



THE COURT OF APPEAL

APPROVED

Record Numbers: 314/2023/315/2023
High Court Record Number: 2018/7829P
Neutral Citation Number [2024] IECA 142

Noonan J.

Binchy J.

Meenan J.

BETWEEN/

DAMIEN GIBSON IN HIS CAPACITY AS ADMINISTRATOR AD LITEM

OF THE ESTATE OF MARIE GIBSON DECEASED

PLAINTIFF/RESPONDENT

-AND-

**KEVIN O’GORMAN PRACTICING UNDER THE TITLE AND STYLE OF
KEVIN O’GORMAN SOLICITORS**

DEFENDANT/APPELLANT

PAULINE GIBSON

DEFENDANT

PAUL MCCLEARY AND BY ORDER

PROMONTORIA (OYSTER) DAC

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Noonan delivered on the 13th day of June, 2024

1. At the start of the first judgment under appeal herein, the High Court judge (Cregan J.) described the case as a “*lamentable tale*” and it is difficult not to agree. It is all the more so as the original plaintiff herein, Mrs. Gibson, died shortly before this appeal was due to be heard, with her son now continuing the proceedings on behalf of her estate.

2. While the facts are set out carefully and comprehensively in the judgments of the High Court, it is convenient for the purpose of this judgment to summarise them again. Mr. and Mrs. Gibson married in 1959 and moved into a council house at 21 Castletymon Green, Coolock, Dublin 5 in 1963. They originally rented the house from Dublin City Council but in 1977, agreed to purchase it from the Council through the housing purchase scheme for a sum of IR£2,500 payable in weekly instalments over a number of years. The trial judge accepted that this was the only borrowing that Mr. and Mrs. Gibson ever had. Mrs. Gibson appears not to have worked outside the home and Mr. Gibson was, for a period of years, a lorry driver and latterly a taxi driver. They were obviously people of modest means whose only asset was their home, which they intended to leave equally to their children after their day. They had a number of children, including the second defendant, Pauline Gibson.

3. In 2003, Pauline Gibson sought to raise a loan of €190,000 with Ulster Bank. This was arranged by a financial advisor, Mr. Martin Leahy, on behalf of Pauline Gibson with First Active Building Society. Pauline Gibson’s solicitor was the first defendant, Mr. O’Gorman.

4. Mrs. Gibson’s evidence to the High Court, which was accepted in full by the trial judge, was that Pauline Gibson approached her and her husband in connection with seeking a loan to carry out renovations to Pauline Gibson’s family home at Fortfield Road in Terenure. Mrs Gibson said that she and her husband were willing to help Pauline in any way they could. Mrs. Gibson’s evidence was that her daughter mentioned something about

borrowing from the bank against the house but the judge found as a fact that Mrs. Gibson had only a vague and limited understanding of what this meant. In particular, Mrs. Gibson's evidence was that she and her husband never agreed to sell their house to Pauline Gibson or less still, transfer it to her for nothing. She was unaware of the amount of money that Pauline was seeking to borrow.

5. Mrs. Gibson's evidence was that she and her husband had met with Pauline sometime in 2003 in Devitt's Pub in Camden Street for the purpose of signing some forms. Mrs. Gibson said that a man walked in whom she did not know, although she appears to have thought he was from the bank, and they signed the forms. Unbeknownst to Mr. and Mrs. Gibson, what they apparently were signing was a purported full transfer of their home to Pauline Gibson. Mrs. Gibson's evidence was that this was done entirely without their knowledge or consent and without any legal advice whatsoever. It is not in dispute that they received no written advice from Mr. O'Gorman and Mrs. Gibson denied a suggestion in cross-examination that she and her husband required money to do up their house and purchase a new taxi for him. The judge accepted Mrs. Gibson's evidence on this point and rejected that of Mr. O'Gorman to the contrary effect.

6. Mrs. Gibson said that they would never have agreed to Pauline buying their house and in the events that transpired, all of the monies raised from First Active were paid over to Mr. O'Gorman who in turn paid them directly to Pauline Gibson or to settle bank debt she had at that time. It was again not in dispute that Mr. and Mrs. Gibson received nothing.

7. Mr. O'Gorman's evidence was that later in 2003, he met with Mr. and Mrs. Gibson in their daughter's house in Terenure for the purpose of signing loan documents to allow the transfer of the property from Mr. and Mrs. Gibson to their daughter and to explain the nature of that transaction to them. His evidence was that on that date, in September 2003, Mr. and

Mrs. Gibson signed the deed of transfer, the family home declaration and a declaration of solvency. Mr. O’Gorman claimed to have given advice to Mr. and Mrs. Gibson that they should consider the matter carefully but agreed he did not suggest that they get independent legal advice. He believed that they got independent advice from Mr. Leahy. All of this evidence from Mr. O’Gorman was rejected by the trial judge who stated that in his view, Mr. O’Gorman was not a credible or reliable witness.

