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Neutral Citation Number: [2007] IEHC 120

THE HIGH COURT

Record No. 2001/364 SP

IN THE MATTER OF THE SUCCESSION ACT, 1965, SECTION 117
AND IN THE MATTER OF T DECEASED

BETWEEN

A

PLAINTIFF

AND
C AND D

DEFENDANTS

Judgment of Miss Justice Laffoy delivered on 28th March, 2007.

A. Introduction
1. In this judgment I deal with the following three actions which were heard together:

(1) the proceedings which were initiated by special summons under the above title on 14th August, 2001 (the s. 117 application);

(2) a plenary action initiated on 15th October, 2001 between A and W, as plaintiffs, and C and D, in their personal capacities, as defendants (the trespass/personal injuries action); and

(3) a plenary action initiated on 15th August, 2002 between A and W, as plaintiffs, and C and D, as personal representatives of T deceased, as defendants (the title action).

2. By agreement of the parties, the s. 117 application was heard on oral evidence and the three actions were heard together in camera, because of the requirement of s. 119 of the Succession Act, 1965 (the Act of 1965).

B. The Section 117 Application

The claim
3. The claim in these proceedings is brought by the plaintiff (A) pursuant to s. 117 of the Act of 1965 seeking a declaration that his late father, T (the Testator), who died on 24th October, 1999, failed in his moral duty to make proper provision for A in accordance with his means and that the court make such provision for him as the court thinks just. The defendants are the personal representatives of the Testator on foot of a grant of probate of his last will dated 8th May, 1998, which issued to them on 19th February, 2001. The Testator died unexpectedly, following a stroke, at the age of 70 years.

The provisions of the Testator's will
4. The Testator devised and bequeathed the property he described as "my dwelling house and lands with the contents thereof" (Blackacre) to his son, the first defendant (C), together with his livestock, his Fiat tractor and his machinery at Blackacre, subject to and charged with the following:

(1) payment of the sum of IR£40,000 to his son, A, within five years from the date of his death;

(2) payment of sufficient sums for their maintenance and support for their lifetimes and the life of the survivor of them for his wife, (the widow), and his daughter, E; and

(3) payment of the sum of IR£40,000 to his son, B, within a period of five years from the date of his death.

5. The Testator added a proviso to deal with an eventuality, which did not happen, that C should predecease him, in which case the Blackacre was to pass to the second defendant (D), and, in the event that he should predecease the Testator, the devise and bequest of the Blackacre was to pass to E.

6. The Testator devised and bequeathed his dwelling house and the contents thereof and his lands at Whiteacre to the widow for her lifetime and as and from her death for his son D and his daughter E as tenants in common in equal shares. He added a proviso that, should D predecease him, which did not happen, or predecease the widow, his tenancy in common interest should pass to E.

7. The Testator bequeathed certain plant and equipment to A (a tarrup silerator, a five-sod plough, a small dung spreader, a slurry tank and a tipping trailer) and he gave his sand screener and "all plant and machinery in the sand pit" and a loader to B.

8. The Testator devised and bequeathed the residue of his estate to the widow.

The Testator's assets at the date of his death
9. The Testator was the owner in fee simple of the Blackacre at the date of his death. The farm was registered on two Land Registry folios, Folio ---- County ---- and Folio ---- County ----. According to the folios the lands aggregated 85.641 hectares or 211.62 acres. The Testator had acquired the lands under a marriage settlement from his father, G F (the grandfather), dated 13th June, 1957 and he had become registered owner on the folios on 30th August, 1957. Contemporaneously with the marriage settlement, the Testator signed an agreement with the grandfather, his mother, G M (the grandmother) and his sister, S, under which, *inter alia*, he agreed that whenever called upon by the grandfather or the grandmother he would execute the charges necessary to charge the lands with certain rights and payments, including the right of the grandfather to reside in the dwelling house on the lands registered on Folio ----, that is to say, Blackacre House, and to be therein supported and maintained during his life and a similar right in favour of the grandmother for her life and also a right of residence in favour of S during her life, such right to cease on her marriage. The grandfather lived in Blackacre House until his death in 1973 or 1974. The grandmother died in 1987. The right of residence of S ceased on her marriage in the early 1960s.

10. Blackacre House comprises a three-storey period residence, most of which has been occupied by A and his wife (W), since their marriage in late 1983, although one room has been used for the purposes of the farm enterprise carried on by the Testator during his

lifetime and by C since his death, a farm yard and farm buildings and agricultural land, to which there was attached a 60,000 gallon milk quota. In the title action, A and his wife (W) claim to have acquired a possessory title to Blackacre House and part of the farmland comprising about 30 acres. For the reasons set out in section D of this judgment, I find that A and his wife have not established their claim to a possessory title. The value of the Blackacre was given as IR£1 million as at the date of the Testator's death on the Inland Revenue affidavit filed with the Revenue Commissioners in relation to his estate.

11. Whiteacre, according to the Inland Revenue affidavit, is registered on Folio ---- County ---- and Folio ---- County ---- and comprises 31 acres, 2 roods and 32 perches. It was valued on the Inland Revenue affidavit as at the Testator's death at IR£280,000. The Testator bought Whiteacre in the mid-1960s and he built a dwelling house on the lands. He occupied the dwelling house with his family, including the grandmother, after it was constructed in the early 1970s. Since his death, the widow has resided there with C and E.

12. The machinery and equipment bequeathed to A was valued on the Inland Revenue affidavit at IR£12,600 and the plant and machinery bequeathed to B was valued at IR£6,500. The livestock and machinery which passed to C was valued at IR£86,535. The net value of the estate at the date of death was IR£1,364,307, there being debts and liabilities in excess of IR£82,000. The value of the residuary estate was in the region of IR£60,000.

Other relevant properties

13. In the late 1960s, around the time he acquired Whiteacre, the Testator acquired another property known as Greyacre, which comprised 44 acres, which remained in his ownership until 1991 or 1992, when it was sold. Through the 1970s and 1980s the Testator farmed the properties he owned (Blackacre, Whiteacre and Greyacre) and he also ran an agricultural contracting business. From the late 1970s through the 1980s, A, B and C worked for him in the farming and agricultural contracting enterprise.

14. In the late 1980s, probably 1988, an additional farm was acquired for the enterprise, which was situate at Brownacre. That farm comprised 88 acres. A site comprising about half an acre was carved out of the holding and was transferred to A. That was intended as the site of a house for A. The transfer of the remainder of the lands was taken in the names of A, B and C as tenants in common. The acquisition was funded by a loan from Allied Irish Finance Limited and the loan was, apparently, secured by three endowment policies on the respective lives of A, B and C. On the evidence, it is clear that the acquisition was actually funded by the Testator, in the sense that whatever payments were required during the currency of the loan and the endowment policies were discharged by the Testator. The endowment policies ultimately did not yield what had been anticipated. The lands at Greyacre were sold around 1991 or 1992 and the proceeds of sale were used to discharge the amount outstanding to Allied Irish Finance Limited. So the Testator cleared the debt off Brownacre.

