

THE HIGH COURT**[2011 No. 2610P]****BETWEEN****MC (A WARD OF COURT SUING BY HER COMMITTEE MARGARET MOLONY)****AND****MARGARET MOLONEY****AND****FC AND JH AND JH T/A H BROTHERS****PLAINTIFFS****DEFENDANTS****Judgment of Mr. Justice Feeney delivered on 2nd day of May, 2013.**

1.1 MC is a ward of Court so found and declared by order of this Court dated the 4th November, 2009. She was born on the 18th May, 1925 and is a widow without child, grandchild or other descendant. She resided with her late husband at their family home at, Rathgar, Dublin, up to his death in 1991 and thereafter she continued to reside in that house by herself until 2006.

1.2 By order of this Court of the 27th January, 2010, Margaret McGreevy was appointed committee of the person and of the estate of MC. By further order dated 12th April, 2010, Margaret Molony, the second named plaintiff, was substituted as committee of the estate and of the person of MC.

1.3 FC, the first named defendant, is the nephew of MC. He resides at T A, K, County Wexford. The second and third named defendants are brothers of R, D, County Wexford and work as agricultural contractors under the trade name of H Brothers.

1.4 MC is the owner of the property at County Wexford ("T A") and was residing in that property with the first named defendant, her nephew, FC, up until the time that she was admitted to a nursing home on the 11th March, 2010. She continues to reside in that nursing home. FC remains in occupation of the property at T A. That property was purchased in 2008 subsequent to the sale of MC's house in Rathgar.

2.1 On the 25th February, 2006, at the time that MC was residing alone in Rathgar, she became unwell and was admitted to St. James's Hospital. At that time MC had no close relations in Dublin but had a number of relations who resided in County Wexford which was the county where MC had been born and brought up. FC was one of her nephews and due to a number of circumstances he had formed a close relationship with MC. When FC was a child he spent two extended periods with his aunt. The first was when FC was three years old and on that occasion he spent approximately six months with his aunt and uncle in Dublin. Some five years later he spent a further period of two months with his aunt in Dublin after he had been hospitalised. When FC became an adult he visited his aunt, MC, on a regular basis from his home in Wexford. MC lived alone after her husband's death in 1991 up until she moved to Wexford. During that period she did not work, having given up her pre-marriage employment on marriage. Prior to marriage she had worked as a legal assistant/secretary to a partner in a firm of solicitors in Dublin.

2.2 On the 25th February, 2006 MC was admitted to St. James's Hospital after her neighbours became apprehensive as to her wellbeing and of her ability to look after herself. The hospital records noted that she was admitted with a history of intermittent confusion and concerns from her neighbours about her ability to self-care. The ability to self-care was confirmed following admission at an interview between MC and a hospital social worker. The hospital records state that MC was admitted with the condition of "acopia". During the course of evidence, Dr. O'Donoghue gave evidence that acopia was a medical term or slang for being "not able to cope". The medical records covering her stay in St. James's Hospital noted that the admission had arisen in circumstances where the neighbours had called an ambulance to bring MC to hospital as a result of "ongoing concerns about her poor self-care skills, vulnerability at home". The notes indicated that MC expressed the view that her neighbours were overreacting. However, the hospital notes record that MC had "considerable difficulty in personal self-care, cooking (eats biscuits only throughout the day) cleaning, etc.". During the course of the hearing, Sinead McSharry, a medical social worker attached to the Accident and Emergency Department at St. James's Hospital, gave evidence that she carried out an assessment of MC shortly after her admission. Her evidence supported by contemporaneous notes indicated that MC was obviously a vulnerable woman and that during the course of the assessment it became clear that there were areas where she was struggling with her personal life and that she was having difficulty with personal care, managing her nutrition and managing to mobilise safely in her home. Shortly after MC's admission to St. James's Hospital, a mini mental state examination (MMSE) was carried out. That examination, also known as the Folstein Test, is a brief thirty point questionnaire test that is used to screen for cognitive impairment and is also used as a basic test or indication for dementia. The MMSE test carried out on MC in the days following her admission resulted in a score of twenty out of thirty. While in hospital there were two occasions when MC was identified as being disorientated but the medical view was that such disorientation arose from active infection. The evidence to me indicated that the interpretation of MMSE scores proceeds on the basis that a score equal to or greater than twenty five points is indicative of normal cognition and that a score of ten to twenty points is indicative of moderate impairment while a score of twenty one to twenty four points is indicative of mild cognitive impairment.

2.3 After MC's admission to St. James's Hospital, a medical condition unrelated to the reason for her admission was diagnosed. That medical condition was an aortic aneurysm and she required surgery. She remained in hospital until the 26th April, 2006 when she was discharged into the care of the first named defendant, FC. From the end of April 2006 up until MC went to reside in a nursing home in County Wexford on the 11th March, 2010, she resided with her nephew, FC, at various different addresses. On release from hospital, MC resided in her original family home at C, County Wexford with FC, her nephew, and his father, who was her brother-in-law being the widower of MC's late sister.

2.4 Prior to her discharge from St. James's, MC had indicated to the medical social worker on the 3rd April, 2006 that she was adamant that she wanted to go home to her house in Dublin and that she believed that she was able to do so as her neighbour was present to support her. The notes of that attendance indicated that MC became very annoyed at any idea of moving to Wexford. Prior to her discharge at the end of April 2006, a family meeting occurred which was attended by FC and a plan was identified whereby she would live at C, in County Wexford. The social worker at St. James's Hospital continued to keep in touch with MC after her discharge for four months. She recorded that FC had tried to persuade MC to sell her house in Dublin and buy in Wexford but that there had been no success.

2.5 Towards the latter part of 2006, MC moved from the house at C, to St M. R H, County Wexford, which was the home of a M K. M K was the partner of FC. She resided in that house for approximately one year until following a dispute in late 2007, she returned to C under the supervision of her nephew, FC. She was there for a number of months until returning to reside at St. M in early 2008.

2.6 The evidence establishes that from her discharge from St. James up until May of 2007, MC was at best reluctant, and at times opposed, to the sale of her home in Rathgar. The evidence, as confirmed by the attendance of the medical social worker, was that FC was desirous of having the Rathgar house sold and an arrangement put in place whereby MC would live with him on a permanent basis. By May of 2007 MC was seriously considering selling her Rathgar property and contact was made with Eleanor Wardlaw (Mrs. Wardlaw), a local solicitor based in Killinick, in County Wexford, who was known to the family. Mrs. Wardlaw gave comprehensive and precise evidence to me and demonstrated that she was an efficient, considerate and committed solicitor. I am satisfied that her evidence was accurate and truthful. This was reinforced by the efficient and comprehensive manner in which she kept attendances. She ensured that MC's interests were fully and properly identified and represented. She was initially contacted by telephone on the 16th May, 2007 and made an appointment to meet MC two days later. On the 18th May, 2007, FC brought MC to Mrs. Wardlaw. By that date MC was dependent upon her nephew, FC, for transport and for the provision of a place to reside. At the meeting MC indicated that she wanted to sell the house in Rathgar and hoped to obtain a price of approximately €2.5m. Mrs. Wardlaw indicated that she would instruct estate agents to assist in the sale and that she would consider the title deeds. Mrs. Wardlaw gave evidence that she was experienced in dealing with elderly people and that, therefore, at the first consultation she sought and obtained the identity of MC's general practitioner and took limited instructions in relation to her medical history. Mrs. Wardlaw was informed that MC intended to purchase a house in Wexford and was considering a property in Tagoat. Mrs. Wardlaw also gave evidence that after the consultation on the 18th May, 2007, FC rang her to inform her that MC's general practitioner, Dr. Liz O'Sullivan, was satisfied in relation to MC's health and mental state. That contact was, on the evidence of Mrs. Wardlaw, entirely unsolicited and was made at a time before Mrs. Wardlaw had contacted the general practitioner.

2.7 FC's enthusiasm for the house in Rathgar to be sold and to progress the sale was not only illustrated by his statement to the medical social worker and by his unsolicited contact with Mrs. Wardlaw in relation to MC's health and mental state, but was also demonstrated by his conduct in late 2006 or early 2007. During that period, whilst MC was residing with FC, he was the active participant in the preparation of a forged letter which purported to have come from a Welfare Inspector in the Dublin South Region in the Department of Social Welfare. That letter later became available in evidence through another relation of MC and was the subject of extensive evidence. The letter is undated but clearly was written during the period between MC's discharge from St. James's Hospital in May of 2006 and when she went to see Mrs. Wardlaw on the 18th May, 2007. The letter was obtained by a relation of MC by the name of E R and that letter was then made available in these proceedings. FC gave evidence that he assisted in the preparation of that letter in that he obtained blank notepaper of the Department of Social and Family Affairs and used that notepaper to type a letter addressed to himself but on his evidence it was dictated by MC. He gave evidence that the letter was produced in the latter part of 2006 or early 2007. FC failed to provide any rational explanation as to the reason or circumstances for the production of that forged letter and the suggested dictation of it by his aunt. The letter was addressed to FC and having regard to its contents it is clear that it was prepared for the purpose of putting pressure on MC to encourage her to sell her house in Rathgar. The letter was typed by FC and was addressed to him and the suggestion that it was dictated to him by MC lacks credibility. When one has regard to the content of the letter and to whom it was addressed, it is clear that the purpose of the letter was so that it could be used by FC to put pressure on MC to sell her house. References within the letter to an assumption that absent MC agreeing to sell the house, that "the State will be taking possession of MC's house at the end of July" and that "the State will be responsible for selling it", together with a closing paragraph that indicated that "an Inspector from the Department of Social and Family Affairs will be making an unannounced visit to you and your aunt at your address in R" and that "this visit will be different from the usual visits . . . from the local health authority", all point to an intent to put pressure on MC. It is probable that not only did FC obtain the headed notepaper and type the letter, but that he also was the person who composed the letter. The reason for writing the letter was to put pressure on MC and it is probable that it was used for that purpose. That letter is demonstrative of the reluctance that MC had to arrive at a decision to sell her home in Rathgar and also of FC's efforts to try and persuade her. Mr. Kohl, in giving evidence, also stated that the forged letter from the Department of Social and Family Affairs had come into his possession through a relation of MC and that he discussed the letter with FC who confirmed that he had written the letter. As set out above, FC in his evidence to this Court disputed that he composed the letter and swore that he only typed the letter from instructions given to him by MC. I conclude that the version given by FC to Mr. Kohl was correct. The attempt by FC to renege from this admission during his evidence resulted in him giving false evidence. FC's claim that MC dictated a letter which contained threats against her, and sought to put pressure on herself to sell her house is not credible.

2.8 Mrs. Wardlaw's attendances confirm that following the initial meeting and the unsolicited contact from FC in relation to his aunt's health and mental state that FC endeavoured to further progress a sale by informing Mrs. Wardlaw that his aunt, MC, had met with the auctioneers and was happy to go along with them and that it had been agreed that the house in Rathgar could be sold by private treaty with a reserve in the region of €2.5m. Thereafter, FC brought the title deeds, a valuation and a marriage and death certificate into Mrs. Wardlaw. After that activity in the second half of May of 2007 there was no contact in relation to the proposed sale until the 19th July, 2007. On that date Mrs. Wardlaw rang FC. FC informed her that MC now accepted that she did not own a second house and that the proposed sale related to her Rathgar property. Mrs. Wardlaw was also informed of the intention of MC to make a will. The issue of the purchase of a new house by MC was also raised and it was indicated by FC that that house might be put into the joint names of the two of them. By September 2007 Mrs. Wardlaw had been contacted by two different relations of MC, other than FC, raising certain apprehensions concerning MC's health and her ability to complete a sale. Mrs. Wardlaw was already proceeding on the basis that MC would require to be independently advised in the absence of any other person by her and that prior to any sale, a medical report as to her capacity would be required. On the 20th July, 2007, MC signed a letter of that date addressed to Anna Rossy in Sherry Fitzgerald, Auctioneers. The probability is that that letter was typed by FC given his involvement in the preparation and completion of the forged letter. The letter commenced by indicating that MC had made up her mind and decided to sell her house in Rathgar and that she was sorry for the delay in trying to make up her mind. The letter also stated that MC knew that the auctioneers had been dealing with her nephew, FC, and that she would trust him to deal with any problems that may arise on her behalf. The letter also stated that MC would leave her nephew to deal with Sherry Fitzgerald on her behalf and that he would take care of the details. On the 14th September, 2007, Mrs. Wardlaw met in private with MC. She inquired about the proposed sale of the house in Rathgar and whether MC was satisfied to sell that house. Mrs. Wardlaw gave advice to MC and informed her that Mrs. Wardlaw was going to write to her general practitioner to obtain a medical report and that she would see MC the following week.

