Neutral Citation Number: [2009] IEHC 405

THE HIGH COURT

2002 2652 P

BETWEEN

JAMES KEATING

PLAINTIFF

AND

CATHERINE KEATING AND PATRICK KEATING

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on the 24th day of August, 2009.

The plaintiff, who was born on 1st August, 1937, is a bachelor. He has lived for most of his life on a small farm located in West Clare near Loop Head. In 1966 he became the owner of the farm which is registered on Folio 1454F, County Clare. He lived in a dwelling house on the land with his brother, a tradesman, who also helped on the farm, until his brother's death in 1994. Thereafter, he lived there alone. The plaintiff's parents had predeceased his brother, his father having died in 1973 and his mother having died in 1979. The plaintiff has one sister, but she has no connection with the events which have given rise to these proceedings.

The first named defendant is the widow, and the second named defendant is the son, of Patrick Keating (Mr. Keating Senior), who was a first cousin of the plaintiff. Mr. Keating Senior was approximately twelve years younger than the plaintiff. He died suddenly in January 1999 at the age of 48 from a massive heart attack. During his lifetime, Mr. Keating Senior had been the joint owner with the first named defendant of a farm of land adjoining the plaintiff's farm. Mr. Keating Senior was a full-time employee of the Electricity Supply Board (the ESB) prior to his death. It was the first named defendant who was primarily concerned with their farming enterprise. For many years, the plaintiff and Mr. Keating Senior and the first named defendant enjoyed a friendly relationship and were frequent visitors to each others houses. As the second named defendant put it, his family lived only two fields away from the plaintiff. The second named defendant was born in January, 1977, so that he was just 22 years of age when the events which are the subject of these proceedings commenced. Having finished school, the second named defendant lived and worked in England and later in the United States. Following the unexpected death of his father in January 1999 he returned home. His dealings with the plaintiff in February 1999 were the genesis of these proceedings.

The plaintiff's claim and the defendants' response thereto as pleaded
The plaintiff's claim as pleaded and as pursued is one of some complexity, notwithstanding the modest nature of the property the subject of the proceedings. It contains a number of elements.

First, arising out of a transfer dated 12th July, 1999 (the Land Transfer), whereby the plaintiff transferred the land registered on Folio 1454F of the Register of Freeholders, County Clare to the first named defendant for value, the plaintiff seeks an order setting aside the Land Transfer on the ground that it was procured by duress or undue influence or, alternatively, on the ground that it was an improvident transaction or an unconscionable bargain. The plaintiff claims ancillary relief with a view to having the title to the land restored to him. He also seeks an order directing the first named defendant to account for all the rents and profits received by her in respect of the land since the date of the Land Transfer. The land registered on Folio 1454F comprises three parcels: land at Feeard comprising 10.9560 hectares (approximately 27 acres); a plot in the townland of Ross comprising .4880 hectares (slightly over an acre); and one undivided thirteenth part of commonage in Feeard comprising 47.7300 hectares. In relation to his share of the commonage, the plaintiff had entered into an agreement for exchange dated 23rd February, 1987 with the Irish Land Commission for the exchange of his one undivided thirteenth share in the entire commonage for an area in the townland of Feeard comprising 4.173 hectares (slightly more than 10 acres), which the plaintiff beneficially owned in 1999. There was, and is, a modest single storey dwelling house on the land registered on Folio 1454F and there were certain farm buildings on the land. As regards this element of the case, the position of the defendants is that the Land Transfer was not procured by duress or undue influence. The defendants further contend that the Land Transfer was for full value and was not an improvident transaction or an unconscionable bargain.

The second element relates to what is described as a purported transfer of the plaintiff's Suckler Cow Premium Quota (the quota) dated 28th May, 1999 (the Quota Transfer) and purportedly made between the plaintiff of the one part and the first defendant of the other part. The plaintiff contends that he did not enter into any agreement with the first named defendant for the sale of the quota to her and that the signature purporting to be his signature appearing on the Quota Transfer was forged. The plaintiff also seeks an order directing the first named defendant to account to the plaintiff in respect of all monies and profits received by her on foot of or by reason of the Quota Transfer from 28th May, 1999. The defendants deny that the plaintiff's signature on the Quota Transfer was forged.

The third element is that the plaintiff seeks damages for detinue and conversion in relation to two separate species of property. First, the plaintiff contends that the defendants removed and converted to their use approximately 47 head of cattle, which were the property of the plaintiff and that the plaintiff received a total of approximately IR£3,500 from the defendants, being a sum significantly less than the combined value of the cattle. Secondly, it is alleged that the defendants removed and converted to their use two items of machinery the property of the plaintiff not included in the sale – a tractor mower and a hay turner. This claim was expanded to include a silage wagon and a trailer. It is alleged that the second named defendant dumped some of those items in a slurry pit. The defendants deny any wrongdoing in relation to either species of property. Their position in relation to the livestock is complicated, in that they contend that some of the cattle were included in their agreement to purchase land from the plaintiff, some of the cattle accompanied the Quota Transfer and, as regards animals which were the property of the plaintiff and were sold, they were sold for full

market value and the defendants paid or proffered the full proceeds to the plaintiff.

The fourth element is a claim for damages, including aggravated or punitive damages or both, against the second named defendant for trespass to the person and assault by the second named defendant on the plaintiff. The incident which gives rise to this claim, which occurred after the plenary summons in these proceedings, which issued on 15th February, 2002, was served on the second named defendant on 16th February, 2002 is admitted.

The final element of the plaintiff's claim is based on an allegation that the second named defendant severed the water supply to the plaintiff's house and closed in the septic tank servicing the plaintiff's house. The plaintiff claims injunctive relief in relation to such alleged interference.

In addition to traversing all of the allegations made by the plaintiff, the defendants have pleaded *laches*, delay, acquiescence and estoppel. On the basis of allegations of trespass on their land, that is to say, the land registered on Folio 1454F, against the plaintiff, they have counterclaimed for injunctive relief restraining trespass. Insofar as so much of those allegations as were not withdrawn were pursued, in my view, the allegations of trespass against the plaintiff were not established by the evidence.

The circumstances of the plaintiff in February, 1999
The plaintiff was 61½ years of age in February 1999. The significance of this is that he was eligible to participate in a scheme operated by the Department of Agriculture and Food known as the Scheme of Early Retirement from Farming (the ERS), which was put in place as a result of the 1992 CAP Reform. It was designed to encourage farmers between their 55th and 66th birthdays, who had been farming as their main occupation for 10 years, to retire from farming and to transfer their land to younger farmers who would thus expand their holdings. There was an upper age limit of 50 for transferees, who had to have a certain amount of farming experience or a relevant farming qualification in order to participate. A transferor received a monthly pension, which amounted to IR£7,275.31 (equivalent to €9,327.74) in 1999. The pension was payable for up to 10 years, but not beyond the transferor's 70th birthday. The ERS required production or quota rights to be transferred with the land or otherwise disposed of. For participants who would become eligible for a State pension, for example, an old age non-contributory pension, provision was made for offset of the State pension against the pension payable under the ERS. The plaintiff was due to become eligible for a State pension as of 1st August, 2003, having attained the age of 66.

The evidence did not indicate what level of income the plaintiff had from his farming activities in February 1999, but I think it is reasonable to infer that it was fairly modest. What is clear is that the plaintiff had financial problems for at least two years and that he had been considering a number of options. This is clear from the evidence of Mr. Michael F. Nolan, a solicitor practising in Kilrush, who acted in the transaction at the heart of these proceedings, which culminated in the Land Transfer. The plaintiff consulted Mr. Nolan in September 1997. At that time the sale of the plaintiff's house was mooted, but nothing happened. The following year, in February 1998 the plaintiff asked Mr. Nolan to act for him in connection with a mortgage transaction with The Wise Mortgage Company Limited (Wise). In fact, the plaintiff had entered into a commitment letter dated 3rd February, 1998 with Wise in relation to an advance of IE£25,000, to be secured by a charge on the land registered on Folio 1454F, County Clare. Mr. Nolan actively discouraged the plaintiff from proceeding with the transaction with Wise because of the high rate of interest which was being charged and the procurement and broker's fees, which he regarded as being unfair. It also transpired that the land registered on Folio 1454F was already charged in favour of ACC Bank Plc. (ACC). It came to light that ACC held the land certificate in relation to the Folio when Mr. Nolan requested it from solicitors who had acted for the plaintiff, as one of a group of landowners, in a sale to the Commissioners of Irish Lights in connection with the Loran C mast at Loop Head. ACC had also registered a judgment mortgage on the Folio in October, 1997 on foot of a judgment obtained in March 1997 in the sum of IR£15,800.65. The position, therefore, was that the plaintiff could not give a charge to Wise. By April 1998 the plaintiff's indebtedness to ACC had risen to IR£17,878.20.