8. Subsequently, a cheque for €190,000 was received by him made payable to Pauline Gibson who was very keen to obtain funds quickly.

9. Mr. Leahy also gave evidence on behalf of Mr. O’Gorman. He is a financial adviser who arranges, *inter alia*, mortgages for customers in return for commission from the relevant financial institution. Mr. Leahy said that he met Mr. and Mrs. Gibson also at Pauline Gibson’s house in Terenure and as noted by the judge, he purported to give evidence as an independent financial advisor to Mrs. Gibson and her husband. The judge did not accept Mr. Leahy was independent or had given such advice. Mr. Leahy’s evidence was to the effect that he understood, presumably from Pauline Gibson, that Mrs. Gibson and her husband were going to transfer their house, valued at €250,000, to their daughter and in return, they would receive €60,000, with the balance of €190,000 being payable to Pauline Gibson. The judge described this as “*ludicrous*” financial advice. He rejected Mr. Leahy’s evidence which he considered to be “*self-serving and unreliable.*”

10. As would be the norm, Mr. O’Gorman was required to give an undertaking to First Active that they would obtain a good marketable title to the property, which was registered land. However, subsequent to 2003, Mr. O’Gorman took no steps to stamp or register the transfer, until he came under pressure from the financial institution to do so in or about 2009.

It was not disputed that if Mr. O’Gorman proceeded to stamp the transfer six years later, this would expose him personally to penalties and interest on the stamp duty.

11. In order to avoid penalties and interest on the stamp duty, Mr. O’Gorman falsely re-dated the transfer by substituting the first page with the original 2003 date, which he destroyed, with a new page dated the 22nd May, 2009, while preserving the signature page with the original signatures, allegedly, of Mr. and Mrs. Gibson. Stamp duty was then paid in the sum of €5,775.00 on the deed on the 12th June, 2009 and thereafter, Mr. O’Gorman applied to the Property Registration Authority (“the PRA”) on the 22nd June, 2009 to register the deed. However, the registration application was rejected and on enquiry, Mr. O’Gorman was informed that the original unconditional consent of the Local Authority to the transfer was required and had never been obtained.

12. Accordingly, this meant that First Active never obtained marketable title to the property, contrary to Mr. O’Gorman’s undertaking. On advising Pauline Gibson of this, she appears to have applied to Dublin City Council for a vesting order which was duly made on the 15th March, 2010 vesting the property in Mr. and Mrs. Gibson. That order purports to have been signed by Mr. and Mrs. Gibson but the judge expressed himself satisfied that the signatures were forgeries procured by Pauline Gibson.

13. Armed with the transfer from DCC, Mr. O’Gorman was about to apply to the PRA for a second time but according to himself, decided to get Mr. and Mrs. Gibson to re-execute the deed of transfer. Consequently, he removed the second page of the 2003 document, the signature page, and prepared a blank page to be re-executed by Mr. and Mrs. Gibson, giving the document for that purpose to Pauline Gibson.

14. Pauline Gibson returned the document subsequently executed to Mr. O’Gorman, who then falsely purported to witness the signatures of Mr. and Mrs. Gibson by signing the

transfer himself which contained the words “*re-executed by the said John Gibson and Marie Gibson in the presence of Kevin O’Gorman*”. The judge held that the signatures of Mr. and Mrs. Gibson on this new 2009 transfer were, as with the earlier document, forgeries procured by Pauline Gibson.

15. Mr. O’Gorman applied for a second time to the PRA on the 26th March, 2010 to register the transfer in favour of Pauline Gibson but unbeknownst to him, the DCC law agent applied a few days earlier on the 18th March, 2010 to the PRA to register the fee simple interest in the name of Mr. and Mrs. Gibson. The judge found that it was not until over three years later that Mr. O’Gorman set about re-dating the transfer from Mr. and Mrs. Gibson to their daughter for a second time from the 22nd May, 2009 to the 16th March, 2010, the latter date being one day after the vesting order made by DCC. While the amendment date is initialled, the judge was satisfied that it was not initialled by Mr. and Mrs. Gibson but rather their initials were forged by Pauline Gibson. Ultimately the application was completed by the PRA on the 24th April, 2014.