15. The position, accordingly, at the date of the Testator's death was that A, B and C were the owners as tenants in common of the lands at Brownacre, which it was agreed at the hearing were worth about IR£500,000 at the date of the Testator's death. Those lands had effectively been provided for them by the Testator. After the Testator's death there was a dispute between B and C, on the one hand, and A on the other hand, in relation to the disposal of the lands at Brownacre. Proceedings were initiated in this Court by B and C, as plaintiffs, against A, as defendant, for the partition of the lands or a sale in lieu of partition. Ultimately, that action was compromised in July, 2003 on terms that the lands would be sold and the proceeds divided between the three owners, the sum of €100,000 to come out of A's share and to be paid to B and C as a contribution towards their costs. The lands were ultimately sold at a price of €2,550,000. The net proceeds were shared between the parties in accordance with the compromise, so that B and C each got €826,067.70 and A got €726,067.70.

16. Through the 1990s and down to the date of the sale, the lands at Brownacre were farmed exclusively by A. There was a sand pit on the lands which was opened around 1990 and was operated more intensively by the Testator in the two years before his death. This explains the reference in the Testator's will to "all plant and machinery in the sand pit", which he bequeathed to B.

The Testator's family at the date of his death

17. The Testator was survived by the widow and five children:

> (1) A, who was born on 14th May, 1958, and who, as I have stated, married W in 1983. At the time of the Testator's death they had one child, F, who was born in October, 1998.
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> (2) B, who was born on 21st July, 1961;
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> (3) C, who was born on 30th March, 1963;
>
> (4) D, who was born on 5th June, 1965; and
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> (5) E, who was born on 3rd October, 1967.

18. Although the widow was notified of her right of election in relation to the Testator's estate under s. 115 of the Act of 1965, she has not elected to take her legal right share of one-third of the Testator's estate. The evidence is that the widow is 76 years of age and is in good health. She is in receipt of a pension, the nature of which was not established at the hearing. As I have already stated, she resides in the house on Whiteacre with C and E.

19. Before considering the relevant facts in relation to the Testator's children, I propose outlining the provisions of s. 117 and the jurisprudence which has evolved in relation to its application.

The law

20. Sub-section (1) of s. 117 provides as follows:

> "Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just."

21. Sub-section (2) provides as follows:

> "The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator and any other circumstances which the court may consider of assistance in arriving at a decision that will be as fair as possible to the child to whom the application relates and to the other

children."

22. As is frequently pointed out, the first attempt to lay down guidelines in relation to the application of s. 117 dates from 1970, when in *B.M. v. T.A.M.* (1970) 106 I.L.T.R. 82, Kenny J. stated as follows (at p. 82):

> "It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death, and must depend upon
>
> (a) the amount left to the surviving spouse or the value of the legal right if the survivor selects to take this,
>
> (b) the number of the testator's children, their ages and their positions in life at the date of the testator's death,
>
> (c) the means of the testator,
>
> (d) the age of the child whose case is being considered and his or her financial position and prospects in life,
>
> (e) whether the testator has already in his lifetime made proper provision for the child."

23. More recently, in *X.C. v. R.T. (Succession: Proper provision)* [2003] 2 I.R. 250, in this Court Kearns J. set out eighteen relevant legal principles which, it was agreed by counsel on both sides in that case, as a result of the authorities which had been cited can be said to be derived under s. 117. One of the principles is that there is a high onus of proof placed on an applicant for relief under s. 117, which requires the establishment of a positive failure in moral duty. That moral duty is to make "proper provision" for the applicant in accordance with the testator's means, not to make adequate provision. The principles set out in paras. (l) to (r) inclusive are relevant to the assessment this Court has to make in this case. They are as follows:

> "(l) In dealing with a section 117 application, the position of an applicant child is not to be taken in isolation. The court's duty is to consider the entirety of the testator's affairs and to decide upon the application in the overall context. In other words, while the moral claim of a child may require a testator to make a particular provision for him, the moral claims of others may require such provision to be reduced or omitted altogether.
>
> (m) Special circumstances giving rise to a moral duty may arise if a child is induced to believe that by, for example, working on a farm, he will ultimately become the owner of it, thereby causing him to shape his upbringing, training and life accordingly.
>
> (n) Another example of special circumstances might be a child who had a long illness or an exceptional talent which it would be morally wrong not to foster.
>
> (o) Special needs would also include physical or mental disability.
>
> (p) Although the court has very wide powers both as to when to make provision for an applicant child and as to the nature of such provision, such powers must not be construed as giving the court a power to make a new will for the testator.
>
> (q) The test to be applied is not which of the alternative courses open to the testator the court itself would have adopted if confronted with the same situation but, rather, whether the decision of the testator to opt for the course he did, of itself and without more, constituted a breach of moral duty to the plaintiff.
>
> (r) The court must not disregard the fact that parents must be presumed to know their children better than anyone else."

24. As is pointed out in Spierin on The Succession Act, 1965 and Related Legislation, 3rd edition, at para. [700] it has been repeatedly stated that the court's function in adjudicating on an application under s. 117 is a two-stage process. The first stage is that the court must decide whether the testator has failed in his moral duty to make proper provision for the applicant child and that decision is made by reference to the circumstances which prevailed at the date of the death of the testator. It is only when the applicant child overcomes what the Supreme Court has described as the "relatively high onus" of proof that there has been "a positive failure in the moral duty" (Re *IAC* [1990] 2 I.R. 143) that the court proceeds to the second stage, which is to decide what provision is to be ordered for the applicant child. As Carroll J. pointed out in *M.P.D. v. M.D.* [1981] I.L.R.M. 179 (at p. 188), when the court moves to the second stage, the provision must be just at the time the court makes its order, so that the court must have regard to the value of the entire estate at the date of the hearing.

25. It seems to me that the requirement that the provision made be just may, having regard to the particular circumstances of a case, require the court to take account of changed economic circumstances, any variation in the value of assets, and any variation in the capacity of assets which are or form part of an enterprise which has passed on death as a going concern to yield income, including any regulatory changes which affect the profitability of the enterprise (e.g. changes in European Union law in relation to subsidisation of agricultural enterprises) between the date of the Testator's death and the date of the hearing

A's circumstances and the provision made for him

26. At the date of the Testator's death A was 41 years of age, he was married and had one child, aged one.

27. A's schooling had finished when he was about sixteen years of age. He had attended Vocational School to Intermediate Certificate level. After he left school, he served his time as an engineering draftsman at T Engineering for four years. After four years at T's he left because, as he testified, he did not take to the work. Farming was in his blood. When he left T he went to work on his father's farming enterprise on a full-time basis. Before that, like his brothers, he had helped out on the farm in the evenings and at weekends.

28. Prior to his marriage in 1983 A lived with his grandmother, parents, brothers and sisters in the house on Whiteacre, which is about seven miles from Blackacre. After he returned to work on the farm and until he got married A was paid a very small amount of money each week by his father for his work, about IR£10 per week. His evidence was that his father's objective was to build up the agricultural contracting business with a view to making money to buy a farm for him in the future, although the time span was not specified. A obtained a HGV licence after he left T.

29. After A got married a number of changes occurred. His father paid him a wage for working in the enterprise, initially at the rate of IR£80 or IR£90 per week, which eventually increased to about IR£120 per week by 1992. At the time his brothers, B and C, were also

involved full-time in the farming enterprise, but they were still living at home on Whiteacre and were being paid lower wages than A. The impression given by A's evidence was that his weekly wage compared unfavourably with the average wage of a farm labourer.