After the private meeting with MC, Mrs. Wardlaw spoke to FC to make arrangements about contacting Dr. O'Sullivan and she also suggested that another family member might help FC in dealing with the details of the sale as some members of the family did not trust him. On the date of the consultation, Mrs. Wardlaw wrote to Dr. O'Sullivan requesting a medical report on MC's capacity and she stated in the letter that –

"I myself have no concerns in relation to MC's mental capacity, although I can see that at times she comes across as a bit scatty, which I understand was always her way. I do not have any particulars in relation to her health and what medication, if any she is on and whether or not she would be capable of living alone".

She went on to request a report on MC's general health and her capacity to deal with her affairs and any views that the general practitioner might have in relation to MC's future. Following the written request for a report there was telephone contact between Mrs. Wardlaw and Dr. O'Sullivan on the 26th September, 2007. Dr. O'Sullivan informed Mrs. Wardlaw that she had done a test on MC which was quite extensive and that she was quite surprised as to how well MC had done and that she was satisfied that she was in possession of all her faculties. She indicated that MC was able to make up her own mind and was not at a stage where she would need to go into a nursing home but Dr. O'Sullivan indicated that she accepted that MC would need to live with somebody else. Following that telephone call, the house in Rathgar was auctioned on the following day, that is, the 27th September, 2007, and the property was sold at auction for €2,800,000. A contract was signed and a deposit of €280,000 paid.

2.9 In November 2007, MC had a falling out with her nephew, FC, and his partner and she left their house and returned to her family home at C. She resided there for a number of weeks with her nephew, FC, staying at night time. Mrs. Wardlaw saw MC on her own in relation to accommodation and discussed with her the possibility of staying permanently in C and finding a companion. On the 15th November, 2007, Mrs. Wardlaw wrote to Dr. O'Sullivan informing her that MC no longer lived in R H and had returned to C, K. In C there were two houses, a newer house where her nephew, J C, and his wife lived with their children, and the old family home which was where MC resided. In that letter Mrs. Wardlaw commented on MC's long-term situation and stated "I do not know whether going forward she (MC) can stay where she is. It seems what is best for her or what she wants is not the same as what FC would like". In the final paragraph of the letter Mrs. Wardlaw stated –

"I have advised FC that any decisions for MC's future will be made by herself in consultation by you and myself. I would therefore welcome at this stage your views in relation to her capability of living alone. I have suggested to her that she might consider a live-in companion. It is accepted that MC does not want to go to a nursing home and this does not arise . . . at present".

On the 17th December, 2007, Mrs. Wardlaw wrote to MC after the sale of the Rathgar property had closed, indicating that there was a net balance after expenses of €2,717,313.05. A month later, on the 14th January, 2008, Mrs. Wardlaw again wrote to MC indicating that it was difficult for MC to make a decision in relation to investment long-term until she had sorted out her house situation and wondering if she wanted Mrs. Wardlaw to set up "an appointment with an investment adviser". She suggested that that advice might be obtained before the deposit renewal date on the initial investment of the net proceeds expired on the 11th February, 2008. Dr. O'Sullivan wrote to Mrs. Wardlaw on 14th January, 2008 and confirmed the oral report that she had given following the examination of MC on the 19th September, 2007. In that report, Dr. O'Sullivan stated in relation to the mental state examination as follows:

"Mini mental state examination was performed and MC performed extremely well. I enclose a photocopy of this exam. Essentially MC is of normal mental state and capable of making her own decisions and managing her own affairs. In short, MC was in good physical and mental health at the time of review. However in view of her age and previous illness I do feel she requires support and is not capable of living completely independently. While she can manage to dress and feed herself with no difficulty she is at the stage where a live-in companion is advised and she realises that."

The mini mental state examination which was enclosed with that letter indicated a score of thirty three out of thirty. That score was incorrect and should have read twenty eight out of thirty.

2.10 On the 22nd January, 2008, Mrs. Wardlaw met in private with MC. MC indicated that she had returned to live in R H but did not like it. The words that she used were I "hate it" and that she wanted "a place of her own". Mrs. Wardlaw informed MC of Dr. O'Sullivan's report and of the fact that Dr. O'Sullivan was of the view that she could not live alone. MC indicated that she was happy to buy a new property at T A which was near to FC's house and that there was a room downstairs that could be converted into a bedroom for herself. She confirmed that she was happy to buy the property and was not being pressurised by anybody to do so and she informed Mrs. Wardlaw that there was land with the house and that she was happy that FC could use the land for his own use and that FC was going to move into the new house with her but that FC's partner was not going to accompany him. The attendance note taken on the 22nd January, 2008 states that MC informed Mrs. Wardlaw that "the house will be sold after your day" and "FC only there for your lifetime". Mrs. Wardlaw gave evidence that it was clear from the consultation that MC agreed to FC living in the house at T A while she was there but that it was never envisaged that FC would live there on his own and that what was envisaged was that the house would be sold after MC had died and that at that stage FC would get a generous inheritance. It was suggested in cross-examination by the first named defendant that MC agreed to give FC a life interest in the property. Mrs. Wardlaw refuted such suggestion and confirmed that a life interest was never discussed and that what was envisaged was that FC would live there whilst MC resided in the house. After the meeting on 22nd January, 2008, arrangements were made for the purchase of the property at T A, K, County Wexford together with adjoining lands and that purchase was completed in April 2008 for a purchase price of €744,000. MC moved into the house at T A together with FC. FC's partner did not move into the house but after a short period, F C's daughter, her boyfriend, and a Polish woman named I S came to reside in the property. After MC went into the nursing home in March of 2010, FC continued to reside in the house. His partner has now also moved into T A.

2.11 On the 10th April, 2008, Mrs. Wardlaw met with MC and discussed the transfer of the balance of the funds arising from the sale of the house in Rathgar which were left after the purchase of the property at T A. Mrs. Wardlaw informed MC that there was a balance of €1,938,300 on deposit with the ICS Building Society and that a representative of the Bank of Ireland Private Banking would meet with MC, as had previously been discussed, to consider the investment of the balance. Mrs. Wardlaw also advised MC that she should ensure that all bills were paid by cheque rather than giving her nephew, FC, sums of money. Prior to that meeting in April 2008, Mrs. Wardlaw had been informed by MC that she was going to the Bank of Ireland Private Banking Section to obtain investment advice. Following the consultation on the 10th April, 2008, Mrs. Wardlaw was in contact with MC and advised her that the balance of monies were being transferred to the Bank of Ireland/ICS Building Society and that a meeting with Bank of Ireland Private Banking was arranged and would take place during the first week of May 2008. Mrs. Wardlaw contacted a representative in the Bank of Ireland and confirmed that contact had been made with a representative of Bank of Ireland Private Banking to make an appointment for MC to receive investment advice and that on that basis Mrs. Wardlaw agreed to fax and post the request for transfer of funds. On the 2nd May, 2008, €1,938,453.41 was transferred into MC's ICS Building Society's account at the Bank of Ireland in R H.

2.12 In the following fourteen months no contact was made with Mrs. Wardlaw and she was not in a position to give any independent advice or to see MC on her own. The evidence established that no independent financial advice was received by MC and that the proposed meeting with Bank of Ireland Private Banking did not occur. It is what occurred after the 2nd May, 2008 when the sum of €1,938,453.41 was lodged which forms the core matters in issue in this case and, in particular, the mode and manner in which sums were withdrawn and the use to which those sums were put.

3.1 The payments which are the subject matter of these proceedings are eight withdrawals which took place from MC's account. The first withdrawal was on the 16th May, 2008 and the last withdrawal on the 14th April, 2009. There is no dispute but that the sum of €1,938,453.41 was lodged to MC's account on the 2nd May, 2008 resulting in a balance in that account of €1,949,619.16. Thereafter, eight withdrawals occurred which are relevant to these proceedings. Those eight withdrawals are set out in eight lettered paragraphs A to H inclusive. (Hereafter in this judgment I shall refer to such withdrawals by such letters).

A – 16th May, 2008 – withdrawal of €100,000 by transfer to account in sole name of FC;

B – 16th May, 2008 – transfer of €10,000 to joint account in names of MC and FC;

C – 3rd July, 2008 – withdrawal of €93,800 lodged to account in sole name of FC;

D – 13th August, 2008 – withdrawal of €42,000 lodged to the account in the sole name of FC;

E – 22nd September, 2008 – transfer of €42,000 to the account in name of FC;

F – 15th December, 2008 – transfer of €50,000 to the account in the joint names of MC and FC;

G – 28th January, 2009 – transfer of €100,000 to account in joint names of MC and FC;

H – 14th April, 2009 – transfer of €500,000 to account in the sole name of FC.

Other than for the withdrawal of the 15th December, 2008, the transfers and withdrawals were executed by MC after she was brought to the Bank of Ireland Branch in Rosslare where the transactions took place. The transfer on the 15th December, 2008 took place in circumstances where MC was in hospital and was carried out by FC. MC had signed a withdrawal slip and that was used in her absence. FC's evidence in relation to this matter was that he had a number of blank withdrawal slips signed by MC so that transactions could take place without her having to attend at the bank.

3.2 The largest withdrawal was the transfer 'H' on the 14th April, 2009. By that date over €400,000 had been transferred either into the sole or joint accounts of FC in a period of less than eleven months. On the 14th April, 2009, FC brought M C to the bank in Rosslare and the transfer was carried out in the public office. At no time was MC spoken to by a senior official and, such conversation as took place, took place with an official from the bank at the public counter and in circumstances where FC, who had brought MC to the bank, was also present in the public office. The process and procedures followed by the bank were cursory and had no regard to the sums involved, the frequency of withdrawals or the age of the account holder. As of the date of that transfer, MC was not only elderly and fragile, but was due within a matter of days to have an assessment as to her mental capacity. To allow and permit the immediate transfer of such a substantial sum of money, representing a significant portion of the funds available to MC, without a private meeting or real consideration is indicative of a lack of full or proper procedures being followed in the bank's dealing with elderly and potentially vulnerable customers.

3.3 FC acknowledges in evidence that he received all the sums of money set out in the earlier paragraph (i.e. 'A' to 'H' inclusive) and states that he used those sums for particular purposes. He claims that his aunt agreed to each and every one of the transfers and had determined that he should receive half of her funds and that she was aware of the intended use by him of the money and what purchases he would make. FC dealt with his claim that his aunt wished to provide him with funds for the purchase of items of machinery and to provide him in total with half of the money available in his cross-examination. (Day 5, pages 120 – 124). He claims that there was a gentleman's agreement between him and MC and J H, the second named defendant, that funds would be provided to purchase machinery for the H machinery business and that FC would be given a wage as soon as the business was built up and that J H and FC would hold joint ownership of the machinery and if the business did not prosper, that the machinery would be returned to the sole ownership of FC. FC claimed that that agreement was an oral agreement first made in 2006 at a time prior to the sale of the house in Rathgar. FC claimed that his aunt stated that "she was going to look after us", that is, himself and J H. At that time J H was assisting in relation to the tidying up and clearing out of the house in Rathgar. FC gave further evidence that his aunt remained interested in the machinery business and would ask questions about it on different occasions. He gave evidence that "he imagines" that the agreement was made sometime in the summer of 2007. When asked to provide details of the agreement, he stated in relation to the agreement that his aunt said she would look after him and that his health was not the best and MC wanted to look after him and that she wanted J H to do that and that his future would be looked after and that he would have a job and that he, FC, would have some machinery of his own. FC gave evidence that he presumed that when it was first mentioned, that his aunt meant he would be looked after when the house was sold, and that he did not recollect or remember any discussion about money other than at one stage his aunt stated that when the house was sold in Dublin, if it was sold for over a million euro, she would give him half of it but he was unable to remember when that was said. Clearly, if that was said, it would have to have been said prior to the sale. He also stated that in relation to his aunt's statements that she said she would give him half of the proceeds and that if he was not mistaken she had said it on more than one occasion and that to the best of his recollection the first occasion would have been in August/September 2006. FC produced a document in purported support of his claim for an oral gentleman's agreement which was dated the 13th July, 2011 and was signed by him and JH. The subject was identified as a gentleman's agreement and the document read as follows:

"This statement is confirmation of a gentleman's agreement between MC, FC and J H. The agreement was that J H would give FC a wage as soon as the business was built up enough to be able to support an extra wage, and was acknowledged by all three of us that this would not happen overnight and would take a few years for this to materialise. J H and FC would hold joint ownership of the machinery and if the business did not work out, ownership of the machinery would return to FC as full owner. Any maintenance including parts, would be paid from the proceeds of the business. I requested J H to confirm this agreement between us in writing for the benefit of the High Court."