16. As found by the judge, quite remarkably throughout all of this convoluted saga between 2009 and 2014, Mr. O’Gorman never once made any contact with his purported clients, Mr. and Mrs. Gibson.

17. Mr. Gibson died on the 8th January, 2017. Subsequently, the current plaintiff herein, Damien Gibson, applied to the Revenue Commissioners to have the owner of the property identified as Mrs. Gibson, for property tax purposes. It was only at that stage as a result of communication received from the Revenue that Mrs. Gibson learned for the first time that she was apparently no longer the owner of her own home. One can only imagine the shock of an elderly and recently widowed woman on learning of these appalling events.

18. To add substantially to an already distressing situation for Mrs. Gibson, the fourth defendant, Promontoria, who had by now acquired the original loan evidently now in arrears, appointed the third defendant as receiver over the property on the 12th September, 2017. He wrote to Mrs. Gibson on the 20th September, 2017 seeking possession of the property. Mrs. Gibson retained solicitors who corresponded with the Receiver but notwithstanding that correspondence, the Receiver and Promontoria issued proceedings in the High Court against Mrs. Gibson and Pauline Gibson seeking an order for possession. At the same time, a motion was issued seeking an interlocutory injunction requiring Mrs. Gibson to deliver up possession of her home and restraining her from interfering with the Receiver.

19. In the affidavit grounding the interlocutory application, the Receiver averred that Mrs. Gibson had no title to the property and had not adopted a *bona fide* approach to asserting such title. He further suggested that the within proceedings were not properly constituted and were not being prosecuted. The implication appears to be that the current proceedings were a sham designed to prevent Promontoria from realising its security. Whilst no doubt these allegations were advanced in good faith by the Receiver, it is readily apparent that they must have been the source of great additional hurt and distress to Mrs. Gibson.

The High Court

20. These proceedings, as originally constituted, named Mr. O’Gorman, Pauline Gibson and the Receiver as defendants. Promontoria was not an original party. It was agreed between the parties, and accepted by the judge, that the trial would proceed in two modules, the first concerned with the substantive factual issues which, once determined, would give rise to the second module to consider remedies. The witnesses who gave evidence on behalf of the plaintiff were Mrs. Gibson, her son Damien and an expert solicitor, Mr. Joseph Thomas. On behalf of Mr. O’Gorman, Mr. O’Gorman himself gave evidence as did Mr.

Leahy and an expert solicitor, Mr. Barry Lysaght. Pauline Gibson did not participate in the proceedings and a judgment in default was previously obtained against her. The Receiver attended at the hearing but made his position clear that he was adopting a neutral stance in the matter and his participation was therefore limited.

21. The first module was heard by the High Court over three days. The proceedings against Mr. O’Gorman are framed in terms of professional negligence and Mr. O’Gorman had obtained a supportive report from Mr. Lysaght. However, when Mr. Lysaght came to give evidence having heard the evidence of the parties over the previous days, Mr. Lysaght conceded that Mr. O’Gorman had been negligent. It was only at that stage, on the third and final day of the hearing of module 1, that Mr. O’Gorman then conceded liability and accepted that he had been guilty of negligence.

22. The judge delivered his first written judgment on the 14th December, 2022. It emerges from the judgment that the following findings of fact were made by the High Court:

- Mr. O’Gorman acted for both sides in the purported 2003 transfer of Mr. and Mrs. Gibson’s family home to Pauline Gibson.
- Mr. O’Gorman never told Mr. and Mrs. Gibson that they were transferring their house to their daughter for no consideration.
- Mr. O’Gorman never stamped or registered the transfer and sought to have it re-executed in 2010.
- Pauline Gibson or someone on her behalf forged her parents’ signatures on the re-executed transfer and other documents in 2010.
- Mr. and Mrs. Gibson never had any borrowings, despite suggestions to the contrary, with the sole exception of the housing loan.

- Mrs. Gibson had no knowledge of the purported transfer of her home to her daughter at any time from 2003 until it was discovered by her son in May 2017.
- Mr. O’Gorman agreed that he never gave any written advice to Mr. and Mrs. Gibson. The judge rejected Mr. O’Gorman’s evidence concerning the circumstances in which the transfer was executed, finding him not to be a reliable or credible witness. In particular, the judge gave six reasons for reaching this conclusion:
 - (1) Mr. O’Gorman altered documents in such a way as to cast serious doubt on his credibility as a witness in respect of any of his evidence;
 - (2) Mr. O’Gorman changed his evidence regarding where he first met Mr. and Mrs. Gibson;
 - (3) Mr. O’Gorman initially claimed to have met Mr. and Mrs. Gibson in or about the 15th March, 2010 and that they re-executed the deed of transfer at that time in his presence. This never happened but on the contrary, Mr. O’Gorman gave the transfer to Pauline Gibson to have it re-executed;
 - (4) Mr. O’Gorman attested the signatures of Mr. and Mrs. Gibson on the transfer in 2010 confirming that they signed it in his presence, when this was untrue;
 - (5) Mr. O’Gorman claimed to have got Mr. and Mrs. Gibson to sign a deed of transfer, declaration of solvency and family home declaration in September 2003 in Pauline Gibson’s house in Terenure but none of these documents were ever produced in court to corroborate his evidence;