30. The second change was that A was allowed to move into Blackacre House, which was vacant at the time he got married. After the death of the grandfather it had been let to a succession of tenants, but it was vacant at that stage, although there is a conflict as to how long it was vacant. A's evidence was that he moved in with the grandmother's consent. However, as is outlined in section D later, the reality is that the Testator was the owner of Blackacre and it was with his father's consent that he lived in Blackacre House from 1983 onwards. I am satisfied on the evidence that Blackacre House was barely habitable even by 1983 standards when it was decided that A and his wife would move in. From the summer of 1983 until he moved in with is wife in December, 1983, A worked in the evenings repairing, refurbishing and improving Blackacre House. The work continued after he moved in and I am satisfied that there has been a continuous process of improving Blackacre House over the years. Initially, A got financial assistance from his father in relation to the work, in that his father paid for the materials used.

31. A's working relationship with his father changed in 1992. In the interim, Brownacre farm had been acquired. A's evidence was that his understanding was that his father's ambition was that each of his sons would have a farm and that he was to have Brownacre. That may well have been his ambition and his intention. Indeed, C's evidence was that the Testator's "grand plan" was to set them all (which I take to mean A, B and C) up. However, as counsel for the defendants submitted, that ambition foundered in the early 1990s. While the evidence is anything but precise, it would seem to have perished on the rock of inadequate returns from endowment policies and high interest rates which were prevalent in the early 1990s.

32. The position from 1992 onwards was that A ceased to draw wages from the Testator's farming enterprise. Thereafter, he farmed Brownacre with the Testator's permission. About half of Brownacre was in tillage and the rest was returned to grass. His evidence was that he had his own herd number. He also used 30 acres of farm land at Blackacre where he grazed cattle and sheep. As I find when dealing with the title action in section D, he used this part of Blackacre with the permission of the Testator. When the sand pit operations in Brownacre intensified around 1998 he worked part-time in the sand pit. He also continued doing contract work, for example, lime spreading. He also continued to help out in the Testator's farming enterprise at Blackacre as needed.

33. Because of the existence of these proceedings and the other actions since the Testator's death, A has continued to reside with his wife and son in, and occupy, most of Blackacre House. A has continued to farm the 30 acres of farm land at Blackacre. Brownacre has been disposed of, but he has received his share of the proceeds of sale as outlined previously. He continued to do haulage work, but denied that it was his main business. He does what he described as a "small bit" of contracting work.

The circumstances of A's siblings

34. B was 38 years of age at the date of his father's death. Like A he attended Vocational School and his schooling finished at Intermediate Certificate level. After he left school he went to work in the Testator's farming and agricultural contracting business. Around 1989 or 1990 he branched out on his own and established a plant hire business. On the evidence, I am satisfied that he was in no way reliant on the Testator's assets and was making his living independent of the Testator at the time of the Testator's death. By then he had married. His daughter was born about six months after the Testator's death.

35. C was 36 years of age at the date of the Testator's death. He also got his second level education at Vocational School, finishing at Group Certificate level. At that stage, the dairyman having left the farm, he was asked by his father to work on the farm. He had expected to go to agricultural college, but that was postponed and, in fact, never materialised. With the exception of approximately a year spent in Australia in 1989/1990 following a car crash, he worked for the Testator until the Testator's death and he remained on the Testator's payroll. He lived with his parents in the house on Whiteacre. C's evidence was that his wage when he returned from Australia was IR£45 per week. It increased thereafter and at the time of the Testator's death it was around IR£60 or IR£70 per week. C was candid in his evidence that, if he wanted extra money from his father, he got it. Around June or July, 1999 he bought a house in [a nearby provincial] town as an investment and the Testator guaranteed the loan. He is unmarried and still lives with the widow and E in the house on Whiteacre, although, as he testified, that arrangement would not be suitable if he wished to live with a partner. He farms at Whiteacre in the widow's name, in the sense that he does the physical work but she gets the income, and he also farms Blackacre other than the 30 acre portion farmed by A.

36. D was 34 years of age when the Testator died. After receiving a second level education at Vocational School, D attended the Regional Technical College [in the nearby provincial town] for three years. He had more of an academic bent than his siblings. As an adult he did not work in the Testator's enterprise and he has always had employment independent of the Testator and an income independent of the Testator's assets. He married around 1999.

37. E was 32 years of age at the date of the Testator's death. While she attended secondary school and did secretarial courses after secondary school, she has never had a job. She is unmarried. While A accepted that E has "special needs", my understanding is that that expression was not used in any clinical sense, but that the family recognise that the probability is that a home is going to have to be provided for her at Whiteacre or elsewhere and that her financial needs are going to have to be provided for for the rest of her life. It is unlikely that she will be in a position to earn a livelihood or that she will marry and she will be dependent on the provision the Testator made for her.

Failure by Testator to make proper provision for A?

38. Of the Testator's five children, only B and D were, in reality, financially independent of him and his assets at the date of his death. Aside from providing for the widow, who had legal entitlements under the Act of 1965, which she has not enforced, the Testator had moral duty to make proper provision for E and also for C because of the former's needs and the latter's commitment to working at a low wage in the Testator's enterprise all his adult life. Given A's special circumstances, in my view, the Testator also had a moral duty to make proper provision for him.

39. Those circumstances were that, by the time of the Testator's death, A and his wife had resided in Blackacre House for sixteen years. For about seven years he had been primarily reliant on farming the Brownacre lands and on his farming activities at Blackacre to provide an income for himself and his wife, who did not work outside the home, and latterly his child. For upwards of twenty years, A had been dependent upon the Testator or the Testator's assets to provide him with a livelihood. On the evidence, I think he was led to believe, that he did believe and that he had reasonable grounds for believing that his father would endeavour to provide him with a farm which would enable him to earn his living from farming for the rest of his life.

40. The death of the Testator and the provisions of his will effectively deprived A of his home and his primary means of livelihood. The Testator must have anticipated that after his death Brownacre would be sold and the proceeds of sale divided equally between A, B and C. In assessing whether the Testator made proper provision for A in accordance with his means, the overall provision made by the Testator for A, one-third of the proceeds of the sale of the 88-acre farm at Brownacre, the site at Brownacre, IR£40,000 and

machinery valued for inheritance tax purposes at IR£12,600, the aggregate value of which would have been in the region of IR£230,000 on the basis of the value of agricultural land in 1999, must be assessed against what A effectively lost on the Testator's death. A lost the facility of living in Blackacre House and he lost the facility of farming the entire 88 acres at Brownacre and about 30 acres at Blackacre. While the Testator could have withdrawn permission for him and his family to reside in Blackacre House at any time between 1983 and 1999, and could have withdrawn the facility to enable him to maintain his herd of sheep and cattle on Blackacre, he did not do so. Moreover, on the evidence, it is clear that it was the Testator's presence which enabled A to farm the farmland at Brownacre exclusively. There is no doubt on the evidence that A, B and C regarded the Testator as the boss and as the person who determined what use Brownacre was to be put to. C acknowledged that the Testator treated Brownacre as his.

41. Having regard to A's age and his family commitments, and his primary reliance on the Testator's assets or assets the Testator effectively controlled for his income in 1999, in my view, the Testator failed in his moral duty to make proper provision for A in accordance with his means.