I am satisfied on the evidence that Mr. Nolan gave prudent advice to the plaintiff in the period from February to April 1998. I am also satisfied that Mr. Nolan advised the plaintiff of what was, in his view, a way of dealing with the plaintiff's problem, which was how he could raise the money to discharge his indebtedness to ACC. Mr. Nolan's evidence was that he suggested to the plaintiff that he should consider availing of the ERS, which would allow him raise a lump sum by selling the land and reserving the right to stay in the house. This would also provide him with a valuable pension at a time when he was five years short of the old age pension qualifying age. While the plaintiff admitted that Mr. Nolan had suggested that he might avail of the ERS, his evidence was that he did not agree to it and that he was not interested in the ERS and he wanted to continue farming. I have no doubt that the plaintiff subsequently decided to apply to participate in the ERS.

At the time, around April 1998, the plaintiff held a quota of 37 premium rights. The following month, May 1998, he transferred two tranches of premium rights, aggregating 19.3 premium rights to two farmers in County Clare, leaving him with 17.7 premium rights. It is not clear from the evidence what consideration the plaintiff received for those transfers. However, what is clear is that he did not reduce his indebtedness to ACC. The plaintiff admitted that he was in serious financial difficulty at the time. However, his evidence was that he could have dealt with the problem by selling cattle or by applying for grants under the Rural Environmental Protection Scheme (REPS), for which he was waiting to qualify.

There is no doubt that the plaintiff's health was compromised and he was in poor physical condition at the end of 1998 and the beginning of 1999. The plaintiff's own evidence was that at the end of 1998 he got very sick, but he did not know what was wrong with him. He had blood on his coat. A cousin told him he had shingles. It was not until early February, 1999 that he decided to go to a doctor. He went to Dr. Thomas Martin Nolan, a brother of Mr. Nolan, who practised in Kilkee and Kilrush at the time. Dr. Nolan was called on behalf of the defendants. Dr. Nolan's evidence was that he had no record of an attendance at his surgery by the plaintiff before February, 1999. He attended on a number of occasions in February, 1999 and he was treated for ulcerated shingles. Dr. Nolan's evidence was that he recalled the plaintiff's condition vividly. He had a very bad lesion on his right shoulder. Dr. Nolan described it as "shocking". It had been there for some time. He also described the plaintiff's back as "pretty awful". Dr. Nolan treated the plaintiff with dressings and changes of dressings and he prescribed pain relieving medication.

The plaintiff's evidence was that he was in a bad state of health in March and April 1999. He was run down and eating little. He was in severe pain with the shingles and that it continued up to the summer of 1999. By July he was still sick. The illness affected him in every way, including his nerves.

In January, 2005, six years after the outbreak of shingles, the plaintiff was referred by his solicitor for a medical report in connection with these proceedings to Mr. John A. Griffin, Consultant Psychiatrist at St. Patrick's Hospital, Dublin. Dr. Griffin saw the plaintiff twice, on 27th January, 2005 and on 5th June, 2008. He described the plaintiff as "a rather circumstantial historian", but nonetheless stated that he completely believed what the plaintiff told him during the course of both interviews. On the issue which I have yet to address, the plaintiff's allegation that he was pressurised by the second named defendant to sell the farm, Dr. Griffin concluded that he was seriously pressurised. He also suggested that the vulnerability of his body and mind due to herpes zoster (shingles) would have played a part in worsening the pressure, which the plaintiff had described as being bullied, intimidated and threatened by the second named defendant and, on a number of occasions being beaten, punched and bruised. Dr. Griffin's evidence was that post herpetic neuralgic pain can cause clinical depression. He expressed the view that a person suffering from depression should not make financial decisions.

Dr. Nolan who saw the plaintiff probably four or five times during February and March 1999 testified that there was no evidence of the plaintiff having been beaten when he physically examined him. Moreover, he has no record of the plaintiff having told him of any threat to beat him. He was looking to ascertain the underlying reason for the shingles. There was nothing in his examination of the plaintiff which suggested mental incapacity at the time. He made the point that the plaintiff was able to drive in and out to and from his surgery. He acknowledged that stress has a role in shingles.

There was other evidence of deterioration in the plaintiff's physical condition around this time. Garda Charles Killeen, who had known the plaintiff since 1989, and who investigated the events of 16th February, 2002, testified that the plaintiff was in a bad state health wise around 1999. He was aware that the plaintiff had a bad dose of shingles and that his general condition disimproved. He saw a big change in the plaintiff, who had lost a lot of weight, and he also saw a change in the manner in which he kept himself, cleanliness being an issue.

The evidence also indicates that conditions around the plaintiff's farm at this time were poor which, I think has to be attributed, at least in part, to the plaintiff's ill health. There was evidence of overcrowding and underfeeding of cattle, of machinery being in a poor state and of the slurry overflowing.

Events between February 1999 and July 1999
There are three series of events during the period from February 1999 to July 1999 which have to be considered. The first is the series of events which led to the execution of the Land Transfer. The second relates to the submission of the Quota Transfer to the Department of Agriculture. The third relates to the disposal and movement of the plaintiff's cattle. While the three are interconnected, I propose considering them separately initially.

However, it is necessary to make some general comments about the evidence. There was a complete conflict between the plaintiff, on the one hand, and the defendants, on the other hand, on most of the crucial events which gave rise to the proceedings. It is extremely regrettable that, when the parties came to testify as to the events in February and March 1999 in this Court, ten years had elapsed since the events had taken place. The parties were understandably vague on the detail of those events, although on certain matters a party testified as to what happened ten years ago with what can only be described as questionable certainty. Fortunately, Mr. Nolan's conveyancing file, and, in particular, his contemporaneous attendances throw some light on what actually happened.

Events leading to the Land Transfer
There was a formal agreement for the sale of the land registered on Folio 1454F by the plaintiff to the first named defendant, the terms of which I will outline later. There is a serious conflict as to the circumstances in which that agreement came about.

The plaintiff's evidence was that he came under pressure to sell the land from Mr. Keating Senior before his death and, after his death, he came under pressure from the second named defendant. The defendants' position was that, as it was put to the plaintiff in cross-examination, he was "plaguing" Mr. Keating Senior and his family to buy his land, because the plaintiff wanted to sell his land but wanted it to remain in the Keating name.

In relation to the allegations of pressure by Mr. Keating Senior, the plaintiff's evidence was that Mr. Keating Senior started to put pressure on him to sell the land following his brother's death in 1994. Mr. Keating Senior put severe pressure on him a lot of times and the pressure was getting "more and more". He was being bullied and assaulted by Mr. Keating Senior, who was twelve years younger than him and who was stronger than him. Specifically he alleged that Mr. Keating Senior assaulted him by putting him up against the wall in his home on more than six occasions at a time when, even though he was in severe pain, he was still working, which I understand to mean that the assaults occurred in December 1998 and January 1999. The plaintiff's evidence was that he did not attend the funeral of Mr. Keating Senior because he was sick and he was disgusted with how he had been treated by Mr. Keating Senior.

The allegations of physical assault on the plaintiff by Mr. Keating Senior were first made during the plaintiff's evidence in chief. The allegations were not pleaded in the case and the plaintiff made no complaint to the Gardaí or to Dr. Griffin that he was assaulted by Mr. Keating Senior. On the evidence I find that the plaintiff was not assaulted by Mr. Keating Senior, which will necessitate considering the submission made on behalf of the defendants that the plaintiff has not come to court with clean hands and should not be afforded any equitable remedy to which he might otherwise be entitled.

The plaintiff's evidence was that, following his return from the United States at the time of his father's death, the second named defendant started putting pressure on him to sell the land. He alleged that the second named defendant beat him in his own home on around twenty occasions. He alleged that he beat him with his fists on his back, on his face, on his eyebrows, everywhere. The second named defendant denied that he assaulted the plaintiff. His evidence was that the day after his father's funeral, he was informed by a neighbour that the plaintiff wanted to see him. When he went to the plaintiff's home he found him in a bad state. He took off the plaintiff's shirt and bathed his back. He offered to take the plaintiff to the doctor the following day, but, when he arrived to do so, the plaintiff had already gone to see the doctor. Around this time, he visited the plaintiff most days. On each occasion the plaintiff would ask the second named defendant to buy the land.

In his evidence in chief the plaintiff said that he never agreed the terms which formed the basis of the formal agreement for sale of the land, although he acknowledged in cross-examination that there may have been discussion relating to the sale of the land. However, he was adamant that there was no discussion in relation to the transfer of any of his cattle.