- (6) Mr. O’Gorman claimed that his file had been lost but gave a number of inconsistent explanations concerning the circumstances of that loss.
- Despite Mr. O’Gorman’s evidence that he gave oral advice to Mr. and Mrs. Gibson concerning the transaction, which was denied by Mrs. Gibson, the judge preferred Mrs. Gibson’s evidence and found that no such oral advice was ever given by Mr. O’Gorman;
 - The judge accepted the evidence of Mr. Thomas concerning Mr. O’Gorman’s negligence, which as the judge noted was not seriously challenged. Mr. Thomas said that Mr. O’Gorman was negligent in that:
 - (1) he failed to explain the nature or consequences of the transaction to Mrs. Gibson;
 - (2) he failed to advise her that the proposed transaction was improvident and of no benefit to her;
 - (3) he allowed the transaction to complete when he knew it was not in Mrs. Gibson’s best interests;
 - (4) he allowed the transaction to complete without discussing it properly with Mrs. Gibson;
 - (5) he acted for both sides of the transaction when there was a conflict of interest;
 - (6) he failed to advise Mrs. Gibson to take legal advice from another solicitor in respect of the transaction;
 - (7) he failed to provide any written advices to Mrs. Gibson in respect of the transaction;

(8) in or about 2009/2010, he represented that he witnessed Mrs. Gibson's signature when he had not done so.

- Mr. Leahy did not give independent financial advice to Mr. and Mrs. Gibson and the judge rejected his evidence that he advised Mrs. Gibson of the risks involved;
- Mr. O'Gorman falsified dates on documents to avoid tax;
- Mr. O'Gorman deliberately destroyed pages of the original transfer;
- Mr. O'Gorman purported to witness the forged signatures of Mr. and Mrs. Gibson when he did not witness them. This was not disputed by Mr. O'Gorman;
- Mr. and Mrs. Gibson's signatures on the transfer to Pauline Gibson and the DCC transfer of the 15th March, 2010 were forgeries procured by Pauline Gibson;
- Mr. and Mrs. Gibson did not in fact sign the purported deed of transfer in 2003.

23. Following on the delivery of the first judgment, it became apparent, if indeed it had not already been, that Promontoria would have to be joined to the proceedings in order to regularise the position concerning their charge registered against Mrs. Gibson's Folio and the appointment of the Receiver. Following the delivery of the first judgment, Promontoria had been invited by Mrs. Gibson's solicitors to accept that their charge was invalid but they declined and, consequently, the second module proceeded primarily on the issue of the validity of the charge, which was fully defended by Promontoria.

24. However, the question of damages against Mr. O'Gorman also remained to be determined. During the course of the first module, the judge had expressed concern about the manner in which damages were to be approached and in particular what award of damages could be made in the context of compensatory damages and/or aggravated damages. It is accepted that no claim was made by Mrs. Gibson for punitive or exemplary damages against Mr. O'Gorman.

25. The judge held that both the charge registered on Mrs. Gibson's Folio and the appointment of the Receiver were void *ab initio*.

26. Turning then to the claim for damages against Mr. O'Gorman, the judge noted that the plaintiff had sought both compensatory and aggravated damages against him. In that regard, he referred to the leading authority on aggravated damages, being the judgment of the Supreme Court in *Conway v Irish National Teachers Organisation* [1991] 2 I.R. 305. He quoted from the judgment of Finlay CJ as follows:

"In respect of damages for tort or for breach of a constitutional right, three headings of damage in Irish law are, in my view, potentially relevant to any particular case. They are:

- (1) Ordinary compensatory damages being sums calculated to recompense a wronged plaintiff for physical injury, mental distress, anxiety, deprivation of convenience, or other harmful effects of a wrongful act and/or for monies lost or to be lost and/or expenses incurred or to be incurred by reason of the commission of the wrongful act.*
- (2) Aggravated damages, being compensatory damages increased by reason of:*
 - (a) the manner in which the wrong was committed, involving such elements as oppressiveness, arrogance or outrage, or*
 - (b) the conduct of the wrongdoer after the commission of the wrong, such as a refusal to apologise or to ameliorate the harm done or the making of threats to repeat the wrong, or*