It was signed by FC and JH. Other than for the claim that MC was agreeable at the date of each transfer for such transfer to take place, and was aware of the purported use or the general intended use of the funds on each occasion, the only matters upon which FC relies upon in support of his claim that he is entitled to retain all the sums transferred out of MC's account is the purported gentleman's agreement and the evidence that he gave relating to MC's desire to give him half of her funds. The claim in relation to

MC's intended wish to give him half of the funds is a matter which was not originally pleaded but which was given in evidence by FC after he delivered an amended defence and counterclaim at the start of the trial.

3.4 Carsten Kohl, a social worker attached to the Protection Service for Older Persons Unit of Wexford Community Service gave evidence to me. He is a senior case worker for the protection of older people within the Wexford Community Services and he became involved with MC when he received a phone call from John R, a brother-in-law of MC, on the 15th January, 2009, wherein he raised certain matters of concern. As a result of that phone call, Mr. Kohl made a home visit to T A on the 26th January, 2009. During the course of Mr. Kohl's interview with MC, she stated that she bought the house and that she gave half of her remaining money to F, referring to FC, and that he bought some machinery with the money. She was asked how she managed her financial affairs and she said that she had a cousin in Rathmines working in a bank but did not go into any further details and she also told Mr. Kohl that F, again referring to FC, had begged her for half of her money. She also indicated that in the past she was running the country and that she was the Taoiseach at some stage and that she ran the whole of Ireland. Mr. Kohl determined to have a follow up visit and visited MC for a second time on the 5th March, 2009. She did not recognise Mr. Kohl from his earlier visit and on that date she appeared quite confused and he formed the impression that she was even more confused on the second occasion than she had been on the first occasion. FC informed Mr. Kohl on that occasion that MC's memory was as usual but that she was more confused after waking up and generally she only became more active and alert later in the day. On the occasion of the second visit Mr. Kohl informed MC that he was planning a referral to a psychiatrist for old age because he felt that it was important that MC's capacity should be tested. Mr. Kohl gave evidence that he had decided to proceed on that basis as a result of his observations and impressions during his two visits. He checked with Dr. Gormley's office and established that a referral to him had already been made in relation to MC through the public health nurse. Dr. Niall Gormley is a Consultant Psychiatrist for old age with Wexford Mental Health Service. FC was aware of the intended consultation with Dr. Gormley which was arranged for April 2009. On the 18th May, 2009, Mr. Kohl rang FC to ascertain what had occurred at the appointment and was informed by FC that MC had missed the appointment as she was sick and that another appointment had been arranged for the end of June. On the occasion of that phone call, FC informed Mr. Kohl of the circumstances of the €500,000 withdrawal on the 14th April, 2009. He told Mr. Kohl that MC had overheard a conversation which had indicated that she might be made a ward of Court and that MC then insisted that she be brought to the bank so that she could put all her money into FC's name. FC told Mr. Kohl that he rang the bank in advance of the visit and asked the manager and the staff to go along with the transaction and FC informed Mr. Kohl that €500,000 was transferred into his account. He told Mr. Kohl that all the money, that is the €500,000, would be invested and would be used for MC's care.

3.5 At the start of May 2008, Mrs. Wardlaw had made arrangements with Bank of Ireland Private Banking Division to advise MC in relation to her funds. After that, she was not involved with MC until July of the following year when, on the 9th July, 2009, she received a phone call from Mr. R, a brother-in-law of MC. Mr. R raised the issue of MC being made a ward of Court. On the following day Mrs. Wardlaw tried to contact Dr. O'Sullivan and contacted the Bank of Ireland in Rosslare and informed them that she had received expressions of concern in relation to a recent transaction on MC's account. The acting manager confirmed to Mrs. Wardlaw that Carsten Kohl, a social worker with the HSE, had called to the branch on the previous day. Mrs. Wardlaw advised the acting manager that her phone call was a formal telephone call and that she was putting the bank on notice of her concern and that she reminded the bank that they had a duty of care to their clients and, in particular, to elderly clients. The acting manager, Peter Hudson, confirmed that he was investigating the matter and that he was seeking advice from the bank's legal department. Mrs. Wardlaw informed the acting manager that if there had been a transaction involving €500,000 that surely that that would have been brought to the attention of the bank manager and not dealt with solely by a teller. The acting manager thanked Mrs. Wardlaw for contacting him. Mrs. Wardlaw was later in contact with Carsten Kohl who informed her that MC had transferred €500,000 to FC and that it would appear that that occurred when there was an assessment pending from Dr. Gormley. Carsten Kohl also informed Mrs. Wardlaw that the money which had been transferred was available for MC's care as it had been invested and he had been informed of that by FC. A few days later FC informed Mrs. Wardlaw of the letter from the HSE to say that an appointment had been made to have MC assessed and that he, that is FC, subsequently postponed the appointment. Mrs. Wardlaw continued to endeavour to deal with the issue concerning the use of MC's funds and on the 10th August, 2009, met with MC in her office. FC was also present. MC indicated that she wanted him to be present at the meeting. Mrs. Wardlaw asked why the money available to MC had not been invested through Bank of Ireland Private Banking and FC stated that MC only wanted to invest €1m and that the bank suggested €1.75m so that MC had said no. During that meeting MC indicated that she did not know that she had given away as much as €500,000 and FC informed her that on the 12th April, 2009 MC gave him €500,000 "to look after her for the rest of her life" and added that he did not ask for it. FC also mentioned that he still regarded the €500,000 as being MC's and that when Mrs. Wardlaw asked him if he would be agreeable to sign a declaration of trust in favour of his aunt, that he indicated that he would be agreeable. At that meeting Mrs. Wardlaw was informed by FC that €70,000 remained in the bank in R H in two accounts, one in his name and the name of IS with a balance of €50,000 and another in his sole name with a balance of €20,000. Mrs. Wardlaw suggested that the money should be refunded to MC immediately. FC agreed to repay €65,000, out of the two bank accounts, to MC. Two days after the meeting with Mrs. Wardlaw, FC confirmed that the transfer would be done and that he was going to the bank the following day. FC did not transfer any funds.

3.6 Dr. Niall Gormley called to see MC on the 9th June, 2009 and following that visit, he wrote a report dated the 18th June, 2009. In that letter Dr. Gormley stated that:

"FC described MC as eccentric by nature, and that she had struggled to provide care for herself when living independently. In addition to the eccentricity, he described a gradual deterioration in her memory, most significantly since a hip fracture last November. On a few occasions she had wandered off from the house and had to be returned by neighbours, but there have been no recent episodes as according to FC MC is never alone at home."

Dr. Gormley carried out a mini mental state examination to test MC's cognitive ability. MC displayed global impairment with an MMSE test result of eighteen out of thirty. At the examination Dr. Gormley identified that MC was inconsistent regarding her move from Dublin and that at times she stated she missed Dublin and did not know why she had left, although later she said she was quite content living in K. Dr. Gormley identified MC's speech pattern as being quite rambling and disjointed. Dr. Gormley concluded as follows:

"In summary MC is an 84 year old lady living with her nephew and his two daughters. Her presentation is consistent with a dementia of moderate severity, on a background of what appears to be a grandiose or eccentric type personality. Her general care appears to be good, and MC did not raise any specific concerns with me. MC would appear to retain decision making capacity for basic day to day affairs, but would not be capable of engaging in any complex financial decision making."

3.7 I also heard evidence from Nurse Molony, an experienced and qualified nurse who had graduated in 1983. In late 2007 she was engaged to provide certain care to MC. She provided care to MC from December 2007 until March 2010. She attended on a regular basis, at least once a week, and she gave evidence as follows (Day 3, question 36):

"But right from the beginning I didn't question the fact that I was also dealing with someone who perhaps was in the early stages of dementia. Now, I never had a diagnosis of that and I never asked for it and it was not part of my remit. But having worked with people who did have it, I just thought for quite a while that it was early stage. I mean, her conversations could jump from one thing to the other and it was never really very much present day, except when she spoke of Francis."

She also gave evidence that (Day 3, question 40):

"The other thing I noticed on a couple of occasions was that when I would go – in my copybook that I kept notes in my fee would always have been left there by FC and on a few occasions she would insist on paying me also. She wouldn't take money back. She used to say to me 'Take one of those'. I was never sure whether she realised it was a twenty euro or a fifty euro or not. I am not sure, but that is something I noticed."

3.8 Dr. Patrick Geoffrey O'Donoghue, a Consultant Psychiatrist and registered medical specialist in general adult psychiatry, gave evidence to me. He had carried out a full review of all available medical records in relation to MC. He also gave evidence that he examined MC on the 29th September, 2009 to enable him to make an assessment as of that date. He gave evidence that as of that date he was very clear that MC had very significant cognitive deficits such that he would make a diagnosis of moderate to severe dementia. He also thought that she was incapable of managing her affairs and could be considered a person of unsound mind. He gave evidence that the dementia was probably an Alzheimer type of dementia which had been running over seven to ten years. A person presenting with the type of symptoms and cognitive capacity demonstrated by MC as of September 2009 would have a history going back "certainly five years or more". He gave evidence that from his examination of the medical records that (Day 1, page 118):

"She was not orientated in time and place, it was fairly consistent throughout the admission in 2006 and certainly for the latter part of her admission in 2006 she wasn't physically unwell. She had, you know, Dr. Nuala Caffrey on 3 April (2006) that she was probably back to her baseline level of function. I think she had significant cognitive deficits at that time, and that makes sense. Everybody was concerned; can this woman care for herself. And I think she had an enduring deficit at that time and it had progressed steadily and slowly."

3.9 I also heard evidence from Ann Kelly who is an occupational therapist who qualified in 2005. She worked in Waterford Regional Hospital from 2005 to 2010. In 2008, whilst working in the orthopaedic ward, she came into contact with MC who was being treated in the hospital as a result of an injury. As part of her examination of MC she carried out a mini mental state examination on the 16th December, 2008. That mini mental state examination was scored as having an outcome of thirteen out of thirty. However, in evidence it was acknowledged that the totting up of the figures of that examination was incorrect and that it should have been sixteen out of thirty. Ann Kelly gave evidence that (Day 2, question 72):

"From my records I would feel that this lady was somebody that had some difficulties with her memory in terms of applying things, you know, from day to day and applying the advice that would have been provided to her. So I suppose that she would be somewhat vulnerable and needing help from other people to manage her daily activities safely at home."

3.10 I also heard evidence from Elizabeth C who was called in evidence by FC. She lived in the house with MC for a period of approximately six months, either in the second half of 2006 or the first half of 2007. Mrs. C gave evidence, in cross-examination, that MC was rambling in her speech but that she disagreed with Nurse Molony's evidence that MC was a person in the early stages of dementia. Mrs. C indicated that she respected the opinion of Nurse Molony and that Nurse Molony had got to know MC and therefore would have been able to assess her as it was Mrs. C's experience that MC dealt with outsiders differently from people that she knew.

4.1 The preponderance and weight of evidence that I heard leads me to the conclusion that by the date of MC's admission to St. James's Hospital on the 25th February, 2006, she was suffering from the early stages of dementia. There are differing outcomes from the of mini mental state examinations which take place after the date of admission in 2006 and different opinions expressed by medical doctors and paramedicals. The different results indicated that MC's condition was not constant and that, depending upon the date and circumstances, she could be more alert and perceptive showing increased cognitive ability depending upon the circumstances and location of the test. However, the weight of evidence and the expert medical opinion, which I accept, is that by February of 2006, MC was suffering from early stage mild dementia with some cognitive impairment. The evidence, which I again accept, is that that is a condition which varies but which, from an overall perspective, progresses. The evidence demonstrates that by February 2006, MC was a fragile individual who had lived alone for a considerable period of time and was clearly having difficulty in caring for herself. It was her inability to care for herself which was the stated cause of her being admitted to hospital in February 2006. By that date MC was in a vulnerable position and was a person who required assistance and care and had reached a stage where she no longer could live alone. The evidence shows that MC was a strong-willed, opinionated lady but had reached a stage where she was vulnerable without assistance and help in everyday activities. The differing views expressed by MC as to her willingness or lack of willingness to sell her house in Rathgar and her views as to where she should reside whilst in County Wexford are indicative of a person who was erratic and inconsistent in her views and liable to alter or change those views. By the time that MC was discharged from St. James's Hospital in April 2006, her mental state and physical condition were such that she could not live by herself and was dependent upon others to provide essential everyday requirements. She could not take care of herself without assistance; she was a person who required to be looked after.