The evidence of the second named defendant was that in the course of a conversation between the plaintiff and the second named defendant in a motor vehicle in February or March 1999, the plaintiff offered to sell, first, for IR£60,000, and later for IR£45,000, the land, the farmhouse and sheds and the quota and the cows that went with it. The plaintiff was going to sell the remainder of the stock. The response of the second named defendant to the offer was that he would have to talk to the first named defendant. He spoke to the first named defendant. She decided that she would buy. After a few days the plaintiff and the second named defendant met. The second named defendant told the plaintiff that his mother had agreed to buy and they shook hands on the deal. It was agreed that the plaintiff would continue to live in the house on the land until he passed away. The next step was to go to a solicitor. Mr. Nolan was chosen, although another firm was acting in the administration of the estate of Mr. Keating Senior. The evidence of the defendants was that Mr. Nolan was chosen to act at the behest of the plaintiff, one of the reasons being that the plaintiff did not want people to know he was selling the land. It was agreed that a deposit of IR£3,000 would be paid by the first named defendant.

In general, the evidence of the first named defendant was vague and unclear as to the terms on which the sale had been agreed. She gave the impression that the agreement had been made between the plaintiff and the second named defendant and that she simply went along with it. However, it was the first named defendant who was involved in instructing Mr. Nolan in relation to the purchase from the purchaser's perspective.

The plaintiff attended at Mr. Nolan's office on 8th March, 1999. Mr. Nolan noted in an attendance docket what he had been told by the plaintiff. It was that he was selling certain land, which approximated to all of the land registered on Folio 1454F to the first named defendant. The price was IR£40,000 plus IR£1,000 per year for five years commencing on 1st December, 1999 and thereafter on each 1st December. The first named defendant had paid the plaintiff IR£3,000 by way of deposit. Of the IR£40,000, IR£20,000 was to go to ACC. Mr. Nolan was told that the first named defendant was under fifty and that her name had been on the farm for more than five years. She had not spoken to the bank, obviously about getting finance for the purchase, yet. Mr. Nolan noted that the contract was to be subject to sanction for the ERS for the plaintiff and subject to the first named defendant getting finance.

All of that is very clear. However, the plaintiff's evidence was that he did not know what the deal was. He did not discover it until a long time after. He knew he was signing about land but he had no idea what about. When it was put to him that his account was improbable, his response was that he could not tell Mr. Nolan anything, as he had not a clue and he was very sick. Moreover, it was the plaintiff's evidence that he was brought to Mr. Nolan's office by the second named defendant, who had beaten him up that morning, told him what to say and waited outside for him. He had received a cheque for IR£3,000 from the first named defendant. He cashed the cheque at the branch of AIB in Kilkee either before or after his attendance at Mr. Nolan's office. He then gave the cash, under threat, to the second named defendant. Evidence was given by an employee of AIB that on 8th March, 1999 the plaintiff had negotiated a cheque drawn on the account of Catherine and Patrick Keating for IR£3,000, for which he obtained a bank draft of IR£1,000 at a charge of IR£1.50, paid an ESB bill in the sum of IR£55 and received the remainder in cash (IR£1,943.50). When he was recalled on the sixth day of the hearing, at the conclusion of the evidence, the plaintiff's evidence was that he had actually cashed two cheques for the same amount on that date and that the above transactions must have been paid from the other cheque which had been lodged. On the basis of the documentary evidence furnished that is patently not the case. I accept the evidence of the second named defendant that he did not receive the proceeds of the cheque of IR£3,000.

Mr. Nolan's evidence was that there was no indication that the plaintiff had been subject to a beating prior to his attendance at his office. It is quite extraordinary, however, that Mr. Nolan did not seek to take the cheque for IR£3,000, which he was aware had been furnished by the first named defendant as a deposit, from the plaintiff and hold it as stakeholder pending the completion of the transaction, in accordance with the normal practice in a conveyancing transaction.

The first named defendant attended at Mr. Nolan's office on the following day, 9th March, 1999. Mr. Nolan's attendance docket records that four matters were raised at that meeting. The first was that the first named defendant wanted Mr. Nolan to check her eligibility for a pension from the ESB. The second was that he was to check the acreage on the folios. The third was that he was to ensure that the first named defendant could be certified as an appropriate transferee under the ERS. The relevant form ERS1A was filled out and signed by the first named defendant and subsequently submitted to Teagasc. On 22nd March, 1999 the relevant certificate confirming the first named defendant's status was furnished by Teagasc. The fourth matter was that IR£20,000 was to be paid as soon as possible.

Mr. Nolan attended to all of the matters which arose at the meeting with the first named defendant. He wrote to the first named defendant on 24th March, 1999 giving details of the land registered on Folio 1454F, omitting the plaintiff's interest in the commonage, and stating that although the house was to be transferred to the first named defendant, the plaintiff would be retaining his right to live in it for his lifetime. The purchase price as set out in the attendance docket of 8th March, 1999 was set out, as was the fact that the plaintiff had already received a deposit of IR£3,000 from the first named defendant. It was recorded that the plaintiff had no milk quota and the same had been recorded on the form ERS1A, which also noted that no herd number was being transferred. The first named defendant was advised to get written confirmation of her loan sanction.

There was confusion up to 8th April, 1999 as to what acreage the plaintiff was transferring to the first named defendant. In a file note made on 8th April, 1999, Mr. Nolan recorded that the plaintiff had telephoned him to say that he had been discussing the matter with the first named defendant. The land being sold amounted to 35 acres because he had been allocated a share in the commonage. The plaintiff told Mr. Nolan that he had signed documents for the Land Commission in respect of the allocation. He promised to leave in Area Aid maps to Mr. Nolan which confirmed where that land was. Mr. Nolan noted that he duly did so. The note suggests to me that the plaintiff had a clear understanding of what he was selling to the first named defendant.

Mr. Nolan also recorded that the first named defendant, who had called to his office the previous day, had left him a bank draft for IR£17,000 pending the requirements of her lender, Bank of Ireland, being sorted out. The bank draft, which was dated 1st April, 1999, was drawn on Bank of Ireland and the first named defendant was the payee. The first named defendant's evidence was that she gave the bank draft to Mr. Nolan in order to have the plaintiff's deeds released from ACC. The bank draft was endorsed in favour of the plaintiff and was furnished by Mr. Nolan to ACC on 9th April, 1999 in full and final settlement of the monies owing by the plaintiff to ACC. This is another extraordinary feature of the transaction – that Mr. Nolan would permit the first named defendant's money to be used to discharge the plaintiff's secured indebtedness to ACC prior to the sale being completed. Mr. Nolan's evidence was that he did not know who

negotiated the settlement figure of IR£17,000 with ACC. When it was put to the plaintiff that he negotiated with ACC and negotiated the debt down from IR£20,000 to IR£17,000, he denied that and stated that no one had told him that the debt had been paid off. That evidence is simply not credible.

A formal contract in the form of the Law Society's Standard Conditions of Sale bearing the date 8th April, 1999 was executed by the plaintiff and the first named defendant. On the evidence I believe that the first named defendant signed on 7th April, 1999 and that the plaintiff signed on 8th April, 1999. The contract reflected the terms which Mr. Nolan had previously recorded. It recorded that the deposit of IR£3,000 had been paid. The closing date was to be not later than one month from execution when the sum of IR£37,000 would be payable. The balance of IR£5,000 payable by instalments was to be secured by a charge executed by the first named defendant in favour of the plaintiff and any arrears were to carry interest at the rate of 15% per annum until payment. Special condition 6 erroneously stated that the purchaser, rather than the vendor, should be allowed to retain the use of the dwelling house on the land for his lifetime but would retire completely from farming. Special condition 7 stated that there was no milk quota attached to or appurtenant to the land in sale.

Following 8th April, 1999, Mr. Nolan attended to the title matters: the transfer of the plaintiff's interests in the commonage which was dealt with in correspondence with the Department of Agriculture and Food; and the acceptance by ACC Bank of the sum of IR£17,000 in full and final settlement of the plaintiff's indebtedness and the release of the land certificate in relation to Folio 1454F. On 16th April, 1999 Mr. Nolan gave Bank of Ireland an undertaking to lodge the land certificate in relation to Folio 1454F with the bank as security for the first named defendant's indebtedness in due course and in the meantime to hold the title documents in trust for the bank.

On 26th April, 1999 Mr. Nolan wrote to the plaintiff informing him that the documents were ready for signing by himself and the first named defendant and suggested the following Friday, 30th April, 1999, for the closing of the sale. The letter explained that the first named defendant would hand over the balance of the purchase money in exchange for vacant possession of the land. Mr. Nolan spelt out that that meant that the plaintiff's stock had to be cleared off the land. Mr. Nolan informed the plaintiff that he had the documentation ready in connection with the ERS, but it could only be lodged when the plaintiff had got rid of all his cattle, as he was required to show that he had retired from farming. He would also have to give up his herd number.