Just provision for A
42. In reality, there are only two assets of the estate out of which provision can be made for A, Whiteacre and Blackacre. The disposition by the Testator of Whiteacre benefits the widow during her life, and after her death benefits E and D. Aside from the restriction contained in sub-s. (3) of s. 117, which provides that an order under s. 117 shall not affect any devise or bequest to a surviving spouse who is the mother of an applicant child, I do not think it would be proper or fair to interfere with that disposition. The Testator was obviously conscious of E's limited prospects in life and endeavoured to provide properly for her. Therefore, it would not be appropriate to interfere with her benefit and, indeed, A accepted that. As regards D, unlike his three brothers, he did not benefit from the sale of Brownacre and enjoy the Testator's bounty in that way. I think it is reasonable to surmise that the benefit given to him in relation to Whiteacre, apart from being a safeguard for E, was intended to make up for that. Therefore, I do not think it would be appropriate to interfere with his benefit, which is contingent on him surviving the widow.

43. That leaves Blackacre. In relation to that asset, the court has to bear in mind that it is subject to the rights of the widow and E and that it is also subject to the payment of IR£40,000 to B. The evidence would suggest that C bore the brunt of the Testator's liabilities, at any rate his bank liabilities, and discharged them out of his share of Brownacre. That also has to be taken into account.

44. The valuation evidence before the court has related primarily to Blackacre, which is located two miles from the nearby provincial town and about fifty miles from Dublin. There is no real dispute as to the value of Blackacre House as it stands, including the farm room, with a shared driveway, serviced by a septic tank and pump outside its curtilage, and its location beside a working farmyard. A valuer who testified put a value of €500,000 on it. Counsel for the defendants accepted that valuation. As regards the lands of Blackacre around Blackacre House farmed by A, the valuer suggested that the valuation was about €30,000 per acre, perhaps more because of the proximity of the lands to the town. The court does not have valuation evidence in relation to the entirety of Blackacre as a single entity. C's evidence was that some of the land was prone to flooding every year and his assessment was that half of the acreage occupied by him since the Testator's death would fetch only €15,000 per acre. His response to the proposition put to him that Blackacre in its entirety is worth between €4 million and €5 million was that like a lot of farmers he is "asset rich but cash poor".

45. The just provision for A has to be made out of Blackacre. Because of the burdens imposed by the Testator on Blackacre, which either cannot or should not be interfered with, and because of the necessity of ensuring that Blackacre is a viable farm, which can provide an income for C, I have come to the conclusion that it would not be appropriate to make the provision by giving A either the house or part of the land. The geography and layout of Blackacre was also a factor in reaching that conclusion. I consider the just provision involves giving A a sum of money charged on Blackacre which takes account of, and is aimed at redressing, the consequences of the Testator's death and the provisions of his will for A but does not make it unrealistic for C to meet the other obligations imposed on him, including the ongoing obligations to the widow and E, while at the same time allowing him to earn a living out of the property. That provision has to be translated to present day values. While, having regard to the state of the evidence, to do so is anything but an exact science, I think that the just provision for A is to substitute the sum of €750,000 for IR£40,000 in the will of the Testator.

46. Otherwise the will stands.

C. Trespass / personal injuries action

Facts
47. These proceedings arise out of an event which occurred on 10th May, 2000, which was preceded by inter partes correspondence, which I consider puts the event in context. The first letter was a letter of 10th April, 2000 from the solicitors acting for C and D, in their capacities as personal representatives of the estate of the Testator. C and D are the defendants in these proceedings but, as I have already pointed out, they are sued in their personal capacities. The letter was to A and his wife, who are the plaintiffs in these proceedings. In the letter, the solicitors complained about the construction of a wall in the yard of Blackacre House, which A had commenced building on the previous day. The complaint was that the wall restricted access to the farmyard and to the main farm and that the construction had been commenced without any consent from the personal representatives. The plaintiffs were called on to stop the construction work immediately and to reinstate the property. Legal proceedings were threatened if they did not do so. There was a response dated 20th April, 2000 from the plaintiffs' solicitors, in which it was stated that the Testator had been consulted and had agreed to the construction of the wall in the interests of confining F to the area immediately behind Blackacre House. It was stated that this agreement was being implemented in the interests of safety as, immediately behind where the wall was being erected, there were open slurry pits and various items of scrapped cars and machinery and also areas containing livestock and working machinery. It was denied that access to the farmyard and the house would be restricted.

48. That letter was followed by a further letter of 26th April, 2000 from the plaintiffs' solicitors to the solicitors acting in the administration of the estate on behalf of the personal representatives, which contained a complaint that on that day a bulldozer, which was being driven by B, who is not a party to these proceedings, "careered" through a portion of the wall demolishing it, despite B having a "banksman" with him who could have directed the machine. Proposals for the compensation of the plaintiffs for the damage to the wall and an assurance that there would be no repetition were sought to avoid court proceedings. The response from the solicitors acting in the administration of the estate was a letter dated 5th May, 2000. It was stated that no consultation had been engaged in with the personal representatives before the building of the wall commenced. That statement was incorrect because the evidence of both A and C was that they discussed the construction of the wall before it commenced. It was asserted that the location of the route of the wall was not in keeping with what was agreed with the Testator and it was already causing severe disruption to farming operations at Blackacre. It was stated that, in particular, the milk lorry had great difficulty in manoeuvring in the farmyard. The hope was expressed that the matter could be resolved without the necessity of proceedings.

49. What happened on 10th May, 2000 was that early in the morning a loading shovel driven by B was used to demolish the wall. I am

satisfied that this occurred at 6 a.m. A had already left Blackacre House to go to work on Brownacre. His wife was in bed in Blackacre House. B arrived accompanied by C, D and a neighbour. When the demolition work commenced the wife was alerted by the noise. She looked out the bathroom window and saw what was happening. She became hysterical. She tried to use the telephone but it was not working. She ran out of the house in her nightdress, having pulled on Wellington boots, and got into a jeep and tried to stop the demolition. The jeep was hit by the loader when she reversed by mistake. I have no doubt on the evidence that the wife suffered a severe shock as a result of the demolition of the wall. Her behaviour bears this out. C in his evidence used the expression "crazy stuff" to describe it. She testified that she drove to Whiteacre to see if the widow could stop the defendants, but she did not remember talking to her. She said her mind was racing. Her recollection was that she then went to the garda station. When she returned to Blackacre the guards were there and A was there. Criminal charges against both C and A in relation to the incident are pending in the District Court.

50. The defendants admitted cutting off the electricity supply while the wall was being demolished, but denied cutting off the telephone to Blackacre House.

51. I have absolutely no doubt, although C denied it when it was put to him in cross-examination, that the defendants acted in a highly irresponsible and an extremely provocative manner in demolishing the wall. The reason giving by C for not awaiting the outcome of the correspondence between the solicitors was that he and his co-executor were frustrated at the pace at which the matter was moving. When he was asked in cross-examination whether he considered the risk of a serious incident if A was at home, his response was that he kind of expected that, but added that the wall was demolished in less than two minutes. C likened A to a child who is told he cannot have a sweet or a bully in the school yard when one tries to stand up to him. He said he, C, felt no responsibility for what happened and he had no regrets in relation to the manner in which the wall was removed. The quickest and least stressful method had been used from his perspective.