4.2 The medical examination carried out by Dr. O'Sullivan in September 2007 indicates that at that time MC's cognitive capacity was sufficient to enable her to make decisions as regards managing her own affairs. Dr. O'Sullivan, in her report of the 14th January, 2008, following her examination on the 19th September, 2007, makes it clear that in view of MC's age and previous illness, that she "requires support" and "is not capable of living completely independently". That report confirms my conclusion that there can be no doubt that by September 2007, and in all probability from her discharge from St. James in May 2006, MC could not live independently and required care and assistance. Between the examination by Dr. O'Sullivan in September 2007 and the admission of MC to Waterford Regional Hospital on the 28th October, 2008, there appears to have been a significant deterioration in MC's condition and in her cognitive ability. This is confirmed by the mini mental state examination carried out on the 16th December, 2008, which demonstrates moderate cognitive impairment. Dementia of a moderate severity was identifiable by December 2008 and was confirmed by the Consultant Psychiatrist's examination in June 2009 and given his evidence in relation to the nature and progress of dementia, the probability is that during 2007 and 2008, MC's cognitive impairment had progressed from mild to moderate and that at no time during 2008 had MC the capacity to engage in any complex financial decision making even though she did retain a capacity to deal with basic day to day affairs. In relation to her day to day existence, the evidence establishes that from May of 2006, MC did not have the capacity to care for herself without help and assistance and had become dependent.

5.1 The claim of the second named plaintiff, as the committee of the person of the first named plaintiff who is a ward of Court, is set

out in the amended statement of claim delivered on the 21st March, 2011. The plaintiffs contends that all the funds withdrawn and as set out in paragraphs 'A' to 'H' above were beneficially owned by MC and that, accordingly, the first named defendant holds such funds on trust for the first named plaintiff. It is also claimed that the first named defendant is accountable to the plaintiffs in respect of all of the eight sums withdrawn from the account of MC. The plaintiffs also claim a full account in respect of the withdrawn sums. It is claimed that the monies properly belong to and are the property of MC. There is also a claim that FC has admitted that he holds the sum of €500,000 upon trust for MC but that despite being called upon to do so, that he has failed and neglected and/or refused to lodge the same in Court for the benefit of MC. There is also an alternative claim made in conversion.

5.2 The first basis upon which the plaintiffs make their claim is that at all material times MC was a person of unsound mind and incapable of managing her person or property. It is claimed that it follows that it would be inequitable and unconscionable for the first named defendant to retain any money of the first named plaintiff and that any transaction by which the first named plaintiff may have been divested of any of her assets constitutes an improvident or unconscionable bargain or transaction and any such bargain or transaction ought to be set aside by order of the Court.

5.3 The second and alternative basis upon which the plaintiffs claim is that at all material times the first named plaintiff, MC, was an elderly and vulnerable person who depended upon FC, the first named defendant, to act in the first named plaintiff's best interests and that FC by his own conduct has purported to take charge of the first named plaintiff's affairs and has placed himself in a position of dominion and trust over MC and that, in the circumstances, the plaintiffs' claim that the first named plaintiff, insofar as the transactions the subject matter of the proceedings are concerned, acted under the presumed undue influence of the first named defendant or, alternatively MC acted under the actual undue influence of FC.

5.4 It is also claimed that the first named defendant was in breach of a duty of care owed to the first named plaintiff not to withdraw any money or undertake any transactions which was contrary to the interests of the first named plaintiff. The plaintiffs plead that the first named defendant exerted influence and pressure on the first named plaintiff together with an alternative plea that the first named plaintiff acted under the presumed undue influence of the first named defendant. The plaintiffs claim a constructive trust in relation to the funds for the use and benefit of the first named plaintiff absolute and for an order that the first named defendant should be compelled to account for such sums and to repay them for the benefit of the first named plaintiff. It is also claimed that the first named defendant continues to reside in the first named plaintiff's property at T A and that he uses the property for his own use and benefit and that notwithstanding that the first named defendant has been called upon to deliver up vacant possession of the property that he has failed to do so and that he is, therefore, trespassing and that he should be directed to deliver up vacant possession of the property.

5.5 It is also claimed by the plaintiffs that the first named defendant has admitted that since the year 2008 he has paid or transferred part of the first named plaintiff's monies, being part of the monies withdrawn at paragraphs 'A' to 'H' inclusive, to the second and/or third named defendants for the purpose of the purchase of machinery by the first and/or second and/or third named defendants for use by the second and third named defendants in the course of their business and that an order should be made for the return of each and every item of machinery purchased. It is pleaded that neither the second or third named defendants are purchasers for value and that they knew or ought to have known that the money provided by the first named defendant to purchase the plant and machinery was the property of and beneficially owned by the first named plaintiff and that in the premise the plant and machinery purchased by the defendants with the first named plaintiff's funds is held upon trust by the second and third named defendants for the first named plaintiff. It is also claimed that any income or profit generated by the second and third named defendants in the use of the machinery is the property of the first named plaintiff and should be accounted for. It is also claimed that any depreciation and/or loss of value in respect of any of the plant or machinery purchased with the first named plaintiff's funds, insofar as it causes a loss to the first named plaintiff, gives rise to a claim for damages.

5.6 The plaintiffs claim a declaration that the first named defendant holds the sum of €937,800 withdrawn from the first named plaintiff's account, being the property of the first named plaintiff together with interest accrued thereon upon trust for the plaintiffs, and that the plaintiffs are entitled to judgment together with interest for that sum. Certain additional ancillary reliefs in relation to injunctions are also claimed. The claims against the first defendant for conversion and/or breach of contract and/or breach of duty is recognised by the plaintiffs as being alternative claims which do not arise in the event of judgment being granted for the sum claimed. Another ancillary relief claimed is a declaration that the funds held in account No. 54947355 – Bank of Ireland, which account is in the name of the first named defendant is the property of the first named plaintiff and an order is sought that those funds be immediately lodged in Court to the credit of the first named plaintiff.

5.7 As regards the second and third named defendants, the plaintiffs claim not only a declaration that all plant and machinery are held in trust, but also a declaration that the first named plaintiff is entitled to recover, as beneficial owner, each and every item of plant and machinery together with all documents of title and/or registration in respect of such plant and machinery. An order is also sought against all the defendants for the delivery of the plant and machinery together with the documents of title and/or registration together with a claim for an account in relation to income which has been earned by use of the machinery. There is also a claim against the second and third named defendants for damages.

6.1 The first named defendant has put in a full defence and counterclaim. He denies that he has wrongfully converted any monies to his own use and that all monies transferred to him have been accounted for and are not due or owing to the plaintiffs. It is expressly denied by the first named defendant that the first named plaintiff is a person of unsound mind or incapable of managing her person or her property. In support of his defence, the first named defendant claims that the first named plaintiff voluntarily put the first named defendant in the said funds in order to provide for his future and that it was the intention and wishes and instructions of the first named plaintiff to transfer the funds in issue to the first named defendant. In effect, the first named defendant claims that in respect of each and every transfer as set out in paragraphs 'A' to 'H' inclusive, that at the time of each transfer the first named plaintiff intended the sums of money to be transferred to the first named defendant for his use and that the first named plaintiff agreed to such transfers, and that in so agreeing she was putting in place and implementing her previously expressed intention of transferring funds for the benefit of the first named defendant.

6.2 It is also denied by the first named defendant that the first named plaintiff was an elderly or vulnerable person who depended upon him to act in the first named plaintiff's best interests and it is denied that she acted under either the actual influence or the presumed undue influence of the first named defendant.

6.3 Insofar as the plaintiffs rely on a claim that the first named plaintiff is a vulnerable person, it is denied by the first named defendant that the first named plaintiff was a vulnerable person but rather was a responsible and capable person possessed of an outstanding ability to make important decisions and never relied upon the first named defendant or any other person to make decisions. The first named defendant claims that in transferring the funds to his benefit he was carrying out the first named plaintiff's express instructions and that in so doing, he was not acting contrary to the interests of the first named plaintiff because he was

carrying out her instructions. There is also a denial that any of the transactions were an improvident or unconscionable bargain or ought to be set aside.

6.4 The first named defendant denies that he exerted any pressure upon the first named plaintiff. It is also denied that the first named plaintiff depended upon the first named defendant other than that she relied upon him to carry out certain duties when requested to do so. It is denied that the first named plaintiff received no independent financial or legal advice in relation to the transactions in issue and it is claimed that the first named plaintiff had legal representation at all material times from Mrs. Wardlaw and also had the benefit of financial advice from the ICS Building Society. It is also claimed that the first named plaintiff had two separate appointments with financial advisers and that they provided the first named plaintiff with all financial advice and assistance when required. The first named defendant pleads that the plaintiffs were aware at all material times that the first named plaintiff had the benefit of both her solicitor, Mrs. Wardlaw, and the financial advice of Bank of Ireland Private Banking and the investment services of FBD. It is also denied that the first named defendant holds €500,000 on trust for the first named plaintiff or that the first named plaintiff has suffered the alleged or any loss.

6.5 In relation to the claim that the first named defendant deliver up vacant possession of the first named plaintiff's property, the first named defendant claims that he is not prepared to deliver up vacant possession of the property because of the arrangement made between him and the first named plaintiff on or about July 2006 which provided that he would have a permanent right of residence in the property subject to him maintaining and providing security for the property and he denies that he is trespassing. In the alternative, it is claimed by the first named defendant that he is entitled to a life interest in the property.

6.6 Insofar as funds were transferred for the benefit or for the use of the second and third named defendants, the first named defendant claims that such funds were transferred for the use of those defendants in their business and it was done at the request of and with the approval of the first named plaintiff in order to provide security for the first named defendant in the future.

6.7 The first named defendant makes complaint in relation to statements that were made in Court by and on behalf of the plaintiffs which it is claimed had the effect of identifying the ward of Court as the first named defendant was personally named. The first named defendant claims that the second named plaintiff wilfully misled the Court. The first named defendant contends that the Court does not have jurisdiction in relation to what transpired between him and the first named plaintiff and other parties prior to the date upon which she was made a ward of Court and that since all transactions prior to that date were made with the first named plaintiff's knowledge and consent, that such transactions cannot be reviewed by the Court.

6.8 The first named defendant counterclaims for the sum of €551,686, which is claimed as being the balance owed to him, which it is claimed is confirmed by an attendance docket of Mrs. Wardlaw dated the 10th August, 2009. The first named defendant also claims that as a result of these proceedings that he has suffered health problems and has been placed under duress and hardship and is entitled to damages. There is also a claim that the proceedings against the first named defendant are frivolous and amount to a defamation of his character. The first named defendant contends that insofar as the second named plaintiff holds property on behalf of the general solicitor that she holds such property which belongs to the first named defendant on trust for him.

6.9 Finally, the first named defendant counterclaims that as a result of false and misleading information being provided to the Court, that he was deprived of his liberty and spent ten days in prison, having been committed for contempt, and that he is entitled to damages arising therefrom.

7.1 The second and third named defendants delivered a defence on the 24th November, 2011. In that defence the second and third named defendants deny that the purchase of the plant and machinery in issue in these proceedings is the property of or beneficially owned by the first named plaintiff and, in making such denial, rely upon what is identified as the gentleman's agreement made between MC, JH and FC. It is claimed that that agreement was made on or about July 2006 and that on foot of that agreement the first named plaintiff acknowledged and recognised that any property bought would not be her property and that she did not desire the return of any such property.

7.2 The second and third named defendants also rely upon a claimed understanding that they had in relation to them accepting funds to purchase machinery that the first named plaintiff had discussed such proposed purchases with her solicitor, and had sought legal advice. It is also claimed that there was consideration insofar as the second and third named defendants guaranteed a job to the first named defendant for his life. The second and third named defendants claim that a request for the return of the plant and machinery is not a request by the first named plaintiff as it is contrary to the gentleman's agreement entered into by the first named plaintiff.

7.3 The second and third named defendants also rely on the defence as maintained by the first named defendant and claim that all transfers of funds were with the consent of the first named plaintiff and in accordance with her directions and wishes. The second and third named defendants deny the plaintiffs' entitlement to any of the reliefs sought and make the same plea as contended for by the first named defendant that any transactions that took place between MC and any of the defendants before she was made a ward of Court cannot be the subject of a Court order and the Court does not have jurisdiction in relation to such transactions.