Closing did not take place on 30th April, 1999, although on the previous day the first named defendant had obtained a bank draft in her favour in the sum of IR£20,000 from Bank of Ireland. Both the plaintiff and the first named defendant attended at Mr. Nolan's office on 30th April, 1999. What occurred is in dispute. Mr. Nolan's evidence was that there was a short meeting, lasting about ten minutes. Mr. Nolan's recollection was that there was an amicable discussion between the parties. The original contract signed on 8th April, 1999 could not be located. A blank counterpart was, however, available. Mr. Nolan's evidence was that the parties signed the counterpart with the error in special condition 6 having been corrected. The counterpart was then dated 30th April, 1999. The plaintiff's evidence was that he walked out of the meeting on 30th April, 1999 after refusing to sign any documentation. The plaintiff acknowledged that the signature on the contract which bears the date of 30th April, 1999, the original of which was put in evidence, is his signature, but he had not signed it on that day. Mr. Nolan's evidence was that, if the plaintiff had walked out, he would have recorded that fact and that he would have ended his involvement in the matter, if there had been an issue between the parties.

On reviewing the situation, I think the probability is that Mr. Nolan's recollection is incorrect and that all that happened on 30th April, 1999 was that Mr. Nolan inserted the date 30th April, 1999 on the undated counterpart, which had already been signed by the first named defendant on 7th April, 1999 and by the plaintiff on 8th April, 1999 and corrected the error in the special condition. I have come to this conclusion from comparing the manner in which Mr. Nolan witnessed the respective signatures of the plaintiff and the first named defendant on the copy of the contract dated 8th April, 1999 which is available and on the original of the contract dated 30th April, 1999. The plaintiff's signature is witnessed by him as "M.F. Nolan", whereas the first named defendant's is written by him as "Michael Nolan", which is consistent with the signatories not having signed at the same time. If I am correct on this, it is understandable that Mr. Nolan should have forgotten what actually happened ten years previously.

What is of more significance is that Mr. Nolan noted two matters on an attendance docket dated 30th April, 1999. The first was that the "quota of 20 animals are to be transferred to" the first named defendant. The second was that the land was to be vacated. It was noted that 16, obviously meaning cattle, would be put on to other land and that 20 had been sold to the second named defendant. Mr. Nolan could not recollect who gave him that information. He regarded the matter of the quota to be the parties' business and he could not elaborate further on what he had written. Mr. Nolan's evidence was that at the end of the meeting the parties left on good terms to work out when vacant possession would be available.

Mr. Nolan wrote three reminders to the plaintiff in relation to closing the sale and having vacant possession available for the first named defendant after 30th April, 1999. The first was dated 4th May, 1999. In that letter, Mr. Nolan stated that the first named defendant was anxious to close, because she was concerned that she would lose the quota and there would probably be problems for her as well with the Area Aid. The plaintiff was requested to attend on 19th May, 1999 to complete and to move his cattle off the land not later than 18th May, 1999. The second reminder was dated 10th June, 1999. Again, Mr. Nolan stated that the first named defendant was anxious to complete and referred to the fact that completion had been postponed to allow the plaintiff to dispose of his cattle. The plaintiff was also reminded that he was losing pension at the rate of IR£160 per week for every week that the closing of the sale was postponed, so that the delay was costing him a lot of money. The third reminder was dated the 2nd July, 1999. Again, this letter seems to have been prompted by the first named defendant. In it the plaintiff was reminded that he would have to put some arrangement in place about his cattle and he was reminded that he was losing his pension. At the end of that letter Mr. Nolan stated that it was a simple matter for the plaintiff to transfer the ownership of the cattle to the second named defendant so that he could get his pension.

The sale was closed on 12th July, 1999, when the plaintiff executed the Land Transfer of that date in favour of the first named defendant. The bank draft of 29th April, 1999 for IR£20,000 was negotiated on that day. A right of residence in favour of the plaintiff was not reserved in the transfer. It would appear that there was a separate deed of charge in relation to the outstanding balance of the purchase money, IR£5,000, which was payable by instalments. In due course on 18th November, 1999 the first named defendant was registered as full owner on Folio 1454F in succession to the plaintiff and a charge for IR£5,000 was registered as a burden in favour of the plaintiff. The judgment mortgage of ACC was subsequently discharged. While the plaintiff's right of residence is not registered as a burden on the folio, the

plaintiff's entitlement to a right of residence for life in the house on the land is not, and never has been, disputed by the defendants.

The Quota Transfer
The quota was first mentioned to Mr. Nolan on 30th April, 1999. His evidence was that he suggested that the parties deal directly with the Department of Agriculture and Food. He had no recollection of seeing the transfer form, and, if it had been left into his office for forwarding to the Department, he would have expected that there would be a covering letter of some kind, which there was not. The evidence of the first named defendant was that she wrote to the Department for the transfer form and she filled out most of it and signed it and dated it. It was dated 28th May, 1999. There was an urgency about completing the form because the application had to be lodged not later than 31st May, 1999. This is clear from the form itself. The first named defendant testified that the plaintiff had also signed the form and that he had filled in the information in relation to the price and the number of units being sold. The first named defendant denied forging the plaintiff's signature, as did the second named defendant. While the form suggested that there was an agreed price of IR£10,000 (IR£550 for each of the 18 units), it was common case that no money was ever paid for the quota.

The plaintiff testified that he never agreed to sell the quota to the first named defendant. The signature on the form was not his signature, nor had he authorised anyone to sign it on his behalf. He never saw the form until he received the transferor's copy from the Department. However, he had done nothing about the matter when he received the copy, which must have occurred in June, 1999. The quota transfer form comprised three pages, the middle and bottom copies being self-carbonising. The middle and bottom copies were returned to the transferor and the transferee respectively with the receipt clause duly stamped. It is clear that the Department received the completed form on 31st May, 1999. The transferor's copy with a receipt showing the date of 4th June, 1999 was returned to the plaintiff shortly after that date.

Mr. Sean Lynch, forensic document examiner, was called on behalf of the plaintiff. His evidence was that the signature of the plaintiff on the transfer form was a forgery and had been created from a tracing from the signature of the plaintiff on the contract dated 8th April, 1999, the original of which is not forthcoming. No evidence was adduced by the defendants to contradict the evidence of Mr. Lynch. I have come to the conclusion, not lightly, that the plaintiff's name, purporting to be his signature, was inserted on the quota transfer form either by the first named defendant or the second named defendant. I have reached that conclusion on the balance of probabilities. I reject the submission made on behalf of the defendants, in respect of which no authority was advanced, that this aspect of the case requires to be proved beyond reasonable doubt. In this civil case the standard of proof is proof on the balance of probabilities in relation to all aspects of the plaintiff's claim.

The disposal and removal of the plaintiff's cattle
The plaintiff's evidence was that in February, 1999 his herd was tested and at the time he had 60 animals, including 40 cows.

In March 1999 the second named defendant, with the assistance of a neighbour, rounded up 12 or 13 animals, perhaps including a calf, from the plaintiff's yard and moved them to the defendants' nearby land. The plaintiff arrived on the scene and became angry at what was taking place. His evidence was that he objected to the defendants taking the cattle. According to the second named defendant, it had been agreed between the parties that the sale would include 12 cattle and that the plaintiff would get rid of the remaining stock. The second named defendant admitted that he had selected the cattle to be taken without reference to the plaintiff and that the plaintiff had become furious. However, the second named defendant suggested that it was not the fact that the cattle were being taken away that annoyed the plaintiff, but rather the presence of a neighbour when this was taking place, because the plaintiff did not want his neighbours to know about the sale of the land. The second named defendant's version of events was that this argument, like other arguments between the plaintiff and himself in 1999, was forgotten next day.

The position, accordingly, was that there were in the region of 47 animals on the land when the sale was closed on 12th July, 1999. In connection with his application under the ERS, the plaintiff was required to surrender his herd number to the Department of Agriculture and Food. He did so by a surrender document dated 16th August, 1999. Thereafter, the plaintiff's stock had to be dealt with under the herd number of the first named defendant in relation to testing, disposal and suchlike.

The plaintiff and the ERS
Mr. Nolan assisted the plaintiff in connection with his application in relation to the ERS. The application form was signed by the plaintiff on the 16th August, 1999 and submitted to the Department on the 3rd September, 1999. The form disclosed that all of the land on Folio 1454F had been transferred to the first named defendant but the use of the house had been retained.