The plaintiffs' case as pleaded
52. In their statement of claim delivered on 7th August, 2002 the plaintiffs alleged that the demolition of the wall amounted to trespass to their property and they claimed to have suffered loss and damage and it was claimed that W had suffered severe personal injury. The case was put on an alternative basis that, in demolishing the wall, the defendants had been guilty of negligence and breach of duty as a result of which the plaintiffs suffered loss and damage and W had suffered personal injury.

53. Because of the view I take that the claim made in the title action cannot succeed, I am of the view that the claim of trespass cannot succeed. Therefore, the issues which remain in these proceedings are whether a claim in negligence has been established against the defendants for the psychiatric injury which W alleges to have suffered as a consequence of the actions of the defendants, and, if so, the measure of damages to which she is entitled.

The claim in negligence: the law
54. The court had the benefit of helpful written submissions on this issue, and indeed on the legal issues in the other two actions, from counsel on both sides.

55. Counsel for the plaintiffs relied primarily on the decision of the Supreme Court in *Kelly v. Hennessy* [1995] 3 I.R. 253 and submitted that W's claim satisfied the five criteria set out by Hamilton C.J. in his judgment (at p. 258) which must be established in order to succeed in an action for damages for nervous shock. It was also submitted that it was arguable that the defendants' actions would satisfy the higher test of the tort of intentional or reckless infliction of emotional harm, referring to the leading case of *Wilkinson v. Downton* [1897] 2 Q.B. 57 and the commentary on the topic contained in McMahon and Binchy on The Law of Torts, (3rd Edition) at paras. 22.28 to 22.34. In my view, the plaintiffs' case as pleaded does not encompass that tort. Notwithstanding the finding I have made as to the reckless behaviour of the defendants, having regard to the state of the pleading, I do not consider it appropriate to consider that tort further.

56. Counsel for the defendants, in their written submission, also considered the criteria set out by Hamilton C.J. in Kelly v. Hennessy, in addition to considering other authorities both in the United Kingdom and in this jurisdiction relating to the circumstances in which a plaintiff in a negligence action can recover damages for a psychiatric injury unaccompanied by a physical injury. They referred to recent observations of the Supreme Court in *Fletcher v. The Commissioners of Public Works* [2003] 1 I.R. 465. In opening his exposition of the law in *Fletcher v. The Commissioners of Public Works*, Geoghegan J. (at p. 491) made some general observations which I propose summarising for the purpose of putting in context the passage from his judgment which, in my view, throws light on how W's claim should be approached. He stated that it was clear from leading cases in common law jurisdictions that reasonable foreseeability was not the only determining factor in imposing liability for psychiatric injury and that other elements such as proximity, reasonableness in the imposition of a duty of care and public policy may all play a role. He also pointed out that in the law of tort there is a double aspect to "reasonable foreseeability", in that it is relevant in considering whether a duty of care exists and, if it does and it has been breached, it is relevant in determining whether a particular item of damage alleged to have resulted is recoverable. He also pointed out that it would seem from the authorities that the test for each type of foreseeability is different: the test of foreseeability for the purposes of liability to a non-primary victim, at least for psychiatric injury, is based on a person of "normal fortitude", whereas in assessing damages on the application of reasonable foreseeability to items of damage, the "thin skull" principle would come into play.

57. Geoghegan J. then went on to state as follows in the passage which I think is enlightening for present purposes:

> "In an ordinary motor accident or factories injury or even, indeed, a medical negligence action, the trial judge does not normally have to consider aspects of the tort of negligence other than reasonable foreseeability. The 'neighbour' of a motorist, for the purposes of negligence liability, is the person who can be reasonably foreseen he may injure through the negligent use of a motor car. It has always been considered reasonable that liability should arise in such circumstances and reasonable foreseeability and proximity effectively become merged. In the vast majority of negligence actions, therefore, a close analysis of the different constituents of the tort, i.e. duty of care, the breach of that duty and the damage which results, is not necessary."

58. In my view, this case does not warrant the type of analysis which courts have had to embark on in the so-called "nervous shock" cases, such as *Kelly v. Hennessy*, or the so-called "fear of disease" cases, such as *Fletcher v. The Commissioners of Public Works*. It seems to me that this case is more akin to the ordinary motor accident or workplace injury case than to the nervous shock case. If an adjoining landowner, at 6 a.m., demolishes a contentious wall at the back of a house in which a family reside, which is within earshot and sight of the house, a person in the house whom it may reasonably be foreseen may be traumatised by the manner in which the demolition is carried out must come within the "neighbour" principle.

59. If I am wrong in that conclusion, then the criteria set out by Hamilton C.J. in *Kelly v. Hennessy* for recovery of damages for

nervous shock are applicable. Adopting the truncated version of the criteria set out by Keane C.J. in his judgment in F*letcher v. The Commissioners of Public Works* at p. 474, these are:

> "1. A plaintiff must establish that he or she actually suffered 'nervous shock'. This term has been used to describe 'any recognisable psychiatric illness, and a plaintiff must prove that he or she suffered a recognised psychiatric illness if he or she is to recover damages for "nervous shock"'…
>
> 2. A plaintiff must establish that his or her reasonable psychiatric illness was 'shock-induced'
>
> 3. A plaintiff must prove that the nervous shock was caused by a defendant's act or omission …
>
> 4. The nervous shock sustained by a plaintiff must be by reason of an actual or apprehended physical injury to the plaintiff or a person other than the plaintiff …
>
> 5. If a plaintiff wishes to overcome damages for negligently inflicted nervous shock he must show that the defendant owed him or her a duty of care not to cause him a reasonably foreseeable injury in the form of nervous shock."

Application of the law to the facts

60. The construction of the wall by A had been the subject of the correspondence which I have outlined. The concerns of the plaintiffs in relation to the safety of F, who was then about eighteen months old, were specifically raised in the correspondence and must have been known to the defendants. While B, who is not a party to these proceedings, drove the machine, it was the defendants, as personal representatives of the Testator, who were objecting to the existence of the wall and they must be assumed to have been directing operations. The wall was within sight and earshot of Blackacre House. The defendants must have anticipated that W would be in the house and that, even if she was asleep, the noise of the demolition work would waken her. In the light of the correspondence which had passed between the solicitors, they must have anticipated that the demolition of the wall in the circumstances in which it was undertaken would cause her distress.

61. In relation to the application of the five criteria identified by Hamilton C.J. in *Kelly v. Hennessy*, the position is as follows:

> 1. It has been established that W actually suffered a recognisable psychiatric illness. This was clearly established by Dr. John A. Griffin, the Consultant Psychiatrist who has treated, and continued to treat, W in his reports of 30th April, 2001 and 30th January, 2005, which were put in evidence, and in his oral testimony.
>
> 2. There is no doubt, on the evidence, that W's psychiatric illness was "shock-induced", in the sense that, being vulnerable to stress and anxiety and having a history of psychiatric illness, the shock which the incident on 10th May, 2000 caused exacerbated her condition. This is evident from her behaviour on that day. It is also supported by the evidence of Dr. Griffin. It is consistent with the opinion expressed by Dr. David Shanley, who examined W on behalf of the defendants, in his report dated 12th June, 2006, in which he stated that it is likely that the wall and its subsequent removal may have been a contributory factor to her subsequent admissions to Hospital under Dr. Griffin's care.
>
> 3. W's shock and the reaction, stress and anxiety which ensued were caused by the defendants' actions in having the wall demolished and the manner in which it was demolished.
>
> 4. Despite the urging of counsel for the defendants that this finding is not justified, in my view, the shock sustained by W was by reason of actual or apprehended physical injury to a person. While it would appear that she did not apprehend any physical injury to herself on the occasion, it is absolutely clear that the whole focus of her distress, stress and anxiety related to her perception that, because of the demolition of the wall, F was in imminent danger of serious physical injury. Dr. Shanley in his report expressed the opinion that it is reasonable to suggest that she was very concerned about F's safety and became obsessed about that aspect. Dr. Griffin used the same word, obsessed, in his oral evidence. He said she was "obsessed" about the wall and that its demolition had a devastating effect on her mental health. When he first saw her after the demolition of the wall, which was on 11th November, 2000, she was very distressed and referred constantly to the demolition of the wall and her fears in relation to F.
>
> 5. I have no doubt that the defendants did owe a duty of care to W and that injury in the form of nervous shock to W was reasonably foreseeable. It is at this point that, because of the similarity to a motor accident or a workplace injury case, any deeper analysis can be dispensed with. However, viewing the factual circumstances objectively, in my view, a reasonable person would have foreseen that the actions which the defendants intended to embark on were likely to have serious psychological consequences for W.

62. Accordingly, I am satisfied that the defendants are liable in damages for the psychiatric injury which their actions in demolishing the wall caused W.

The medical evidence

63. W had a history of psychiatric illness before the wall was demolished. She first attended Dr. Griffin in November, 1983 suffering from stress and depression. At the time, although her symptoms were not severe, she was admitted to [a psychiatric hospital] for a period of about two weeks. Following treatment she made a good recovery. Her last out-patient appointment was on 14th March, 1984.

64. W was admitted to hospital again after the birth of F in April, 1999, suffering from stress and depression. At that stage she spent six weeks in [the psychiatric hospital]. Dr. Griffin's evidence was that there was an element of post-natal depression involved. She was treated with anti-depressants, anxiolytic medication and sleeping tablets. When she was discharged she was normal.

65. After the demolition of the wall, before Dr. Griffin gave his first report in April, 2001, W had four periods of hospitalisation in the psychiatric hospital: between 9th November, 2000 and 20th November, 2000; between 4th December, 2000 and 11th December, 2000; between 12th December, 2000 and 23rd December, 2000; and between 4th January, 2001 and 5th March, 2001. Dr. Griffin's opinion was that the worries and stresses about the safety of F played a part in each of those admissions. In between admissions he had seen her at numerous out-patient consultations and had to take telephone calls from her, perhaps, three or four times a week.

66. After Dr. Griffin gave his first report, W had a further period of hospitalisation in 2001 under his care: from 17th May, 2001 to 25th

August, 2001.

67. W's Voluntary Health Insurance cover ran out in August, 2001. She had two periods of hospitalisation in a midland psychiatric hospital, which I understand is a public hospital. The first was from 27th November, 2002 to 14th January, 2003 and the second was from 11th June, 2003 to 14th November, 2003. No medical evidence was adduced in relation to those periods of hospitalisation.

68. After her Voluntary Health Insurance cover resumed, W was back under the care of Dr. Griffin. She had a further period of hospitalisation, this time in the psychiatric hospital, from 6th November, 2003 to 10th February, 2004. Again she was treated with anti-depressants and anxiolytic medication. When she was discharged on 10th February, 2004, she was on maintenance doses.

69. W had eight periods of hospitalisation between November, 2001 and February, 2004 for periods ranging from one week to two months (2), three months, four months and five months. At the time of her first hospitalisation, F was only two years old. The fact that she was separated from him at that time understandably is a matter of great regret for her.

70. When Dr. Griffin reviewed W in his report of 13th January, 2005, he stated that she had been well for the previous three months. However, he recorded the medication she was on at the time and commented that she was on three powerful anti-depressants and mood stabilising medications which she required to take on a daily basis. He also reiterated his opinion that the constant distress she had suffered from in relation to the wall being knocked down and the fact that her son might fall into a drain or slurry pit had exacerbated and prolonged her clinical state.

71. At the hearing Dr. Griffin testified that W's condition was very much improved. Since 16th August, 2006 she had had no need for anti-depressant or other medication. As regards the prognosis, he said it was guardedly good. She had coped reasonably well. He was guardedly optimistic that she could avoid hospitalisation but she would continue to need out-patient consultation.

72. The case was made by counsel for the defendants that W had many other stressors in her life at the time, apart from the demolition of the wall, the litigation in relation to the estate of the Testator and related matters being mentioned. This was put to Dr. Griffin, whose response was that she constantly talked about the wall rather than the other matters, which she adverted to at times.

73. In his report, Dr. Shanley said that when he examined W on 6th June, 2006 there was no evidence of depression. She had maintained that she remained well from a psychiatric point of view, largely because F had reached the age of seven and a half years and that much of the fears she had previously had receded by then.

74. In his first report of 30th April, 2001 Dr. Griffin referred to the adverse effect which W's "legal case", obviously referring to these proceedings, was having on her in a tone veering on desperation. He pointed out that unless and until the legal situation was resolved expeditiously, it would be very difficult to help her in a meaningful way. It was obvious in the course of the hearing that she was under severe stress. It is reasonable to assume that her stress will be alleviated and her condition will improve when these proceedings are out of the way.

Damages
75. There is no claim for special damages before the court. I assess the general damages to which she is entitled at €50,000, comprising €40,000 for pain and suffering to date and €10,000 for pain and suffering in the future.

D. The title action

The claim as pleaded and presented
76. The title action was the last of the three actions to be initiated. As I have stated in the introduction, the plaintiffs in the title action are A and W, whom I will refer to as the plaintiffs in this section, and C and D, qua personal representatives of the Testator, are the defendants. The property to which the title action relates is described in the schedule to the statement of claim as "the lands and premises known as Blackacre … consisting of a dwelling house, small yard front and back and entrance avenue shown outlined in red on the map annexed …". However, the agreed position at the hearing was that the claim related to the entire of the area outlined in blue, including the area outlined in red on the map identified on the second day of the hearing. The land in issue comprises an area of about 30 acres. The case pleaded in the statement of claim, on my reading of it, seems to relate only to Blackacre House. However, I will deal with the case as presented at the hearing.

77. The case as pleaded by the plaintiffs is that in 1983, following their marriage and with the consent of the grandmother, they commenced to restore and occupy "the Property". It was asserted that the grandmother was "the life tenant … under a family settlement" of "the Property" and that on her death in 1987 the remainder man under the family settlement was the Testator. The basis of the plaintiffs' claim in the title action as pleaded is that, since the death of the grandmother in 1987, they have been in sole and exclusive occupation of "the Property" without acknowledging the title of the Testator or his estate and, accordingly, they have barred the title of the Testator's estate. On that basis they claimed a declaration that all the estate or interest of the estate of the Testator in "the Property" had been extinguished by the adverse possession of the plaintiffs and that they are entitled to the entire legal and beneficial interest therein.