8.1 All matters raised in the first named defendant's counterclaim are in issue and the plaintiffs deny that the first named defendant is entitled to any of the reliefs sought in his counterclaim.

9.1 I have already determined that as a matter of probability that from the start of 2008, MC was suffering from a cognitive and mental incapacity. The impairment was not fixed. The evidence establishes that the extent and severity of the impairment varied and altered and was not constant but that there was, in all probability, a gradual deterioration. I had the report of Dr. Niall Gormley, a Consultant in Old Age Psychiatry, and it is clear from his expert opinion that by June of 2009, MC was incapable of engaging in any complex financial decision making. The evidence as to MC's mental state and condition at the time of her admission to Waterford Regional Hospital on the 28th November, 2008 is such that the probability is that by that date there was a lack of capacity on the part of MC to engage in any complex financial decision making. The evidence of Nurse Molony, who commenced her regular visits to MC in late 2007 establishes to my satisfaction that the probability is that from the start of 2008, MC's early stage dementia had reached a level that whilst she was able to make decisions in relation to basic every day matters, that she had no longer the capacity to engage in any complex financial decision making. Nurse Molony's evidence about MC's conduct and her inability to deal with simple financial transactions, when taken together with Dr. Gormley's expert evidence in relation to the progress and course of dementia, leads me to the finding that I am satisfied that as and from the start of 2008, MC was no longer capable of engaging in any complex financial decision making.

9.2 In respect of the extent and nature of MC's dementia and cognitive impairment in the period from her discharge from St. James in May 2006 up to being made a ward of Court, the evidence establishes that for that entire period MC was incapable of minding herself without assistance and had become dependent to such an extent that FC was in a position to exercise dominion over her. The

evidence that I heard leads to the conclusion that after MC's release from St. James's Hospital in May 2006, she could not live alone and required assistance and supervision and, absent same, she would have required to be in a nursing home. She could not live alone. MC was at a clear disadvantage in relation to her nephew, FC, by reason of her mental capacity, increasing dementia and her dependence upon him for independent living. As and from her discharge from St. James's Hospital, MC was, in effect, in the care of FC until she went into a nursing home in 2010. It was the provision of the care, back-up, supervision and management of her daily life by FC which enabled MC to continue to cope. Absent such assistance MC would have been incapable of independent living and coping.

9.3 I am satisfied from the evidence that the transfer of funds from MC's bank account to the control of and to the benefit of FC from May 2008 to April 2009 were as a result of influence expressly used by FC for the purpose of obtaining such funds. The evidence establishes that FC sought to exercise control and dominion over MC, and to ensure that she acted in accordance with his wishes and to his benefit. This is apparent from the efforts that he made to compel, and to some extent coerce, MC into selling her house in Rathgar thereby raising a substantial capital sum. FC's preparedness to forge a letter purporting to come from a State body was carried out by him in late 2006 or early 2007 and I am satisfied that that forged letter was concocted by FC for the express purpose of persuading or forcing MC to sell her house in Rathgar and thereby achieving a situation where there would be substantial sum of money available. My finding in relation to this matter is further supported by FC's dealings with Mrs. Wardlaw and his clear attempts to progress the potential sale of the Rathgar property. The intentions of FC are further identifiable from his attempt to have the property in Wexford, which MC purchased, placed in the joint names of himself and MC. The intentions of FC are further demonstrated by the manner in which he arranged to have blank bank withdrawal slips signed by MC so that they could be used without her having to attend at the bank. After May 2008 no financial advice was made available, and no legal advice was available to MC at the time of the withdrawals and FC was aware of this fact. By May 2008, given the extent of MC dependence and her need for day to day supervision, it must have been apparent to FC that at the time that each of the eight withdrawals and transfers the subject matter of these proceedings were made, that MC had received no independent legal advice, or financial advice. Notwithstanding that, FC pleaded in his defence that such advice, both legal and financial, had been provided. Notwithstanding that plea, no credible evidence was led as to any advice either legal or financial being received by MC from the date that €1,938,453.41 was lodged on the 2nd May, 2008 up to and after the withdrawal of €500,000 on the 14th April, 2009. FC accompanied MC to the bank to make all the withdrawals other than on the one occasion when he withdrew the funds using a pre-signed withdrawal slip. I am satisfied from the evidence of Nurse Moloney, who was a regular visitor to MC during the entire of 2008, that it must have been apparent to FC that MC was suffering from cognitive impairment and had difficulty comprehending financial transactions and making any detailed or considered decision in relation to any significant financial matter. The true intentions of FC in his dealings with his aunt's financial affairs is further established by the evidence that I heard concerning how he responded to being questioned in relation to the €500,000 withdrawal which had occurred in April 2009. FC informed Mr. Kohl that the entire sum would be invested and used for MC's care. I accept Mr. Kohl's evidence in relation to this matter and it is supported by his contemporaneous note. That statement made by FC to Mr. Kohl was a false statement and one which FC must have known was untrue as the entire funds were not available to be invested and used for MC's care when he made that statement. FC also informed Mrs. Wardlaw that he would transfer the funds remaining under his control to MC's account, and, notwithstanding that he indicated to Mrs. Wardlaw that he would be attending at the bank to complete such a transfer, no transfer took place. Mrs. Wardlaw was not questioned in relation to her evidence that FC made such a statement. I accept Mrs. Wardlaw's evidence in relation to this matter and her evidence was supported by a contemporaneous note. FC provided me with no explanation as to why he went back on his word and chose to proceed on the basis that the funds were available to him for his own use.

9.4 I have already set out my findings in relation to the forged letter. I am satisfied that in relation to that matter, FC gave false evidence. His preparedness to give false evidence was further apparent from the evidence that he gave in relation to the purchase of two properties in Poland. His evidence on that matter was inconsistent and when information and documents became available which demonstrated that his initial evidence was incorrect, FC demonstrated a willingness to change his evidence without regard to the truth. The manner in which FC dealt with the purchase of two properties in Poland, including details of the actual purchases, the names of the persons purchasing the properties, the price received, the advice obtained before the purchases were completed, the location of the properties and the very presence of FC in Poland, was so unreliable and so inconsistent and shifting that I concluded that I was able to place little reliance on FC's willingness to truthfully account for his dealings with his aunt's monies.

9.5 In his defence, FC sought to rely on a series of recorded phone calls which took place from January 2009 up to August/September of that year. There was one further call at Christmas 2011 but that was of no relevance. Transcripts of those calls were available in evidence and FC sought to rely on the contents of those calls to establish that his aunt had agreed that she would give him half of her property and had agreed to support him out of her funds. Having considered the contents of those phone calls, in their entirety, it is clear that rather than demonstrate that MC had formed the clear intention to gift half her money to FC and to support him in his business dealings, that they demonstrate a person manifesting moderate dementia with a significant inability to communicate in a logical and coherent manner. The telephone calls are entirely consistent with the description contained in Dr. Gormley's report that by the year 2009, MC's speech pattern was quite rambling and disjointed. FC sought to place considerable emphasis on what is described as call No. 1 in support of his claim that his aunt wanted to give him half of her funds, but it is apparent from the overall content that during that telephone conversation MC was at times rambling and incoherent. Insofar as any conclusion can be drawn from those phone calls, they support the findings and conclusions contained in Dr. Gormley's report of June 2009. All of the telephone calls relied upon by FC occurred after 2008 and at a time when MC was presenting as a person with dementia of moderate severity. The content of those phone calls is consistent with that diagnosis.

9.6 The capacity and intent of FC to influence MC to his benefit, without regard to her genuine wellbeing, is best illustrated by the circumstances surrounding the final withdrawal of €500,000 in April 2009. That withdrawal took place in circumstances where FC was aware that there was a psychiatric examination due to be carried out on his aunt for the purpose of ascertaining her mental capacity. FC was involved in and knew of the cancellation of the initial appointment which was due to take place within a matter of days of the date of withdrawal. To proceed with a withdrawal of such a substantial sum as €500,000, representing almost a third of MC's remaining funds, and when such funds were to be used by FC for a number of transactions which were for his own benefit, leads to the conclusion that there is no doubt but that the €500,000 withdrawn in April 2009 can be viewed as being as a result of influence used by FC for the purposes of obtaining such funds. FC's purported defence that he was acting on his aunt's freely expressed wish at a time that she was capable of making such a decision lacks credibility given FC's knowledge of his aunt's dealing with Mr. Kohl and the imminent psychiatric examination.

9.7 I have already identified that by the start of 2008, MC was in a situation that FC had influence over her. FC in his defence claims that insofar as the plaintiffs seek to shift the onus on to him to establish that each of the gifts or transfers resulted from the free exercise of the donor's will, that such onus can be discharged by him establishing that MC received independent legal and financial advice. The evidence of Mrs. Wardlaw, which I accept, establishes that no legal advice was given by her from early May 2008 until after the last withdrawal in April 2009. Nor was there any evidence of any other legal advice. Mrs. Wardlaw in her evidence showed that she was a caring and attentive solicitor who would have ensured that MC received separate and independent advice and that she was properly and fully advised on financial matters before engaging in the transfer of any substantial sums of money. The

evidence of Mrs. Wardlaw, which I accept, was that in relation to the circumstances and manner upon which the funds the subject matter of these proceedings were withdrawn were such that she was "horrified". That evidence shows that any transfer of funds that would have occurred after her advice would have taken place in entirely different circumstances from those that actually occurred. There is no evidence that at the time when the funds were transferred to the control and benefit of FC, that any legal advice was given. Whilst it was pleaded by FC that independent financial advice was provided by Bank of Ireland Private Banking, there is no evidence whatsoever of such advice and I am therefore satisfied that MC received no independent legal or financial advice in relation to any of the transfers either shortly before or at the time that such transfers occurred.

9.8 I shall deal later in this judgment as to how the funds that were withdrawn by the eight withdrawals the subject matter of these proceedings were used. That will include the purchase of the machinery, the use of that machinery, the site comprised in Folio 54540 of County Wexford, the two Polish properties and other miscellaneous expenditure. I shall also deal with the dwelling house and lands at T A which are owned by the first named plaintiff and where the first named defendant resides.

9.9 The first named defendant in his defence raised an issue, which was not pleaded, but which was dealt with in evidence, relating to a claim that his aunt agreed to give him half of her funds. FC dates his aunt's purported agreement to give him half of her funds to late 2006 and also claims that she might have repeated her intention to make such a gift. That purported agreement was made long before any final decision had been made to sell the house in Rathgar and before there was any knowledge of what was the amount of the net proceeds of sale. The terms and conditions of such purported contract are so uncertain and vague that it would be impossible to conclude that there was a contract or agreement between MC and FC. No evidence was led as to what was actually agreed or as to the terms that the parties actually bound themselves to. For contractual obligations to arise from an agreement between two parties, I would have to be able to identify an agreement containing an offer to perform a certain action on certain terms and acceptance of that offer and also to identify consideration passing between the parties. The first named defendant's evidence went no further than to suggest that he received an indication from his aunt that he would at some time in the future receive half of her monies. At best, that amounted to no more than a promise and it was never sufficiently clearly identified so that I could conclude that there was a contract or an agreement or, indeed, any commitment. Even if I accept the evidence of FC in relation to his aunt's indication, I am unable to identify what his aunt's real intention was, nor can it be said that the intention of MC was clearly communicated and understood by FC. Even on the basis of FC's own evidence, there is no evidence that MC intended to make a contract and, at best, any statement that she made in relation to an intention to provide FC with half of her funds at some future date. It was no more than a promise and was not a legally binding contract or agreement.

9.10 In relation to the so-called gentleman's agreement, I have already identified that when FC gave evidence in relation to this matter, that he presumed that when it was first mentioned that his aunt meant that he would be looked after when the house was sold. He did not recollect or remember any discussion about money other than at one stage his aunt stated that when the house was sold in Dublin, if it was sold for over a million euro, she would give him half of it. He was unable to remember when that was said. Again, even if MC made such a statement, it does not and cannot amount to a contract or an agreement. It fails to demonstrate any intention on the part of MC to create a binding legal agreement and fails to identify what was MC's real intention in making such a statement. In relation to the so-called oral gentleman's agreement, it is once again apparent that the terms of such purported agreement or contract are so uncertain as to be unenforceable. It is impossible to ascertain from the purported gentleman's agreement what are the true intentions of MC and to what extent, if any, she agreed to provide funds to FC and JH. Even if I were to accept the evidence of FC in relation to the gentleman's agreement, I have no evidence which enables me to identify the terms by which it is claimed that MC agreed to be bound and there is no evidence of offer and acceptance or of consideration. There is no evidence of the meetings of mind which is implicit in the concept of any legally enforceable agreement.