The plaintiff's application was duly approved and the plaintiff was awarded a pension from 21st October, 1999 but not beyond 1st August, 2007. The plaintiff was notified of this by letter dated 23rd February, 2000 from the Department. The pension initially was at the rate of €9,237.74 (IR£7,275.31) "at 1999 prices".

Disposal of the remainder of the plaintiff's stock
In May 2000, the first named defendant involved Mr. Nolan once again in the matter of the disposal of the plaintiff's stock, which is clearly indicative of tension between the parties. What the first named defendant told Mr. Nolan at that stage, as he recorded in an attendance note dated 8th May, 2000, was that she had bought 12 animals separately from the plaintiff for which she had paid by cheque and that another 18 were bought with the quota and were considered to be included in the purchase price for the land. The complaint of the first named defendant was that there were still 16 animals on the land, between cows and heifers and she wanted them either to be sold or removed immediately. All had been duly tested. Later, some of the animals were sold under the first named defendant's herd number (although I note that all of the statements were directed to the second named defendant) at Clare Marts Limited in June 2000 and the cheque of the first named defendant in the sum of IR£2,302 was furnished via Mr. Nolan to the plaintiff, with a covering letter dated 19th June, 2000 from Mr. Nolan in which the deductions which had been made by the first named defendant (haulage and veterinary fees for testing) from the amount paid by Clare Marts Limited were explained. In that letter Mr. Nolan made it clear that the first named defendant wanted the remaining 9 cows on the land to be disposed of by the end of the year and arrangements would be made for their disposal.

In the following October, more animals were sold through Clare Marts Limited and the first named defendant's cheque for the full amount (IR£925.22) paid was remitted to the plaintiff via Mr. Nolan.

On 4th December, 2001 Mr. Nolan sent to the plaintiff a further cheque from the first named defendant representing the proceeds of sale of 3 cows and calves through Clare Marts Limited on 8th October, 2001. The cheque was subsequently returned by the plaintiff uncashed. Mr. Nolan in his letter stated that 4 cows, the property of the plaintiff, remained on the land and he set out the tag numbers. He informed the plaintiff that the second named defendant intended bringing the cows to the Mart as soon as possible and would account to the plaintiff for the proceeds of sale. It is clear that the instructions for that letter were given to Mr. Nolan by the second named defendant. There is an attendance note dated 3rd December, 2001 on the plaintiff's file in relation to the contention of the second named defendant that the first named defendant became entitled to 18 cows with the quota from the plaintiff. Mr. Nolan recorded that he knew nothing about 18 cows going with the land as part of the deal. He was informed by the second named defendant that he could "argue that point himself". Mr. Nolan's evidence was that 3rd December, 2001 was the first occasion on which he met the second named defendant.

IR£5,000 balance of the purchase money
With his letter of 4th December, 2001, Mr. Nolan sent to the plaintiff a cheque drawn on the account of the first named defendant in the sum of IR£2,000 representing two instalments of the balance then due. The plaintiff also returned that cheque. The first named defendant tendered two further cheques for the Euro equivalent of IR£1,000, which were dated respectively 14th November, 2002 and 26th November, 2004. In a reply dated 13th August, 2007 to a notice for further and better particulars from the plaintiff's solicitors, it was stated that it was believed that a further payment of IR£1,000 had been made by the first named defendant to the plaintiff in respect of the sale monies. No evidence of that payment was adduced.

Other complaints
The evidence is replete with complaints by the plaintiff against the defendants and vice versa. The plaintiff complained that at some point in the middle of 1999 the second named defendant cut the water mains at the back of the plaintiff's house while using a digger on the land, cutting off the water supply to the house and leaving him without drinking water and sanitary and heating facilities. At a later stage the second named defendant erected a fence near the plaintiff's house which restricted his access to the well on the land, which has since become contaminated. The second named defendant admitted that he cut the water mains but he said that he did so accidentally and that he had repaired it. The fence was erected in order to prevent cattle from straying out on to the road.

The plaintiff's complaint in relation to his machinery was that the second named defendant had taken some items and buried other items in a slurry pit on the land. The second named defendant's response was that the machinery was scrap and of no use to the plaintiff. However, he acknowledged that the plaintiff was extremely annoyed at his course of action.

The second named defendant in turn, in December, 2001, raised with Mr. Nolan the issue of old machinery belonging to the plaintiff which remained on the land. Mr. Nolan advised him to contact the Environmental section of Clare County Council.

The position by December 2001 was that serious tension had built up between the plaintiff and the defendants. It was at that stage that the plaintiff instructed his current solicitor in relation to the matter. His evidence was that the trigger for his decision was that his cattle had been sold when they were worth nothing.

The evidence of the second named defendant was that by that stage he was getting sick of the situation in relation to the land because the plaintiff was refusing to sell his cattle and did not want his neighbours to know that he had sold the land to the first named defendant. He decided to return to the United States. He could no longer handle the arguments with the plaintiff, stating that "enough was enough". The first named defendant's evidence corroborated her son's. She said he had been getting "hassle" from the plaintiff which he eventually was no longer able to handle and this led to his decision to sell stock and return to the United States.

The decision of the second named defendant to return to the United States brought matters to a head. These proceedings were issued on 15th February, 2002 without a preliminary letter having been dispatched to the defendants. The plenary summons was served on the second named defendant on the 16th February, 2002, because it became known that he was leaving the country.

Since February 2002 the first named defendant has farmed the land she acquired herself with the assistance of her neighbours. She has kept her herd number open in the hope that the second named defendant will return to Ireland.

The assault
The proceedings were served on the second named defendant by a summons server on the evening of Saturday, 16th February, 2002. He was socialising in a public house in the Kilbaha area after an international rugby match between Ireland and England. The summons server testified that he asked him to come outside and served him with the papers outside. The second named defendant then drove to the plaintiff's house. In his statement to Garda Killeen on 19th February, 2002, he said he went to the plaintiff's house to find out why the plaintiff alleged that he had not been paid for the land. When he arrived, the plaintiff withdrew into the house and locked the door, refusing to answer him. The second named defendant kicked the door in a fit of temper, picked up a battery and threw it through the glass of the plaintiff's front door and then threw a spare wheel in through the plaintiff's window. In his statement, he said that he knew what he did was wrong, he was sorry for breaking the glass and offered to pay for the damage done. The second named defendant was charged, appeared before the District Court and was given the benefit of the Probation Act.

Garda Killeen testified that the plaintiff was very upset about the incident. When he was investigating that incident, the plaintiff informed him that he had been threatened by the second named defendant. However, no complaints had been made to the Gardaí before that and Garda Killeen said that he never saw the plaintiff "roughed up". The plaintiff's evidence was that, as a result of the incident, he was so terrified that he had slept in one of the outhouses on the land for a few days. He also said that he has not gone out much since that time.

The second named defendant in his evidence expressed regret for the incident but he accepted that he had not apologised to the plaintiff at the time.

Value of the land as of 1999
No evidence of the market value of the land registered on Folio 1454F as of April 1999 was adduced on behalf of the

defendants. However, Mr. Nolan expressed the opinion that the figure of IR£45,000 was a reasonable figure in the context of the deal in question. His view, from his knowledge of the area, was that it was not an undervalue but he did not rule out the possibility that a better price could have been got for the land. He emphasised that the number of potential transferees who fitted the profile of a qualifying transferee for the purposes of the ERS was limited. The fact that the plaintiff was remaining in the house for life was also a factor. His view was that the price was in accordance with the "going rate" or not that far from it.

Mr. Michael Fitzpatrick, a chartered surveyor and valuer, gave evidence on behalf of the plaintiff. He inspected the property on 4th February, 2002 and on 6th May, 2002 and gave his first report on 14th May, 2002. He estimated the open market value of the property as of 8th April, 1999 at IR£240,000 (€304,737). That figure had taken into consideration the plaintiff's right of residence in the dwelling house for his lifetime. In his oral evidence Mr. Fitzpatrick stated that the market value would have been IR£40,000 higher if no right of residence had been reserved. The figure of IR£240,000 included what Mr. Fitzpatrick described as "Hope Value" of IR£100,000, the hope being that planning permission would be forthcoming for approximately 4 detached housing sites. Mr. Fitzpatrick described the property as having extensive road frontage and as being in a scenic location.

Mr. Victor Leyden, an architect, gave evidence on the prospects of obtaining planning permission in April 1999. Mr. Leyden inspected the land in June 2006 and he gave a report of July 2006. As he pointed out, because of the unusual configuration of the land registered on Folio 1454F, which is a long narrow holding traversed by three public roads, it comprises three separate parcels of land with five separate lengths with public road frontage. Mr. Leyden's opinion at the time was that the land could accommodate four dwelling houses in addition to the existing dwelling house, which under the Clare County Development Plan 1999 could have been used as homes for local people or as holiday homes. Mr. Leyden's oral evidence was that planning permission might have been obtained for four houses but, as I understood his evidence, it did not go beyond the realms of possibility.

