had been separately advised and if the solicitors' file was more complete and/or the solicitor was available to give evidence to the court as to the extent of the advices he gave to the plaintiff.

- 149.** Unlike in *Caroll*, the evidence in this case is that the solicitor had previously acted for and knew the plaintiff. I believe it is likely in those circumstances that the solicitor had at least some knowledge of the extent of the plaintiff's assets. It was the plaintiff who chose the solicitor and who paid him. The file notes show that there were separate meetings with the plaintiff before the Transfer. While there is a dispute regarding the length of time the plaintiff was in the solicitors' office on his own, I believe that the defendant's estimate of timing is more realistic. It is clear from the file that enquiries were made regarding other dependents or relatives of the plaintiff. There is specific reference to the dispute with the plaintiff's niece being over (although that was not in fact correct at that date). This entry must reflect information provided by the plaintiff. He either volunteered it without prompting or he gave it as an answer to a question from the solicitor. If it was the latter, this would illustrate that the solicitor may have asked about other transfers of land made by the plaintiff or, perhaps more likely, the solicitor may have known of the dispute and was trying to understand what had happened in relation to it. If it was the former, this in turn illustrates the knowledge the solicitor had of the plaintiff's affairs.
- 150.** It is clear from the file that not all of the plaintiff's assets were being transferred – certain specific lands were identified by the plaintiff in that regard. There is criticism that the conveyancing file does not display any assessment by the solicitor of the plaintiff's assets remaining following the Transfer. I accept that there is nothing explicit on the file to that effect. However, the plaintiff was already a client of this legal practice. It was clear to the solicitor that the plaintiff was retaining a right of residence and thus his accommodation needs were being met. This solicitor knew the plaintiff and had previously acted for the plaintiff in purchasing property (including property that was being retained) and had acted for the plaintiff in transactions with the local county

council on foot of which the plaintiff received substantial compensation payments.

Without determining the point, I believe that there was every possibility that the solicitor was satisfied that the Transfer would not leave the plaintiff in a difficult financial situation. Of course, that is also in fact the position in light of the extent of the assets and income retained by the plaintiff following the Transfer.

- 151.** Furthermore, the file notes mention “*no influence*” and that the plaintiff did not want to include a revocation clause in the deed. I believe that the notes also likely demonstrate that the plaintiff was questioned about why the defendant was selected over anyone else – this is demonstrated by the fact that the notes recite that the defendant is the only one who came near the plaintiff and that the defendant was a young trained farmer. The court does not accept the plaintiff’s explanation in evidence that the intended meaning of the phrase “*Jim is the only one who comes near me*” meant that the defendant was the only one who came near the plaintiff to look for money.
- 152.** On the evidence, the plaintiff gave all instructions to the solicitor about the Transfer.
- 153.** What is not clear from the file alone is whether alternative options were discussed such as leasing the farm or transferring the farm by will on the plaintiff’s death. These matters may well feature in the litigation against the solicitor. What I am satisfied of however is that the plaintiff did not believe the Transfer was in fact a lease. I do not accept that the plaintiff was under any confusion as to what type of transaction he was entering into. There is no suggestion on the conveyancing file of a lease. On the contrary, all entries are consistent with a transfer, including the documentation which needed to be signed. The plaintiff had, both before and after the Transfer, entered into many transactions for leasing land and for purchasing land. I believe he understood the difference between the two and therefore I do not accept as credible his evidence to the court that he believed he was leasing the land to the defendant. The plaintiff showed a

clear understanding of the difference between a transfer and a lease of land and he had entered into both types of transaction many times.

154. My assessment of the plaintiff is that he is a very independent man who after the Transfer continued to lead an active life and went on to purchase additional lands at considerable expense from his own resources. The plaintiff prudently retained sufficient and adequate assets and income to maintain himself into the future. Given his age it made sense to hand the farm over to the next generation especially if the next generation included a young trained farmer who could take over the lands in a tax efficient manner and who was willing to do so. The defendant was the natural successor and the only viable alternative for the plaintiff if the farm was to be kept within the wider Fitzhenry family. It is significant in this case that there is neither a plea of, nor any evidence to substantiate, duress or undue influence by the defendant or any other party on the plaintiff. I do not believe on the evidence that any presumption of a resulting trust arises. I do not believe that the plaintiff was vulnerable or that the circumstances are such that equity should intervene to set aside the Transfer as either an improvident transaction or an unconscionable bargain. Regrettably, I believe that the plaintiff was unprepared for the emotional and psychological consequences he experienced following the Transfer and that he regretted transferring the land and stock to the defendant.

155. There was allegation and counter allegation made by the parties regarding their respective behaviour, access to lands and other matters. I have not dealt with this evidence in any particular detail as, in my view, it is not directly relevant to whether the Transfer should be set aside. It may be relevant to damages. It is submitted by the parties that such activities were the sole reason why the farm was not improved and returned to dairying and that each party has suffered financial loss as a result of the

actions of the other. Suffice to say that in my view both parties have suffered in their own way since the Transfer. That is a matter of some regret, particularly in the context of a close-knit family. I do not believe it would be appropriate on the evidence to attribute individual blame to either party for actions following the Transfer. I do not propose in all the circumstances to make any award of general damages in this case.

The orders to be made

156. In light of the conclusions outlined above, I believe the following orders should be made in these proceedings:

1. A declaration that the defendant is entitled to the entire legal and beneficial interest in the Transferred Lands, subject only to the right of residence in favour of the plaintiff registered thereon;
2. An order directing the plaintiff to vacate the *lis pendens* registered on the Transferred Lands;
3. An order restraining the plaintiff from interfering with and/or obstructing the defendant from his full and beneficial use and occupation of the Transferred Lands
4. An order dismissing the plaintiff's proceedings.

157. I will list this matter for mention on Tuesday 10 October at 10.30 am when I will hear the parties in relation to the form of Order suggested as well as their submissions regarding legal costs and any other issues arising from this judgment.