9.11 An examination of the transactions the subject matter of these proceedings confirms that there were eight separate transfer of funds, either by cash being withdrawn by FC or funds being transferred into an account or accounts controlled by him. It is therefore necessary that I look at each of those transactions separately and determine whether or not in respect of all or any of the transfers there was the free exercise of the will by MC in and about the transfer of such funds. In addressing that issue, I shall look at the legal authorities available to assist me in determining whether or not all or any of those transactions should be set aside.

10.1 The issue of undue influence and improvident transactions and the legal principles to be applied was considered by the Supreme Court in *Carroll v. Carroll* [1999] 4 I.R. 241. That case dealt with undue influence and did not address the issue of lack of capacity. Denham J. considered the issue of undue influence commencing at page 253 of her judgment. She held:

"There are two classes of transactions which may be set aside on the grounds of undue influence. They were described by the House of Lords (in the judgment of Cotton L.J.) in *Allcard v. Skinner* (1887) 36 Ch.D. 145 at p. 171 as: -

'The question is - Does the case fall within the principles laid down by the decisions of the Court of Chancery in setting aside voluntary gifts executed by parties who at the time were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes - First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have at or shortly before the execution of the gift been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.'

This case arises under the second class of case. Counsel for the defendant quite rightly accepted that this case falls into the latter category. He acknowledged that the relationship between Thomas Carroll senior and Thomas Carroll junior and the surrounding circumstances gave rise to the presumption of undue influence.

The legal situation arising on such relationship being established was described in *'Equity and the Law of Trusts in Ireland'* by Hilary Delany at p. 482 as: -

'Once a relationship giving rise to a presumption of undue influence is established, and it is shown that a 'substantial benefit' has been obtained, the onus lies on the donee to establish that the gift or transaction resulted from the 'free exercise of the donor's will'. As Dixon J put it in *Johnson v. Butress*, the evidence must establish that the gift was 'the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee'. The manner in which this presumption may be rebutted relates to two main

issues; first, the question of whether independent legal advice has been received and secondly, whether it can be shown that the decision to make the gift or transfer was 'a spontaneous and independent act' or that the donor 'acted of his own free will'.

I adopt this analysis of the law and apply it. In this case the presumption is established and a substantial benefit was obtained thus the onus lies on the donee, the defendant, to establish that the transfer was the free exercise of the will of the donor, Thomas Carroll senior. Thus, it was for the defendant to provide the evidence that the transfer was the independent and free gift of Thomas Carroll senior. The issue then arising is whether there was evidence upon which the learned trial judge could be satisfied that the presumption was not rebutted. In analysing this the first matter is that of independent legal advice. . . .

In considering whether Thomas Carroll senior acted of his own free will an important matter was whether or not the transfer was read over to Thomas Carroll senior. There was no evidence of this even though the defendant was given an opportunity in the High Court to address the matter.

This case is not about the presence or absence of mental capacity. The onus is on the defendant to produce evidence to dislodge the presumption of undue influence.

The learned trial judge concluded, on this aspect of the case, at p. 230 that:-

'I am not satisfied that the [defendant] has established as a matter of probability that the transaction was the result of the free exercise of the donor's will such as to rebut the presumption of undue influence. Mr Joyce allowed that in substance and fact he was acting as the 'family solicitor' in the transaction for both parties. He saw the donor on two occasions for a total of about 35-40 minutes, not all of which was devoted to the business of the transfer. It is clear that the donor never read the transfer deed nor had it read to him by anyone else. While its contents were apparently discussed between him and Mr Joyce, I am not satisfied that any real consideration was given to the fact that the donor (a frail man, in dependent circumstances) was disposing of all his real assets without reserving to himself (by way of a revocation clause or by way of charging the property with his maintenance and support), any protection for his own future particularly in the event of a falling out with his son, or in the event of his son predeceasing him. It is, I think, clear that Philip Joyce was not aware of the family's circumstances either in the context of the position of the other members of the family, the totality of the assets held by the family members or the assurances given by the donor to other members of the family including the plaintiffs as to their user of the Burke Street premises during their lifetimes. Thus, while I accept the evidence (which was not really disputed) that the donor was a man who was mentally alert at the date of the transfer, I am not at all happy that at the date of the transfer he had the necessary independent advice (whether it was that of a legal advisor or a competent and qualified lay person) such as would persuade me that the transaction was made of his own free will.'

There was evidence before the learned trial judge upon which he could reach these conclusions of fact. Thus, I would affirm his determination.

Counsel for the defendant submitted that for the plaintiffs to succeed there should be evidence that Thomas Carroll junior exercised undue influence on Thomas Carroll senior. This submission was at the core of the appeal. Counsel argued strongly that as Thomas Carroll junior himself had not unduly influenced his father that was sufficient to rebut the presumption. He argued that in this case Thomas Carroll junior did not exercise undue influence, or in counsel's word, 'wiles' on Thomas Carroll senior. That being the case, it being accepted that Thomas Carroll senior was mentally capable, it was submitted that he could give away his assets as he wished. Counsel for the defendant relied on the lack of undue influence exercised by Thomas Carroll junior and referred to *Reg. (Proctor) v. Hutton* [1978] N.I. 139.

However, this is not a case of actual undue influence being expressly exercised but is rather a case in which the relationship between the donor and donee has raised the presumption of undue influence. It is then for the defendant to rebut the presumption. The burden was described in *Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127 at p. 135 by Hailsham L.C.:-

'It is necessary for the donee to prove that the gift was the result of the free exercise of independent will. The most obvious way to prove this is by establishing that the gift was made after the nature and effect of the transaction had been fully explained to the donor by some independent and qualified person so completely as to satisfy the Court that the donor was acting independently of any influence from the donee and with the full appreciation of what he was doing; and in cases where there are no other circumstances this may be the only means which the donee can rebut the presumption. But the fact to be established is that stated in the judgment already cited of Cotton L.J., and if evidence is given of circumstances sufficient to establish this fact, their Lordships see no reason for disregarding them merely because they do not include independent advice from a lawyer. Nor are their Lordships prepared to lay down what advice must be received in order to satisfy the rule in cases where independent legal advice is relied upon, further than to say that it must be given with a knowledge of all relevant circumstances and must be such as a competent and honest adviser would give if acting solely in the interests of the donor.'

In *Reg. (Proctor) v. Hutton* [1978] N.I. 139 at p. 146, Lowry L.J. described the different approaches to the different classes of undue influence. He stated:-

'When relying on 'express undue influence' the plaintiff must prove that an unfair advantage has been gained by an unconscientious use of power in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating. The undue influence which is presumed in the second class of case is influence of the same kind: the difference lies in not being able to prove its exercise but, by virtue of the presumption, undue influence is deemed to have been exercised until its exercise is negated on a balance of probabilities by evidence.'

It is clear that what is at issue is whether the donee has taken advantage of his position or '... been assiduous not to do

so. The question can only be answered in each case by a meticulous consideration of the facts': Hanbury, '*Modern Equity*' (9th ed.) p. 652.

I am satisfied that this is the correct approach. In this case, the presumption existing, it was then necessary to conduct a careful analysis of the facts. On the facts it was a matter of determining if the donee, Thomas Carroll junior, had taken advantage of his position or had been assiduous not to do so. This was not a case where the issue was whether Thomas Carroll junior had taken advantage of his position expressly. Rather it was a case where in the circumstances assiduous care should have been taken not to take advantage of the position of Thomas Carroll senior.

The learned trial judge conducted a painstaking analysis of the facts as has been set out fully in this judgment. I am satisfied that the appeal was argued on a mistaken approach to the law. The reason for the equitable law to protect Thomas Carroll senior is one of public policy - to protect a frail person. As Cotton L.J. said in *Allcard v. Skinner* (1887) 36 Ch. D. 145 at p. 171:-

'In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused.'

Thus, the issue is whether on the facts and circumstances of the case the donee has rebutted the presumption of undue influence. The facts and circumstances of this case were fully considered and determined by the learned High Court Judge. In this case the donor was giving away practically his sole asset and the learned trial judge made careful findings of fact about the transaction."

10.2 There are two classes of transactions which a court can set aside on the grounds of undue influence. There is also a separate and related ground upon which a transaction can be set aside and that is on the basis of the absence of mental capacity. As was identified in the judgment of Denham J. in the *Carroll* case, that particular case was not about the presence or absence of mental capacity. I have already determined earlier in this judgment that the probability is that from early 2008, MC was suffering from a cognitive and mental incapacity to deal with any matter requiring complex financial decision making. When looking at particular transactions it is the capacity of the persons making such transactions at the time of the transactions which is critical. The first in time of the eight transactions under review occurred on the 16th May, 2008 and I am satisfied from the evidence that by that date MC had a cognitive and mental incapacity to deal with transactions of that nature. MC's impairment was such that her condition was subject to gradual deterioration. This case is, therefore, a case where the presence or absence of mental capacity is in issue. On the basis of the determination that I have made concerning MC's mental capacity as and from May 2008, I am satisfied that she did not have the mental capacity to engage in or carry out any of the eight transactions the subject matter of these proceedings. On that ground alone, I am satisfied that each of the transfers of funds were not made by MC as an exercise of her free will. She, as donor, did not have the necessary capacity.

10.3 In relation to the plaintiffs' claim concerning undue influence, the extract from the judgment of Denham J. in the *Carroll* case makes it clear that there are two classes of transactions which may be set aside on the grounds of undue influence. I adopt and apply the approach of Denham J. concerning undue influence as set out in her judgment in the *Carroll* case. The first class identified are cases where the evidence establishes that voluntary gifts executed by a party were made at a time when that party was under such influence that the Court is satisfied that such gift was as a result of influence expressly used by the donee for that purpose. That class can be identified as actual undue influence being expressly exercised. To establish that there was such undue influence, a plaintiff must establish, in the words of Laurie L.J. in the *Reg. (Proctor) v. Hutton* case:

"... that an unfair advantage has been gained by an unconscious use of power in the form of some unfair and improper conduct, some coercion from outside, some overreaching, some form of cheating."

It is unnecessary for the plaintiffs to take on the onus of proving such unfair advantage in this case. That arises from the fact that I am satisfied that there is clear and compelling evidence that this case comes within the second class of undue influence as identified in the judgment of Denham J. The facts establish that the relations between MC and FC at or shortly before the date when each of the eight transactions were carried out were such as to give rise to a presumption that FC, the effective donee of such funds, had influence over MC. As held by Denham J. in the *Carroll* case:

"In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will."

In adopting and applying the analysis of the law set out in the *Carroll* case, I am satisfied that, first, the relationship between MC and FC gives rise to the presumption that FC had influence over MC, and, second, once such presumption is established that each of the eight transfers represented a benefit which was obtained by FC and that therefore the onus lies on him to establish that each transfer was a free exercise of MC's will. It is for FC to provide evidence that each of the transfers was the independent and free exercise of MC's will and, absent that evidence, the presumption is not rebutted. Such presumption arises in circumstances where the evidence established that by May 2008, MC was reliant upon FC and can be said to have been truly dependent upon him. By that date and for a considerable period prior to that date, MC was in a situation where her day to day existence and welfare was reliant and dependent upon the actions and conduct of FC. The evidence shows that MC was in relation to her day to day existence sustained by FC and dependent upon him. MC was suffering from cognitive and mental incapacity by that time. There was also a clear disparity of age and mental and physical capacity. The entire of the evidence which I heard in relation to MC's condition and circumstances as of May 2008 are such that she would have been incapable of independent living without the assistance and support of FC. The medical evidence established that MC was in such a condition that she could only continue to reside outside of nursing home type care because FC resided with her and ensured that MC's personal requirements and safety were provided for. By the date of the first of the eight transactions, MC was incapable of independent living and could not cope by herself.