Mr. Fitzpatrick's initial valuation, leaving aside the land at Ross which is bog and which he did not value, and leaving aside the "Hope Value", put almost IR£3,800 per acre on the plaintiff's land as of April 1999. He did not cite even one comparison. In an updating report dated 25th February, 2009 he analysed statistical evidence published by the Central Statistics Office for the year 2000, there being no statistics available for 1999. Applying the figure for 2000, and again leaving aside the bog, he came up with a higher figure for the land, based on IR£4,500 per acre. Further, extrapolating from the Permanent TSB/ESRI House Price Index and applying the Revenue Commissioners "rule of thumb", whereby site value represents approximately 25% of the total value of the dwelling house, he valued the four sites. His revised figure for the combined land value and "hope development value" was €340,911.

I consider the valuation evidence adduced on behalf of the plaintiff to be totally divorced from the reality which prevailed in 1999. I do not believe that any prospective purchaser would factor any development value into the price of the land. I also believe that the value put on it as agricultural land by Mr. Fitzpatrick is grossly exaggerated.

Having regard to the state of the evidence, it is impossible to reach a conclusion as to what the entire holding would have fetched if sold on the open market with vacant possession in April 1999. I think it is probable that it would have fetched more that IR£45,000. However, the deal encompassed in the agreement made by the plaintiff with the first named defendant in April 1999 ensured benefits for the plaintiff, which would not have been available on an open market sale – the reservation of a right of residence for life in the house and guaranteed eligibility for the ERS.

Duress/undue influence
As I have said at the outset, the plaintiff seeks to have the transfer set aside on the basis that it was procured by duress and undue influence. It is common case that it is only actual, not presumptive, undue influence which could arise on the facts of this case. As I have already stated, I find on the evidence that Mr. Keating Senior did not beat or bully the plaintiff in the manner alleged by the plaintiff in his evidence. I also find on the evidence that, prior to the plaintiff attending on Mr. Nolan on 8th March, 1999 and giving him instructions in connection with the sale to the first named defendant, the second named defendant did not beat, bully or intimidate the plaintiff to procure the sale of the land to the first named defendant, as the plaintiff alleged in his evidence. Moreover, as I have stated, I am satisfied that the plaintiff's evidence that he was forced to hand over the proceeds of the deposit cheque of IR£3,000 to the second named defendant is untrue.

Taking an overview of the evidence, I think the true position is that it was the plaintiff who was trying to persuade Mr. Keating Senior during his lifetime, and after his death, the second named defendant to purchase the plaintiff's land. I reach that conclusion because I believe that the evidence shows that the plaintiff's motivation was to get a lump sum to discharge his indebtedness to ACC and to put himself in a position where he would be eligible for a pension under the ERS.

Accordingly, I consider that neither the contract for the sale of the land registered on Folio 1454F nor the Land Transfer, insofar as it gave effect to the contract, was procured by duress or undue influence, as alleged by the plaintiff.

Clean hands?
As is explained in Delany on *Equity and the Law of Trusts in Ireland* (4th Ed., 2007) (at p. 19), the equitable maxim that he who comes to equity must come with clean hands reflects the discretionary nature of equity and requires that a person seeking equitable relief must restrain from fraud, misrepresentation or any other form of dishonest or disreputable conduct if he wishes to be granted a remedy. An important aspect of the application of the maxim (cf. Delany at p. 21) is that a court will decline to intervene on the basis of the "unclean hands" principle unless there is a sufficient connection between the inequitable conduct and the subject matter of the dispute. The subject matter of the dispute with which I am now concerned is the Land Transfer. The plaintiff made an allegation of conduct on the part of Mr. Keating Senior, who is dead, and the second named defendant which, if true, would constitute serious wrongdoing. Because I do not accept the veracity of the plaintiff's evidence on the allegations, I am satisfied that such wrongdoing has not been proven by the plaintiff and he has not established that the Land Transfer was procured by duress or undue influence. For whatever reason, in my view, the plaintiff has not given evidence which reflects the true position at the end of 1998 and the beginning of 1999. That means that one aspect of his claim fails. However, in my view, it does not mean that he cannot pursue an equitable remedy with a different foundation.

Therefore, I consider that it is appropriate to consider the alternative basis on which the plaintiff seeks to set aside the Land Transfer, namely, that it was of such an unconscionable and improvident nature that the court should intervene and set it aside in equity.

Unconscionable transaction
In making his case, counsel for the plaintiff relied on the following passage from Delany (*op. cit*.) (at p. 701):

> "A transaction may be set aside in equity where one party is at serious disadvantage by reason of poverty, ignorance or some other factor such as old age, so that unfair advantage may be taken of that party. Equity will intervene particularly where a transfer of property is made for no consideration at all or at an undervalue and where the transferee acts without the benefit of independent legal advice."

The circumstances in which the court will intervene to set aside an improvident transaction were considered by the Supreme Court most recently in *Carroll v. Carroll* [1999] 4 I.R. 241. There, in her judgment, Denham J. quoted the oft quoted passage from the judgment of Gavan-Duffy J. in *Grealish v. Murphy* [1946] I.R. 35 (at p. 49/50) to the following effect:

> "The issue thus raised brings into play Lord Hatherley's cardinal principle (from which the exceptions are rare) that Equity comes to the rescue whenever the parties to a contract have not met on equal terms, see Lord Hatherley's judgment (dissenting on facts) in *O'Rorke v. Bolingbroke*; the corollary is that the Court must inquire whether a grantor, shown to be unequal to protecting himself, has had the protection which was his due by reason of his infirmity, and the infirmity may take various forms. The deed here was in law a transaction for value …; however tenuous the value may have proved to be in fact, and, of course, a Court must be very much slower to undo a transaction for value; but the fundamental principle to justify radical interference by the Court is the identical principle, whether value be shown or not, and the recorded examples run from gifts and voluntary settlements (including an abortive marriage settlement) to assignments for a money consideration. The principle has been applied to improvident grants, whether the particular disadvantage entailing the need for protection to the grantor were merely low station and surprise (though the grantor's rights were fully explained) …, or youth and inexperience …, or age and weak intellect, short of total incapacity, with no fiduciary relation and no 'arts of inducement' to condemn the grantee …. Even the exuberant or ill-considered dispositions of feckless middle-aged women have had to yield to the same principle …".

Counsel for the plaintiff submitted that, if the court were to find, as I have found, that it was the plaintiff who pursued the defendants to purchase the land, that is not a bar to the plaintiff being able to maintain an action to have the Land Transfer set aside as improvident. Counsel pointed to the fact that in *Grealish v. Murphy*, Gavan-Duffy J. found that the plan to put in place the transaction which was set aside in that case was not originated by the defendant, but by the plaintiff, Gavan-Duffy J. commenting that any picture of the defendant "as an adventurer, inveigling his witless victim into a trap in the October settlement, would be a caricature". Those observations of Gavan-Duffy J. were made in the context of considering whether there was evidence of undue influence in relation to the transactions sought to be set aside.

Professor Delany in her commentary refers to a number of different formulations of the circumstances in which equity will intervene as being more specific or more comprehensive than the reference of Gavan-Duffy J. to the parties not having "met upon equal terms". For instance, she quotes from the judgment of Peter Millett Q.C., as he then was, in *Alec Lobb (Garages) Ltd. v. Total Oil (Great Britain) Ltd.* [1983] 1 WLR 87 (at pp. 94/95) in which the essential pre-conditions for setting aside a transaction on the grounds of unconscionability are set out as follows:

> "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. Second, this weakness of the one party has been exploited by the other in some morally culpable manner … And thirdly, the resulting transaction has not merely been 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."

That passage, in my view, provides helpful guidance for determining whether a transaction should be set aside in equity on the ground of unconscionability. I would observe that I have no doubt that, on the peculiar facts as recorded by Gavan-Duffy J. in *Grealish v. Murphy*, if the requirements set out in that passage had been applied, they would have been met.

Before considering whether each of those requirements has been fulfilled in this case, I propose summarising what I consider the evidence establishes in relation to the plaintiff's approach to the transaction and his understanding of it.