78. Two alternative claims were advanced in the statement of claim based on the assertion that the plaintiffs had carried out extensive work to restore "the Property" as a dwelling house fit for habitation. The first was an assertion that the estate of the Testator was estopped from recovering possession of "the Property". The second was that the estate of the Testator had been enriched by the works and improvements carried out by the plaintiffs and that it would be just and equitable that the estate should compensate the plaintiffs in respect of the cost of the works and the enhancement of the value of the dwelling house and lands. The plaintiffs sought an injunction restraining the defendants from trespassing on "the Property" and damages as compensation for unjust enrichment.

79. As I have stated, the plaintiffs' case was presented on the basis that the title claim extended not only to Blackacre House and yard but also to lands comprising about 30 acres, being part of Blackacre, which the plaintiffs asserted that A farmed to the exclusion of the Testator and his estate for upwards of twelve years prior to the initiation of these proceedings.

80. The defendants denied that the plaintiffs were in sole and exclusive occupation of Blackacre House since 1987 and contended that –

> (a) the plaintiffs have only ever occupied a portion of Blackacre House, the remainder having been used by the Testator during his lifetime, and thereafter by C;

(b) the plaintiffs have never occupied the yard or the entrance avenue, but have made use of them in common with the Testator during his lifetime and, after his death, with C; and

(c) that the plaintiffs' occupation of the portion of Blackacre House after 1987 and during the lifetime of the Testator was with the licence or permission of the Testator and was part of his consideration for working on the family farm.

81. It was also contended by the defendants that A used the farmland with the permission of the Testator. The defendants have counterclaimed for an injunction restraining the plaintiffs from trespassing on the Property, on the basis that the defendants, as personal representatives of the Testator, have revoked the permission given by the Testator to the plaintiffs. They also have claimed damages for trespass.

The law

82. The plaintiffs' claim is that they have acquired title by adverse possession to the property in issue and that claim is based on the Statute of Limitations, 1957 (the Act of 1957). Section 13(2) of the Act of 1957 provides that no action to recover land shall be brought by any person, other than a State authority, "after the expiration of twelve years from the date on which the right of action accrued to the person bringing it". The accrual of a right of action to recover land is dealt with in s. 18, sub-s. (1) of which provides:

> "No right of action to recover land shall be deemed to accrue unless the land is in the possession (in this section referred to as adverse possession) of some person in whose favour the period of limitation can run."

83. Section 24 provides that, at the expiration of the period fixed for a person to bring an action to recover land, the title of that person to the land shall be extinguished.

84. Counsel for the defendants, in their written submissions, have referred to s. 51 of the Act of 1957 which, in effect, provides that, in the case of an action to recover land, if a person in possession acknowledges the title of the owner during the limitation period, the limitation period starts running again from the date of the acknowledgment. However, "acknowledgement" has a very specific meaning for the purposes of s. 51: by virtue of s. 58 it must be in writing and signed by the person making the acknowledgement. On the evidence, I am satisfied that s. 51 does not come into play, because no acknowledgement which complies with the requirements of s. 58 had been identified.

85. The real issue in this case is whether the plaintiffs have been in adverse possession within the meaning of that expression in s. 18 since 1987, as they contended, or, indeed, at any time.

86. The authorities on the meaning of the expression "adverse possession" in s. 18 address two concepts: the type of use and occupation of land which constitutes possession; and the circumstances in which possession is adverse. The law in relation to both concepts is well settled. Both concepts were considered in this Court by Costello J., as he then was, in *Murphy v. Murphy* [1980] I.R. 183. In relation to the first concept, he stated as follows (at p. 193):

> "The first question of fact to be determined is whether the defendant was ever in 'possession' of the widow's lands. In a passage which was quoted with approval in *Treloar v. Nute* [1976] 1 W.L.R. 1295, Lord O'Hagan in *The Lord Advocate v. Lord Lovat* (1880) 5 App. Cas. 273 at p. 288 of the report:-
>
> > 'As to possession, it must be considered in every case with reference to the peculiar circumstances. The acts, implying possession in one case, may be wholly inadequate to prove it in another. The character and value of the property, the suitable and natural mode of using it, the course of conduct which the proprietor might reasonably be expected to follow with due regard to his own interests – all these things, greatly varying as they must, under various conditions, are to be taken into account in determining the sufficiency of a possession.'"

87. In addressing the question whether the possession was adverse, Costello J. stated as follows (at p. 195):

> "Turning, then, to the nature of the defendant's possession, I think the test I should apply is this. Was the defendant's possession inconsistent with and in denial of the widow's rights as the legal owner of the land? … If it was, then the defendant would be 'a person in whose favour the period of limitation could run' within the meaning of s. 18 of the Act of 1957 and his possession would be adverse. In considering a problem of this sort, the relationship between the owner of the land and the person in possession and the nature of the lands in controversy are highly relevant matters to be taken into account. If a person is in possession of lands with the consent or licence of the owner, then his possession is not adverse: see *Hughes v. Griffin* [1969] 1 W.L.R. 1295. The inference of the existence of a licence is one that may be drawn more readily where the relationship is a family one than where no family ties exist."

88. On the appeal to the Supreme Court in *Murphy v. Murphy*, which was dismissed, Kenny J. in his judgment (at p. 202), having traced the history of the concept of adverse possession, stated as follows:

> "In section 18 of the Act of 1957 adverse possession means possession of land which is inconsistent with the title of the true owner: this inconsistency necessarily involves an intention to exclude the true owner, and all other persons, from enjoyment of the estate or interest which is being acquired. Adverse possession requires that there should be a person in possession in whose favour time can run. Thus it cannot run in favour of a licensee or a person in possession as a servant or caretaker or a beneficiary under a trust: *Hughes v. Griffin* …"

89. At the end of his judgment Kenny J. stated that whether a person in possession of land has been in adverse possession is ultimately a question of fact.

90. In *Seamus Durack Manufacturing Limited v. Considine* [1987] I.R. 677, Barron J. reiterated what Kenny J. had said in *Murphy v. Murphy*: that each case must be decided on its own facts. He then continued (at p. 683):

> "Adverse possession depends on the existence of *animus possidendi* and it is the presence or absence of this state of mind which must be determined. Where no use is being made of the land and the claimant knows that the owner intends to use it for a specific purpose in the future, this is a factor to be taken into account. The principle has relevance only insofar as that when the factor is present it is easier to hold an absence of *animus possidendi*."

91. More recently, what constitutes possession was considered by this Court (O'Hanlon J.) in the following passage in his judgment in *Doyle v. O'Neill* (Unreported, 13th January, 1995):

> "In order to defeat the title of the original landowner, I am of opinion that the adverse user must be of definite and positive character and such as could leave no doubt in the mind of a landowner alerted to his rights that occupation adverse to his title was taking place. This is particularly the case when the parcel of land involved is for the time being worthless or valueless for the purposes of the original owner."

92. The last sentence in that quotation has no relevance to the facts of this case. In the case before him, O'Hanlon J. held on the facts that the acts of user which it was asserted constituted possession, which he found were casual, sporadic and of an inconclusive nature, were not such as to ground a claim to a possessory title.

The legal ownership
93. It is clear from the statement of claim in the title action that at the time it was delivered the plaintiffs did not have documentary evidence of the title to the lands registered on Folios ---- and ----- County ----. I have set out the details in relation to the title in section B of this judgment. The grandmother was not a life tenant of Blackacre House between 1957 and her death in 1987. She merely had a contractual right to be granted a right of residence, support and maintenance by way of charge. As such, she had no title to the house or land and she was not a person who could have brought an action to recover possession of the house or land. The Testator was the owner of the house and land in fee simple at all times after 1957 until his death and he was the person against whom the plaintiffs must show they were in adverse possession. The plaintiffs' claim is that they were in adverse possession against him since 1987.