10.4 The issue of undue influence and the application of the legal principles identified in the *Carroll* case was considered by Gilligan J. in *Prendergast v. Joyce* [2009] 3 I.R. 519. In that case the plaintiff in her capacity as the representative of M.J.'s estate, sought to have certain banking transactions set aside for reasons of undue influence and improvidence. In determining that the transaction should be set aside, Gilligan J. held that the relationship between the donor and the donee in that case was such as to give rise to a presumption that the donee had influence over the donor, and that, in such circumstances, the onus was on the first defendant to establish that the transfers were the free exercise of the donor's will. The presumption of undue influence identified by Gilligan J. arose from the actual relationship between the donor and the donee at or shortly before the time of the impugned transactions coupled with the circumstances of the parties relevant to the acquisition of a position of influence, including the age, position in life,

state of health and other particular vulnerabilities of the donor. At paragraph 40 of his judgment (p. 532) Gilligan J. held:

"40. The categories of relationship to which the presumption applies are neither closed nor rigid (*McGonigle v. Black* (Unreported, High Court, Barr J., 14th November, 1988)). In *McGonigle* the presumption applied in the context of a friendship between the lonely and vulnerable donor of the land concerned, who could not cope well without support and had resorted to alcohol abuse, and a friend who lived nearby, who had frequent contact with him and provided him with some home comforts. In the context of the instant case, it is appropriate to recall that the presumption has been applied in the context of a relationship between an aunt and her nephew by marriage (*Inche Noriah v. Shaik Allie Bin Omar* [1929] A.C. 127) and even as between a man and his great nephew (*Cheese v. Thomas* [1994] 1 W.L.R. 129). This is not to suggest that it would apply in all such relationships: leaving aside those categories of relationship which, by their nature, automatically raise the presumption of undue influence, the question of whether the presumption applies depends on the particular circumstances of the case."

Gilligan J. went on to identify certain circumstances which a court might take into account by reference to the judgment of Budd J. in *Gregg v. Kidd* [1956] I.R. 183. Those matters included not only the issue of friendship between a lonely and vulnerable donor who could not cope without support and whether the person who benefited from a gift from the donor had frequent contact and provided the donor with home comforts but he also identified that a court should have regard to the disparity of age and of mental or physical incapacity. Indeed, the mere dependence upon the kindness and assistance of another could be a factor. Gilligan J. also identified from the judgment of Budd J. that to bring the principle of undue influence into play, it must be shown that the opportunity for the exercise of the influence or ascendancy on the donor existed, such as where the parties reside together and meet frequently. He also identified the issue of close family relationship and the capacity for such a relationship to create a situation where influence is readily acquired. In this case, there was a close family relationship between MC and FC. The circumstances in which MC resided created a situation where influence was readily acquired. The facts in this case establish that such influence also arose through the disparity of age and mental and physical capacity between MC and FC. By the date of the first gift, MC had significantly impaired mental capacity, was elderly and frail and was dependent upon the kindness and assistance of FC. FC had a continuing opportunity to exercise influence or ascendancy on and over MC and her day to day existence and welfare was dependent upon him. MC was at a serious disadvantage to FC by reason of her diminished mental capacity and the day to day circumstances of her existence.

10.5 Once, as in this case, a relationship giving rise to a presumption of undue influence is established and where it has been shown in evidence that a donee has received a substantial benefit, the onus lies on that donee to establish that the gift or transaction resulted from the free exercise of the donor's will. That onus can be discharged by evidence showing that the gift was the independent and well understood act of a man or a woman in a position to exercise a free judgment based on information as full as that of the donee. As identified by Denham J. in the *Carroll* case, the manner in which such presumption may be rebutted relates to two main issues, first, the question of whether independent legal advice has been received, and secondly, whether it can be shown that the decision to make the gift or transfer was a spontaneous and independent act or that the donee acted of his own free will. The first named defendant led no evidence to discharge such presumption. There was no evidence that MC received independent legal advice at the relevant time and such evidence as was available established that for a substantial period leading up to the transactions in question MC had no access to legal advice. There was also no evidence that she received any financial advice. FC gave evidence that MC refused advice to lodge or deposit a certain sum because she disagreed as to the suggested amount of such deposit. However, there was no evidence to support such claim and I heard no evidence as to who gave such advice, what was the advice, how, when and in what circumstances it was given. Absent evidence on these matters, the claim as to the receipt of such advice is of no value in discharging the onus on FC. None of the transactions could be said to have been as a result of MC's free will given her diminished and mental capacity.

10.6 Insofar as MC had to interact with the bank to facilitate the transfer of funds, the evidence established that the bank went no further than complying with the necessary mechanical or procedural requirements and provided no advice to MC. The Bank merely processed the transactions. Whilst FC gave evidence of statements allegedly made by MC indicating a desire to transfer funds to him, the position is that even if those statements were made, they were made at a time when I am satisfied that she did not have the cognitive capacity to understand such transactions. They were also made in circumstances where undue influence can be deemed to have been exercised. The facts of this case show that FC took advantage of his position and in no way whatsoever sought to provide or ensure that MC had assistance or advice in relation to any of the transactions. Assiduous care should have been taken not to take advantage of the position of MC and FC did not lead any evidence to show that such care was, in fact, taken.

10.7 A separate head of claim made by the plaintiffs is the claim that in the circumstances of this case, the impugned transactions were such that they constitute an improvident or unconscionable bargain and ought to be set aside by order of this Court. As set out above, I am satisfied that in relation to each and every one of the impugned transactions, FC exercised influence over MC at a time when she was dependent upon him and in circumstances where she received no independent legal or financial advice in relation to any of the transactions. She was divested of her funds and in all of the transactions there was no consideration. Gilligan J. in the *Prendergast* case dealt with the doctrine of improvidence and held that it was not confined to transactions for value and could apply to gifts (see paragraphs 79 – paragraphs 82 at pp. 545 – 547 of the judgment of Gilligan J.). I adopt and apply, as he did, the identification of the jurisdiction in equity to set aside a transfer once three criteria identified by Shanley J. in *Carroll v. Carroll* [1998] 2 ILRM 218 have been established. Those three criteria are:

1. that one party was at serious disadvantage to another by reason of poverty, ignorance or otherwise, so that circumstances existed of which unfair advantage could be taken;
2. that the transaction was at an undervalue; and
3. that there was a lack of independent legal advice.

All of those three criteria are established in this case. It is clear that MC was at a serious disadvantage to FC owing to her cognitive impairment and her overall circumstances were such as to enable FC to take an unfair advantage of MC and each of the impugned transactions were transactions for no value and there was a lack of any independent legal advice. The evidence in this case discloses a case of improvidence. In arriving at such a conclusion, I am adopting and applying the statement of the law set out in paragraph 80 of the judgment of Gilligan J. in *Prendergast v. Joyce* (at p. 546) where he held:

"It has also been suggested in a series of cases . . . that to have a transaction set aside for improvidence, it must be established that the defendant acted in a manner which involved some element of moral turpitude. I am satisfied that this proposition does not represent Irish law."

11.1 I shall now deal with the property the subject matter of these proceedings including the eight payments identified above. The

uncontroverted evidence is that the first named defendant received all the money the subject of the eight withdrawals which were paid into accounts, either in his sole name or controlled by him. The evidence identified and traced certain specific purchases or items of expenditure made from such funds. It was also established that a site comprising Folio 54540F, County Wexford, was purchased with the funds. I shall deal with the Polish properties in a separate paragraph. Each of the payments or transfers received by FC were made in circumstances where I am satisfied that such transactions should be set aside on the basis of lack of capacity, undue influence and on the basis of improvidence. I heard evidence from Liam Dowdall, an accountant of Smith & Williamson Freany Limited, in relation to his analysis of the documentary evidence in relation to the transactions and the expenditure made from such funds. I accept Mr. Dowdall's evidence and his analysis as the most complete, consistent and accurate account of the use to which the funds were made. His evidence was grounded in the available documents. Based upon his analysis, I accept that €937,800 was withdrawn from MC's bank account. Mr. Dowdall's analysis identifies the amount expended thereafter, by FC, on his business, plant and machinery, cash withdrawals, credit card payments, third party payments, household expenses, the Polish apartments and loan, land at K and other expenditure which totalled a figure of €944,661.88. That figure is almost €7,000 greater than the sum withdrawn (i.e. €6,861.88) and if one gives allowance to the first named defendant for that figure, and also for the sum which Mr. Dowdall calculated as benefiting MC of €29,420.29, the calculation results in a sum of €36,290.92 and when that figure is deducted from the €937,800, the outcome is €900,009.08. That sum is the total amount in respect of which MC received no benefit. I recognise that the sum attributed to the benefit of MC is a calculation and that it has been prepared on the basis identified in Mr. Dowdall's report of the 4th October, 2012 and must represent therefore an estimation rather than an actual figure, but I am satisfied that it represents the most realistic figure available to the Court and one upon which I should rely.

11.2 In relation to the purchase of machinery, the defendants rely on a purported agreement described as the gentleman's agreement to entitle them to retain possession and ownership of the machinery. As indicated earlier in this judgment, I am satisfied that there is no legal basis for such agreement and it follows that the defendants must account to the plaintiffs in respect of all machinery purchased by them. At the time that the funds were transferred and when such funds were expended on the purchase of machinery, the same took place in circumstances and at a time when MC could not truly be said to have consented to such transfers or to such purchases. It is also the case that such transactions were improvident. The evidence led by the defendants in relation to the amount expended on machinery was, to some degree, inconsistent and inaccurate. FC in the income and expenditure account provided by him identified the sum of €417,540, whilst JH produced a document which suggested that the total expenditure was €332,560. That expenditure was confirmed by JH in his oral evidence. Liam Dowdall, the forensic accountant who examined the documentary evidence, identified a figure almost identical to the figure provided in evidence by JH. Mr. Dowdall identified a sum of €322,560 as being expended on machinery which is a figure only €10,000 less than the figure given in evidence by JH. Insofar as there is a discrepancy between those figures, I prefer the evidence of Liam Dowdall, who, during his evidence, dealt with each and every purported discrepancy and ultimately concluded that he could identify a figure of €322,560 as being provided to the machinery and agricultural contracting business carried on by the three defendants. Mr. Dowdall's evidence established the purchase of machinery to the value of €322,560 and that each and every item of such machinery was purchased from monies withdrawn from MC's account. There was disputed evidence in relation to one item, namely, a John Deere tractor, but despite the first named defendant's assertions, no evidence was produced to identify a John Deere tractor as described in the affidavit sworn by Mr. Owens within these proceedings. The machinery with a total value of €322,560 which has been identified by Mr. Dowdall consists of twenty nine items and I list those twenty nine items:

- (1) Welgr Baler
- (2) Mchale Wrapper
- (3) Nissan Navara – motor vehicle
- (4) Kuhr Mower 301 serial number 920076
- (5) Duetz Fahr 4060 Registration 95KE5813
- (6) John Deere 6810 Tractor Registration 01TS3862
- (7) JCB Fratrac 155
- (8) Richard Western Dung Spreader
- (9) Pedrotti Grain Dryer
- (10) John Deere 6910 Tractor Registration 01KE10393
- (11) Kuhn Hay Tedder model 10601
- (12) Claas 3M Front Mower
- (13) MF 8937 Loader Registration
- (14) Claas Liner Rake
- (15) Vacuum Tank
- (16) Front PTO Kit
- (17) John Deere 6920S Tractor Registration 03WD809
- (18) Grain and Silage Trailer
- (19) Grass Tedder
- (20) Herron HD 20 Dump Trailer
- (21) Bridgeway Swath Conditioner

- (22) McConnell Hedge cutter PA 8000
- (23) George Dwyer Harrow
- (24) Gardu de-mount Sprayer
- (25) Kuhn Power Harrow
- (26) M B Trac 150hp Tractor registration 87C 12803
- (27) Chieftain Transport Trailer
- (28) Hitachi tracked Digger
- (29) Kevereland Plough

The evidence of the second and third named defendants was that they were aware that the funding for the machinery came from MC but sought to defend their entitlement to use and retain possession of such machinery on the basis of the so-called gentleman's agreement. From that document it is clear that all parties were aware that the machinery had been acquired from monies emanating from the account of MC. I am satisfied that both the second and third named defendants were at all time aware that the money used to purchase each of the items of machinery, came from MC and there is no evidence that either of them took any steps to ensure that MC had received the benefit of any independent advice before proceeding with the purchase of any of the items of machinery. An analysis of the evidence given by the first and second named defendants in respect of the purchase of machinery demonstrates a casual and unplanned process leading to the purchase of various items of machinery. No assessment or projections were made in respect of any of the items of machinery to determine whether or not any item of machinery would generate a profit when used. It is also clear from the evidence that as of the date of the so-called gentleman's agreement no actual machinery had been identified. It is also the case that the evidence established that even though it was claimed that the purchases of machinery was for the benefit of FC, notwithstanding the considerable sum expended on machinery, that in the three years 2009 to 2011 inclusive, FC benefited by payments that he received from the H brothers' business in a total sum of less than €10,000. The evidence which I heard and which was confirmed by Mr. Dowdall identified that, notwithstanding the purchase of machinery for the H brothers' business without any cost to the business, that their business was operating at a loss from 2008 onwards.