The plaintiff's actions through 1997 and 1998 clearly indicate that he felt under financial pressure. There was no evidence of what he earned in 1998 or 1999, but it is reasonable to infer that receipt of a pension under the ERS would be more beneficial to him than continuing to operate as a farmer and I believe that was his thinking at the time. In late 1998 and early 1999 he had two objectives. He wanted to raise a lump sum to discharge his indebtedness to ACC and he wanted to become entitled to a pension under the ERS. In the course of the hearing, alternative options to selling the land were suggested as being available to the plaintiff, for example, leasing the land for, say, ten years or continuing farming and selling stock to settle the ACC debt. In reality, neither option could have achieved both of the plaintiff's objectives.

Counsel for the plaintiff put forward ignorance on the part of the plaintiff and his physical and mental health as support of the argument that he was under serious disadvantage.

On the issue of ignorance, in my view, the plaintiff had learned a lot from his dealings with Mr. Nolan in 1997 and 1998. I think he understood that selling the land, but reserving the house or a right of residence in the house, and obtaining a pension was the best way forward for him, even though he resiled from that position when testifying. He demonstrated in his dealings with Mr. Nolan on 8th March, 1999 that he understood the requirements of the ERS. He demonstrated later that he understood the acreage involved in the sale and the complexities of the exchange in relation to the commonage. I am satisfied that he was capable of sorting out his liability to ACC and negotiating a sum in full and final settlement and did so. What the plaintiff did not understand, or, alternatively, did not want to know, was that once the land was sold he could not keep his stock on the land and in the farm buildings for as long as he wished. In the course of his cross-examination, when the plaintiff's obvious dissatisfaction with the deal after the contract was in place was put to him, the

second named defendant stated that the plaintiff wanted to sell the farm and still farm at the same time. I think there is a large element of truth in that. However, the second named defendant also stated that the plaintiff wanted to go through with, that is to say, complete, the transaction. I do not think that it true. I think it is probable that the plaintiff did not realise that he would have to remove his stock from the land until he received Mr. Nolan's letter of 26th April, 1999. The reason the sale of the land was not closed on 30th April, 1999 was because the plaintiff was not in a position to give vacant possession. The plaintiff's delay in closing the sale suggests that he was reluctant to dispose of his stock with a view to closing. I think it probable that the plaintiff was pressurised by the defendants to close after 30th April, 1999 and his resistance to the pressure was weak because of his physical and psychological condition.

Apart from that, having regard to the defendants' case as to the terms they agreed with the plaintiff, the Land Transfer cannot be considered on its own. There were parallel transactions in relation to the quota and the stock. As I have already found, the plaintiff's signature was forged on the Quota Transfer. The quota had value, and the plaintiff should have received its value but he did not. As regards the stock, the defendants' story evolved over time and is riddled with inconsistencies. However, I am taking their final position, as conveyed to Mr. Nolan in 2000 and 2001, as being that 18 animals passed with the quota and 12 animals were bought separately. I do not accept the evidence of the defendants that the overall transaction included agreement by the plaintiff for the transfer of the quota with 18 cattle. Apart from the finding that the plaintiff did not sign the Quota Transfer, the quota rights were notional rights which were transferable as such and stock would not normally accompany the transfer of quota rights. Moreover, even if there was a separate agreement between the plaintiff and the second named defendant for the sale of 12 cattle in early March 1999 and the defendants paid for those animals, which I doubt, there being no proof in the form of a cashed cheque adduced in evidence, even though such evidence was adduced in relation to other aspects of the parties' dealings, the second named defendant rode roughshod over the plaintiff in selecting and removing animals without the consent of the plaintiff. In their dealings with the plaintiff in relation to the quota and the stock after March 1999, the defendants took unfair advantage of the plaintiff and I think it is probable that the second named defendant bullied and intimidated the plaintiff. Even though the dealings in relation to the quota and the stock were outside Mr. Nolan's purview, in my view, they permeated the whole transaction, and, in any event, on the defendants' case they were part of it.

I have come to the conclusion that the plaintiff was seriously disadvantaged because of his lack of understanding of the overall ramifications of what he was doing after he contracted to sell the land to the first named defendant and his state of health was a contributory factor in relation to his inability to understand, or, alternatively, to do anything to reverse the situation. The second named defendant, with the approbation of the first named defendant, exploited the situation once the plaintiff was contractually bound to sell the land. Unfortunately, in the words of Gavan-Duffy J. the plaintiff did not have "the protection which was his due by reason of his infirmity". Mr. Nolan allowed the Land Transfer to come to fruition on an irregular basis, in that the plaintiff had actually received almost half the purchase price, and had disposed of most of it, when the contract was signed. After the contract was signed, Mr. Nolan's focus was on the first named defendant getting title and vacant possession. In my view, given those circumstances, the plaintiff could not be said to have got independent legal advice. Aside from those circumstances, applying the principles set out by Barron J. in *Carroll v. Carroll* (at p. 265), the plaintiff could not be said to have got the benefit of independent legal advice.

In determining whether the transaction entered into by the plaintiff with the first named defendant was improvident, it is necessary, in my view, to have regard to the fact that the plaintiff's objective was to qualify for a pension under the ERS and to continue to live in the house, with the implications those factors had in relation to the price he was likely to achieve. On the evidence before the Court, I cannot form a view as to what would have been a reasonable price having regard to those factors. However, when one puts the benefits which the first named defendant obtained in the overall transaction – the land, the house subject to the right of residence, the outbuildings, the quota and 18 head of cattle – alongside the price the plaintiff was to receive – IR£45,000 – with payment of one ninth of it deferred over a period from one to five years, in my view, the overall transaction was improvident. It was also oppressive and unfair.

Accordingly, I have come to the conclusion that the Land Transfer should be set aside unless it has been established by the defendants that on the basis of some equitable principle, the plaintiff has lost the right to have it set aside.

Affirmation and *laches*

For the reasons which have informed the conclusion that the plaintiff was disadvantaged in dealing with the defendants after he signed the contract for the sale of the land, I am of the view that, until he instructed his current solicitors around December 2001, the plaintiff was not cognisant of the facts which gave rise to his entitlement to have the transaction set aside, or, alternatively, he was, for the same reasons, incapable of taking the necessary steps to have the transaction set aside.

Accordingly, he cannot be said to have affirmed or acquiesced in the transaction, nor can he be said to be guilty of *laches*. Therefore, those defences fail.

Restitutio in integrum

The parties did not address the mechanics of the setting aside of the Land Transfer. In particular, they did not address the issue of whether *restitutio in integrum* is possible, as they should have done. The first named defendant paid IR£40,000 for the land. I am basing that conclusion on the assumption that, in the absence of concrete evidence to the contrary, the plaintiff was not paid one instalment of IR£1,000, and on the fact that he rejected the remaining four instalments which were proffered. On the setting aside of the Land Transfer, the first named defendant is entitled in equity to the return of the sum of €50,790 (IR£40,000). Subject to hearing further submissions from the parties on this point, what I would propose is that, on repayment of the sum of €50,790 to the first named defendant, either by way of set off against sums to which the plaintiff becomes entitled from the defendants or otherwise, the court make an order directing that:

(a) the plaintiff be registered as full owner on Folio 1454F in place of the first named defendant,

(b) the charge registered on the folio to secure the sum of IR£5,000 be discharged, and

(c) the land certificate in relation to the folio be delivered by the first named defendant to the plaintiff free from any equitable charge or lien, which will obviously necessitate the discharge of any monies owing by the first defendant on the security of the land.

Other remedies
Leaving aside the incident on 16th February, 2001, which I will deal with separately, the plaintiff has made an elaborate claim for damages under various headings which, in my view, is wholly unrealistic and exaggerated. It is also inconsistent with the claim to set aside the Land Transfer, insofar as counsel for the plaintiff were prepared to rely on the evidence adduced on behalf of the defendants that prior to the Land Transfer the plaintiff was not able to properly manage his farm and his domestic situation or even his person.

The major element of the plaintiff's claim for damages is a claim for loss of profits and interest thereon from 1999 to 2009, the final amount of which came to almost €190,000. The foundation of this claim was the evidence of Mr. Pat McMahon, a member of the firm of Philip Farrelly & Partners, Agricultural Consultants. Mr. McMahon carried out an exercise in which he assessed, on a theoretical basis, the profits which the plaintiff would have earned from farming between 1999 and 2009 on the assumption that he would have been carrying on a suckler cow enterprise and a dry stock enterprise on the land. The exercise was wholly theoretical and it took no account of what the plaintiff actually earned in 1999 or 1998 from his actual farming enterprise. Mr. McMahon's evidence was that he was told that accounts were not available. The theoretical exercise took no account of the plaintiff's age or ability to farm. The pension which the plaintiff actually received in the period, which was payable only on the basis that he did not own the land, was not deducted. The taxation implications of Mr. McMahon's theoretical assessment were considered by Mr. Niall Garvey of the firm of Niall C. Garvey & Co., Chartered Accountants. Mr. Garvey's opinion was that, since income tax would be exigible on the missed profits and the interest thereon, the relevant sums should be paid in gross to the plaintiff. Mr. Brendan Lynch, Actuary, then performed the exacting task of calculating interest at the rate of 8% per annum on the missed profits after tax. For good measure, Mr. Garvey grossed up the interest to take account of the fact that the plaintiff would be liable for income tax on the interest.