Adverse possession by plaintiffs?
94. In determining whether the plaintiffs' use of either the part of Blackacre House occupied by A and his wife since 1983 or the 30 acres of farmland, the yard and farm buildings which A used for the purposes of his farming activities and for the maintenance of his sheep and cattle herds, was of a type which ousted the legal title of the Testator before his death or of his estate after his death, the core issue is whether such use and occupation amounted to adverse possession within the meaning of the Act of 1957. In my view, it did not because on the evidence the occupation of the house and the use of the land were with the permission of the Testator.

95. In their written submissions counsel for the defendants have listed a variety of factors which they contend illustrate that the actuality of the occupation and use by the plaintiffs of the property of which they claim they were in adverse possession is inconsistent with the concept of adverse possession: that A continued to draw wages from the farming enterprise until 1992; that the materials used for the initial repairs of Blackacre House in 1983 and 1984 were funded by the Testator; that a site for a house for A was provided at Brownacre when that property was acquired; that A believed that Brownacre was to be his; that the permission of the Testator and the executors were sought for the construction of the wall in the yard; and the sharing of resources and machinery and the shared use of the yard. Counsel for the defendants submitted that the evidence established that A had the express permission of the Testator to use the house and farm. Alternatively, it was submitted that the relationship between the Testator and A was such that a licence would inevitably have been inferred.

96. I have no doubt, taking an overview of the evidence, that the plaintiffs' use and occupation of the part of Blackacre House which they have occupied over the years since 1983 and A's use of the 30 acres of farmland was with the permission of the Testator. Moreover, I have no doubt that, whether the permission was actually expressed by the Testator in terms that, the occupation and use could continue for as long as the Testator wished, that was what A understood to be the position. On at least three occasions in the 1990s, the Testator demonstrated that he was in control of Blackacre and the plaintiffs did not demur.

97. First, in May, 1994 the Testator instructed his solicitors to write to A requesting that he remove all his stock, cattle and sheep which were his (A's) property from the lands at Blackacre. The letter was dated 12th May, 1994 and the request was to remove the stock before 31st May, 1994. A's evidence was that at the time there was dissention between him and the Testator. He wanted the Testator to buy extra machinery, but the Testator was "in trouble with the bank" and would not. A's evidence was that the Testator dismissed everything he said and would lash back at him saying that, if A did not do what he told him, he was to get his sheep and cattle out of Blackacre. As A put it, the Testator would "fire up and cool down". A's evidence was that, while he was surprised to receive the letter, he did not respond because he thought things would cool down and they did until the next letter.

98. That next letter was a further solicitor's letter of 21st December, 1994. There were two complaints in that letter. The first was that A's sheep and lambs were grazing the lands of Blackacre with the result that in the following spring there would be no grass available for cattle, resulting in serious loss to the farming operation. A was asked to remove his sheep from the lands on or before 31st December, 1994. The second complaint was that an application had been made to the Department of Agriculture for sheep headage payments in the name of the Testator without his permission. It was stated that, if the practice did not stop immediately, the Testator intended bringing the matter to the attention of the appropriate authorities. The letter also stated that the Testator wished that the house at Blackacre be vacated on or before 30th June, 1995. Again, A did not respond to that letter. His evidence was that he thought it as well not to start an argument. In any event, he could not move out because he had no money. He also testified that he felt that the Testator was not entitled to make him leave because he had promised to buy him a farm and he, A, had worked hard for the Testator, having worked longer hours than the labourers.

99. The third occasion was in May, 1998 following an argument between A and the Testator after the Testator had tipped a load of sand on the drive to Blackacre House and during which argument the door of the Testator's tractor was damaged. That incident resulted in a letter of 19th May, 1998 from the Testator's solicitors to A in which A was admonished that there was to be no repetition of his conduct towards his father and was advised that the use of the lands should be vacated by the end of July, 1998. I think it reasonable to infer that the instructions for that letter were contemporaneous with the making of the Testator's will on 8th May, 1998; it referred to the Testator having consulted his solicitor recently concerning the incident.

100. As counsel for the defendants put it, there was a rapprochement between the Testator and A when the Testator's first grandchild, F, was born in October, 1998. Despite the arguments between them, the Testator never took steps to eject the plaintiffs from Blackacre House or the farmland. However, in my view, that did not alter the permissive nature of the plaintiffs' occupation and use of Blackacre House and the farmland. In my view, it is clear on the evidence that A never had the *animus possidendi* necessary to render the occupation and use adverse possession within the meaning of s. 18 of the Act of 1957. In his evidence, A was very forthright about his expectations. He never expected that Blackacre would be left to him by the Testator. His understanding was that Blackacre would be split between C and B and that he would get Brownacre. His understanding and expectation when Brownacre was acquired was that it would be his. He would work with the Testator until the loan on Brownacre was paid off. His evidence was that the Testator said that when the loan was paid off he would get C and B "to sign off". Having regard to the evidence, it is impossible to infer that A ever formed the intention of ousting the Testator's title to Blackacre.

101. For all of the foregoing reasons the plaintiffs' claim to have established title by adverse possession must fail.

102. In their written submissions, counsel for the plaintiffs, in making the case for the application of the doctrine of proprietary estoppel have outlined the relevant legal principles by drawing on the commentary and the authorities cited in Delany -on Equity and the Law of Trusts in Ireland, 3rd Edition, at p. 637 et seq. However, in applying the principles to the facts of this case, it seems to me that they have strayed beyond the parameters of the case made in the plaintiffs' statement of claim, which has focussed on the works and improvements carried out by the plaintiffs to Blackhorse House, rather than the fact that A worked for the Testator for over ten years at low pay. Aside from that, it is clear on the evidence that the Testator never gave A an assurance that Blackacre House would be his. Moreover, A never had any expectation that Blackacre House would be his. It is reasonable to infer that the reason why A carried out the works and improvements to Blackacre House, the extent of which is disputed, was for the comfort and ease of living of himself and his family. The plaintiffs have had the use of the house free of rent since December, 1983. In my view, they have not made out a case for a claim in equity arising from the works and improvements they carried out to the house, nor for damages.

E. Orders

103. The court will make the following orders:

> (1) In the s. 117 application, a declaration that the Testator has failed in his moral duty to make proper provision for the plaintiff in accordance with his means and an order providing that the devise and bequest of the lands of Blackacre to the first defendant shall be subject to and charged with the payment thereout of the sum of €750,000 to the plaintiff, in substitution for the sum of IR£40,000, provided for in the will, the said sum to be paid by 31st October, 2007.
>
> (2) In the trespass/personal injuries action, an order that the defendants pay to the second plaintiff the sum of €50,000 for damages for negligence and an order dismissing the other claims.
>
> (3) In relation to the title action, an order dismissing the plaintiffs' claim and an order on the defendant's counterclaim granting injunctions in the terms of paragraphs (a) and (b) of the prayer on the counterclaim with a stay until 31st October, 2007 or until the payment of the sum of €750,000 to the first plaintiff by the defendants as personal representatives of the Testator, whichever occurs last, and orders dismissing the other claims and counterclaims.