11.3 In the light of the findings that I have made, I am satisfied that the plaintiffs are entitled to the declarations which they have sought in relation to each and every item of plant and machinery purchased with and from the funds of MC and that such machinery is held by the defendants upon trust for the plaintiffs. The first named plaintiff, MC, is the beneficial owner of such plant and machinery as it was acquired using her funds and she is entitled to recover such machinery from the defendants. The plaintiffs are entitled to an order that the defendants deliver up all the items of machinery and plant as such machinery and plant is the property of the first named plaintiff, together with all documents of title and registration in respect of each and every item.

11.4 The plaintiffs also seek an order directing the defendants to account for all income which has been earned from the use of, or renting out the said plant and machinery. In the light of the evidence which I heard in relation to the profitability of the H Brothers' business and, in particular, the fact that it has been loss making since 2008, I am satisfied that it is not in the Ward's interest to have such an order made, given the costs and expenses involved in completing such account and given the nature and extent of the other reliefs granted to the plaintiffs.

12.1 The first named defendant purchased lands comprising Folio No. 54540F of the Register of Freeholders, County Wexford. In evidence, the first named defendant, FC, acknowledged that he held that property on trust for the Ward. When directly asked whether he, FC, accepted that the site in question was held by him on trust for his aunt, he replied "yes". In the light of that acknowledgement and in the light of the earlier findings made by me in this judgment in relation to the circumstances in which funds were obtained, it follows that the plaintiffs are entitled to an order directing the first named defendant to take all necessary steps to convey the said property to the plaintiffs. In default of the first named defendant taking such steps, I will consider an application by the plaintiffs pursuant to s. 26(vi) of the Trustee Act 1893 vesting the said lands in the plaintiffs, or, alternatively, for an order pursuant to s. 33 of the said Act appointing a person to convey the land to the plaintiffs and I will give liberty to apply in respect of this matter.

13.1 In these proceedings the plaintiffs also seek possession of the lands and property known as T As. The plaintiffs seek an order directing the first named defendant to deliver up vacant possession of the property of the first named plaintiff, at T A, K, in the County of Wexford, being the property comprised in Folio Nos. 22942F, 43020F and 37422F of the Register, County of Wexford. That dwelling house and the lands adjacent thereto are the property of MC and she resided in that property with FC up until the 10th March, 2010, which is the date upon which she transferred to a residential nursing home. FC has continued to reside in the property and to use the lands. Earlier in this judgment I have dealt with FC's claim that he has an entitlement to remain on in possession of the house and property on the basis of an agreement that he had with MC. I am satisfied there is no such agreement enforceable at law and that any statement made by MC in relation to FC's entitlement was limited to his entitlement to remain in possession as long as she was in the premises. Insofar as there is disputed evidence in relation to this matter, I prefer the evidence of Mrs. Wardlaw. There is no dispute that the property has been demanded from the first named defendant and that it was purchased by MC. It is also clear from the evidence of Mrs. Wardlaw that she never received any instructions from MC that the property at T A was ever to be put into the joint names of MC and FC nor was FC ever given any promise by MC that he would receive an interest in the property. FC has failed to establish any intention on the part of MC of conferring any interest in the property or lands on him either in the nature of a life interest or otherwise. It follows that the plaintiffs are entitled to the orders sought directing the first named defendant to deliver up vacant possession of the property of the first named plaintiff at T A, K, in the County of Wexford, being the property comprised in the three folios identified above.

13.2 Certain sums of money are retained in bank account No. 54947355 in the Bank of Ireland in the name of the first named defendant. The evidence of Mr. Dowdall, the forensic accountant, established that those funds are the funds of MC. In the light of the findings made by me, it follows that I should make a declaration that the funds held in that account in the name of the first named defendant are the property of MC and that she is entitled to a declaration to that effect. It follows that the order sought that such funds are to be immediately lodged in Court to the credit of the first named plaintiff should be made.

14.1 The evidence which I heard from the first and second named defendants and the evidence from the forensic accountant identified that there was a significant gap or void in relation to the precise use of funds made from the overall sums withdrawn from MC's account. In the light of that, the relief sought by the plaintiffs that the defendants should each be required to account to the

Court in respect of the expenditure of all monies received by them is an order which I am satisfied should be made. Given that I am satisfied that the funds are properly the property of MC and that the defendants have failed to fully and comprehensively account for the use of such funds, an order requiring them to account for such funds is needed.

15.1 I heard extensive evidence in relation to the acquisition of two apartments in Poland. In relation to those transactions, there was available to me details concerning the transfer of €125,000 into account No. 44173798 in the name of IS on the 26th May, 2009. That transfer took place at a time when FC was aware that MC was awaiting a psychiatric assessment as to her capacity to deal with financial matters. In the two weeks leading up to the 29th May, 2009, there were some eight withdrawals from the savings account of FC which had been put in funds from MC's bank account. The sum of €250,000 was transferred into FC's savings account on the 24th April, 2009. One of the eight draw-downs was the sum of €125,000 transferred on the 26th May, 2009, which was in relation to the purchase of properties in Poland. The other seven draw-downs which took place between the 18th May, 2009 and the 29th May, 2009 amounted in total to a sum slightly in excess of €100,000. Those seven withdrawals and transfers, together with the transfer of €125,000 in respect of the Polish properties, resulted in the funds standing in FC's saving account being significantly diminished over a two week period. The manner, mode and timing of those transactions, when taken together with FC's knowledge of the imminent psychiatric examination of MC, results in my concluding that the purpose of such withdrawals and transfers was to diminish any sum which would be available for repayment to MC in the event of her being found to be incapable of conducting financial transactions.

15.2 FC's evidence in relation to the investment in two properties in Poland was inconsistent and changed during the course of his evidence when certain matters were put to him. FC claimed that one apartment was purchased for IS, at the request of MC, and another purchased under a loan arrangement with Ms. S's mother, BS. That claim is inconsistent with statements made by FC during 2009 to both Carsten Kohl and Mrs. Wardlaw that the Polish properties were brought as an investment for his aunt. Those statements were made much closer in time to the actual investment. They are at variance with FC's later claim that his aunt instructed him to purchase a property in Poland for IS and to give her parents money to buy an apartment for themselves. The fact that FC demonstrated a willingness to change and alter his account as to the circumstances in which he funded the purchase of the Polish properties, and on whose behalf they were being purchased, identifies his willingness to mislead the Court. On the 9th July, 2009, FC told Mr. Kohl, as confirmed in Mr. Kohl's contemporaneous note, that in relation to the €500,000 withdrawn in April 2009, that it was invested in (apartments) and that its purpose was to invest it for and to use to provide for MC's care. At a meeting on the 10th August, 2009 between FC and Mrs. Wardlaw, in Mrs. Wardlaw's office, also confirmed by a contemporaneous attendance note, FC answered in response to what portion of the €500,000 which had been withdrawn was available, and FC responded by saying that €200,000 had been invested in two apartments in Poland in the joint names of himself and IS and when asked by Mrs. Wardlaw as to whether FC would be agreeable to signing a declaration of trust in favour of MC, he indicated that he would. Mrs. Wardlaw also noted that it was proposed to do up the two properties and to then sell them on and the meeting concluded by it being suggested that any money from the sales would be returned to MC. The position adopted by FC in 2009 is entirely different from what he later swore during these proceedings. It is the case that FC's evidence as to the actual mechanics of the purchase of one of the two properties and how it was identified and viewed and purchased was inconsistent with his claim that as of May 2009 that property had yet to be purchased. In evidence FC acknowledged that he stayed in the property, yet he claimed that the property had not been purchased by that date. The extent to which FC was prepared to mislead the Court was illustrated by his evidence concerning the use of his credit card in Poland. When faced with evidence of such use and his claim not to have been in Poland at that time, he then claimed his card was used by IS. That evidence lacked credibility and I am satisfied in relation to that and a number of other matters, FC was endeavouring to mislead the Court. That conclusion is also borne out by the evidence that I heard in relation to the banking arrangements concerning the purchase of properties in Poland. That evidence was supported by documentary evidence which was available in court. It is clear from that evidence that in April 2009 arrangements were made to transfer €215,000 to Poland. A transfer of €65,000 was made on the 15th April, 2009 from FC's current account and thereafter on the 24th April, 2009, a joint account in his name and IS was set up and some four days later €150,000 was transferred to that joint account on the 28th April, 2009. That transfer was from FC's current account. It is the case that by the end of April 2009, FC had taken steps to ensure that money would be transferred to Poland and I am satisfied that those steps were taken in circumstances where FC was endeavouring to ensure that funds would not be available for repayment in the event that MC was taken into wardship. The inconsistency of the evidence was further borne out by FC's initial denial that he had ever travelled to Poland and it was not until after the records of his credit card account were put to him, in cross-examination, which demonstrated that the credit card had been used in Poland on the 30th April, 2009, that FC changed his evidence to acknowledge that he had travelled to Poland at that time. In the course of the written submissions, the plaintiffs identified a substantial number of inconsistencies in FC's evidence in relation to his transactions concerning the Polish properties and I am satisfied that they are accurate and give an illustration of the willingness of FC to alter and change his explanations depending upon what documents were being put to him. The plaintiffs in their submissions claim that the evidence given by FC in relation to the acquisition of apartments in Poland was utterly inconsistent, incredible and unreliable. I am satisfied that that represents a correct analysis of FC's evidence in relation to the Polish properties. In the light of that finding, and given the absence of any clear, conclusive or definitive evidence in relation to the two Polish properties, I am satisfied that the Court should make an order requiring FC to account in respect of the monies transferred to the joint account of himself and IS (being the €65,000 and €150,000 identified above) and that he fully account to the plaintiffs for those sums and the apartments in Poland and any other assets or monies held by him in Poland either in his own name or in the name of any other party.

16.1 In the light of the findings that I have made in this judgment, I am satisfied that there is no basis for the counterclaim made by the first named defendant. The first named defendant has failed to establish that there is any sum due or owing to him or that there was any agreement between him and MC for the payment by MC of a sum to him representing half of her assets. I am also satisfied that the plaintiffs have correctly and properly pursued this claim against the first named defendant and that the case against him was not a frivolous one nor was it prosecuted in an improper manner nor were the plaintiffs or any of them guilty of any deception or of misleading the Court as claimed. The defendants have put forward no basis for their claim that the Court cannot deal with matters prior to MC being made a Ward. The Court has such jurisdiction and it will exercise it in protecting MC and as a matter of public interest. The first named defendant has failed to establish that any wrong was done to him or that he has suffered any loss or damage as a result of the conduct of these proceedings.

17.1 The first named plaintiff is entitled to a declaration that the first named defendant holds the sum of €900,009.08 withdrawn from the first named plaintiff's deposit account as property of the first named plaintiff together with interest thereon from the date upon which the first named plaintiff was made a Ward of Court, that is, from the 4th November, 2009. The first named plaintiff is entitled to judgment against the first named defendant for that sum together with the interest accrued thereon. I will also make an order for the accounts and inquiries identified in this judgment. I will hear the parties in relation to any injunctive relief that is required in the light of the orders made. I will also make an order directing the first named defendant deliver up vacant possession of the property of the first named plaintiff at T A, K, comprised in the three folios identified in this judgment. The first named plaintiff is also entitled to a declaration against all three defendants that the plant and machinery identified in this judgment was purchased with funds of the first named plaintiff upon trust for her and a declaration that as the beneficial owner thereof, the first named plaintiff is entitled to recover from all the defendants possession of each and every item of plant and machinery as set out in this judgement together with all

documents of title and registration documents relating to such plant and machinery and, if necessary, an order directing all three defendants to deliver up to the plaintiffs all plant and machinery identified in this judgment together with the documents of title and registration. The plaintiffs are also entitled to damages against all three defendants for any loss or diminution in value of the machinery on the sale of such machinery after it is transferred to the plaintiffs and I will hear the parties as to how such damages are to be calculated and the procedure to be followed. The first named plaintiff is also entitled to a declaration that the funds held in account No. 54947355, Bank of Ireland, in the name of the first named defendant, are the property of the first named plaintiff and that such funds should be forthwith lodged in Court to the credit of the first named plaintiff. I will also hear the parties in relation to any further orders that are required in the light of the judgment that I have given.