I find absolutely no basis in fact for the proposition that the plaintiff missed any profits by reason of not being involved in farming from mid-1999 onwards. If there was a basis in fact for such a claim, it could have been substantiated by putting in evidence the facts that demonstrated that the plaintiff was making a profit before he applied for the pension under the ERS in mid-1999. The fact that no such evidence was adduced, which the plaintiff would have been capable of adducing if it existed, leads me to the conclusion that there is no such evidence, because there was no profit. Taking an overview of the evidence, I have come to the conclusion that, had he been farming, the plaintiff would not have made profits in excess of his pension under the ERS or from 1st August, 2003 in excess of the combined value of the pension under the ERS and the old age non-contributory pension thereafter, whether one factors in the interest for which he would have been liable to ACC or not, which the plaintiff's expert witnesses also ignored. Accordingly, I do not consider it appropriate to award any damages for missed profits.

The plaintiff's claim is even more bizarre when it comes to quantifying the claim for the items of machinery which it is alleged were appropriated by the second named defendant or ended up in the slurry pit. One of the items in question, a mower, was represented as having been purchased in 1993 for IR£1,800, although no evidence of this was adduced. Its value for the purposes of this claim was put at IR£800. Mr. Garvey in his report, which was put in evidence, went to the trouble of considering whether Capital Gains Tax would be exigible on an award in respect of, *inter alia*, this item. Overall, a value in excess of €10,000 is put on four items of machinery, which it is claimed that the second named defendant appropriated or destroyed, and over €7,000 in respect of interest is claimed on top of that. The second named defendant admitted that he disposed of a wagon and trailer, but he contended that they were scrap. I think it probable that they had very little value and I am going to award €2,000 damages under this heading.

Departing from the case as pleaded in the statement of claim, the plaintiff also seeks damages representing the value of 37 cattle on the basis that he received payment for 23 of the 60 cattle which were on the farm in February 1999. The contemporaneous evidence in relation to the disposal of cattle, based on the information given by the first named defendant or the second named defendant to Mr. Nolan as appears from his file, and the evidence given at the hearing, is contradictory and very confusing and, frankly, impossible to reconcile. I consider that the fair course is to compensate the plaintiff for the loss of 30 animals. Mr. McMahon has suggested figures based on the average prices for animals sold through Clare Marts Limited in the spring of 1999 as appropriate. The figures in question are considerably in excess of the prices achieved on the sales by the second named defendant of his own and of the plaintiff's stock through Clare Marts Limited in 2000 and 2001, as evidenced by the statements put in evidence. Moreover, the evidence suggested that the plaintiff neglected his animals after the defendants took over the land and it was the second named defendant who had to feed and maintain the stock. In the circumstances, I propose to award €12,000 damages under this heading.

The plaintiff's claim for restocking the land, which was particularised at €38,000 in June 2007, and evaluated by Mr. McMahon at between €40,000 and €45,000, is unsustainable. If the plaintiff were to restock the farm at the level represented by those figures, presumably, he would get value for his money.

In relation to the Quota Transfer, I consider that the plaintiff's claim as pursued involves double accounting. He has claimed through Mr. Garvey's calculations the Euro equivalent of IR£10,000, the price which appeared in the Quota Transfer but was never paid, together with interest on that sum which also has the benefit of the grossing up exercise. In addition, the plaintiff has claimed an account from the first named defendant of the profits she actually received from the Department of Agriculture and Food in respect of the premium rights which accrued to her following the submission of the Quota Transfer to the Department which amounted, in fact, to 15.7 premium rights, the Department having deducted two premium rights on the transfer. The profits were received by the first named defendant either under the Suckler Cow Scheme while it was still in force, or by leasing out quota, or under the Single Payment Scheme since it came into operation in 2005. Based on evidence given by an official of the Department of Agriculture and Food, I consider that the plaintiff's calculation of the sums the first named defendant received at €39, 527.60, roughly speaking, correctly reflects the aggregate value of the benefits which accrued to her from her ownership of the quota. The first named defendant should account to the plaintiff for this sum. Therefore, as the plaintiff is, in effect, being recompensed for the loss of the quota, there can be no question of the plaintiff being recompensed for not being paid IR£10,000 for the Quota Transfer in 1999.

Finally, there was no evidence on the basis of which the court could assess the cost of restoring the water supply and sanitary facilities to the house. In any event, in relation to this element of his claim, the plaintiff failed to mitigate his loss. The injunctive relief sought is not appropriate, as the land will be reverting to the plaintiff.

Summary of remedies
In summary, therefore, the reliefs to which the plaintiff is entitled in relation to the Land Transfer, the Quota Transfer,

the appropriation of his cattle and the loss of the machinery and equipment are that:

(1) the Land Transfer will be set aside on the basis that *restitutio in integrum* will be effected by set off to the extent appropriate,

(2) the first named defendant is liable to account to the plaintiff for the sum of €39,527.60 in respect of the quota,

(3) the plaintiff is awarded €14,000 damages for the loss of machinery and cattle.

Damages for assault/trespass

I have no doubt that the plaintiff had a very frightening experience on 16th February, 2001, which affected him adversely. However, I do not accept, as is asserted in the plaintiff's claim, that he has suffered post-traumatic stress disorder in consequence of that event or his treatment generally by the defendants.

The plaintiff apparently did not receive any medical treatment following that incident. As I have stated, he was first seen by Dr. Griffin in January 2005. In fact, he was seen twice by Dr. Griffin, on both occasions, for medico legal purposes, not for treatment. The purpose of Dr. Griffin's first report dated 28th January, 2005 was obviously to establish that the plaintiff was disadvantaged when he entered into the transactions with the defendants in the spring of 1999. In an addendum to his second report dated 6th June, 2008, Dr. Griffin stated that the plaintiff "probably fits into a diagnosis now of post-traumatic stress disorder". More than seven years had elapsed since the events of February 2001, when this diagnosis was made. Therefore, it is not possible to find a causal link between the second named defendant's maltreatment of the plaintiff and the condition Dr. Griffin diagnosed.

The appropriate level of damages for personal injuries is, in my view, €12,500.

With the leave of the court by order dated 16th October, 2006, the plaintiff delivered an amended statement of claim on 15th October, 2006. Apart from correcting an error in relation to the date of the Quota Transfer, the only change in the statement of claim was to seek aggravated or punitive damages or both from the second named defendant for trespass to the person or assault. While the conduct of the second named defendant on 16th February, 2001 was unquestionably reprehensible, and while, as I have recorded, he did not apologise to the plaintiff, he admitted what had happened both in the criminal proceedings brought against him and in these proceedings. I do not think that this is an appropriate case in which to award aggravated damages, particularly as I have found that the plaintiff in his testimony made allegations against the second named defendant which I have found to be untrue. I see no basis for exemplary or punitive damages on the facts of this case. In arriving at those conclusions, I have had regard to the principles laid down in *Conway v. Irish National Teachers Organisation* [1991] 2 I.R. 305.

General observations

The plaintiff is now ten years older than he was in 1999 when he considered that it was time to retire. He is now 72 years of age. Since he retired there have been changes at EU level and at national level in the monetary aids which are available to farmers. For instance, the Single Farm Payment was introduced in 2005. An important point made by Mr. McMahon in his report is that, even if the plaintiff returns to farming in the future, he will not have an entitlement to a single farm payment as he did not farm in the relevant years. Apart from that, the plaintiff's changed circumstances as a result of this judgment may have implications in relation to his past and future entitlement to an old age non-contributory pension. This is something to which consideration will have to be given by the plaintiff and his advisors.

Finally, this action ran for six days in the High Court. While the court was not informed of the rateable valuation of the land, I would be very surprised if it exceeded the jurisdiction of the Circuit Court. All of the principal witnesses as to fact and most of the professional witnesses travelled from Clare or Limerick. I think the action would have been more appropriately brought in the Circuit Court in County Clare. I make that observation from the perspective of the real value of the claim and the cost and convenience to all concerned, not in response to the suggestion in the submissions made on behalf of the defendants that the plaintiff's evidence might have been different if he had to give it in the Circuit Court in Kilrush. Notwithstanding that submission, the defendants took no steps to have the proceedings remitted to the Circuit Court.