- (c) *conduct of the wrongdoer and/or his representatives in the defence of the claim of the wronged plaintiff, up to and including the trial of the action.*

Such a list of the circumstances which may aggravate compensatory damages until they can properly be classified as aggravated damages is not intended to be in any way finite or complete. Furthermore, the circumstances which may properly form an aggravating feature in the measurement of compensatory damages must, in many instances, be in part a recognition of the added hurt or insult to a plaintiff who has been wronged, and in part also a recognition of the cavalier or outrageous conduct of the defendant.

- (3) *Punitive or exemplary damages.”*

27. Having considered this and other authority, the judge went on to say:

“48. However, in my view, the plaintiff in this case did not just suffer worry and stress. The plaintiff is an elderly woman who had moved into her family home with her husband and family in 1963. She lived there happily with her husband and raised her family over the ensuing decades. Her husband passed away in 2017. It was only after his death that the plaintiff discovered that the property was not registered in her name or that of her husband but was in fact registered in her daughter’s name. The fact of this fraud understandably came as a great shock to the plaintiff. Whilst the first named defendant is not accused of any fraud, there is no doubt that his gross negligence contributed to this manifest interference with the plaintiff’s right to the proper enjoyment of her home. Through the gross negligence of the first defendant, the first defendant caused or permitted a situation to arise where the plaintiff’s

property rights were significantly affected and which required the plaintiff to bring legal proceedings to remedy these matters.

49. *Indeed the plaintiff suffered the extraordinary experience of receiving a letter from the Receiver's property management agent demanding that she vacate the property within a period of weeks (or provide some proof of a tenancy or other agreement under which she was in possession of the property). One can only imagine the fear that this would have instilled in an elderly woman who had just lost her husband. This was an unlawful violation of her property rights caused by the first defendant's gross negligence.*

50. *In the circumstances I am of the view that an appropriate figure to compensate the plaintiff for this interference in her property rights over the last number of years is €5,000."*

28. These findings of the trial judge and the award of €5,000 are not the subject of appeal by Mr. O'Gorman. His appeal in that regard is confined to the issue of aggravated damages, which the judge awarded in the sum of €30,000. In reaching a conclusion that an award of aggravated damages should be made against Mr. O'Gorman in this case, the judge set out a number of factors which he considered provided a basis for such damages at paras. 56 to 70. These included:

- (1) Mr. O'Gorman deliberately destroyed part of the original purported deed of transfer which he said was dated 2003 and created a new document with a deed with a date of the 22nd May, 2009.
- (2) Mr. O'Gorman falsified the date to avoid tax under the Stamp Duty legislation.

- (3) Mr. O’Gorman signed his name on a document stating *“re-executed by the said John Gibson and Marie Gibson in the presence of Kevin O’Gorman”* when this was untrue.
- (4) Mr. O’Gorman stated in interrogatories (subsequently confirmed on affidavit) that Mr. and Mrs. Gibson had signed their signatures in his presence when he knew this not to be true.
- (5) Mr. O’Gorman made no attempt to contact Mr. or Mrs. Gibson in the years 2009 to 2014 to advise them in any way about the transaction.
- (6) Mr. O’Gorman changed the date on the transfer for a second time from the 22nd May, 2009 to the 16th March, 2010 in order to post-date the DCC transfer order.
- (7) Mr. O’Gorman defended the proceedings on the basis of the evidence of his expert, Mr. Lysaght, whom it emerged he had mis-instructed, leading Mr. Lysaght to change his view when he gave oral evidence. The judge found that the instructions given to Mr. Lysaght were incomplete and misleading.

29. The judge went on to hold that despite knowing all of these things, Mr. O’Gorman *“still sought to defend this case tooth and nail until the third day of the trial when it became clear to his own expert that Mr. O’Gorman’s actions in this matter were indefensible.”*

30. The judge noted that after Mr. Lysaght’s evidence, Mr. O’Gorman, instead of conceding liability entirely and moving on to an assessment of damages, continued to argue the point that the plaintiff had obtained independent financial advice from Mr. Leahy. His final conclusions on this issue were:

“69. All of the above matters lead inexorably to the conclusion that an award of aggravated damages in favour of the plaintiff as against Mr. O’Gorman is justified in this case.

70. Having regard to the fact that Mr. O’Gorman, as his counsel indicated to the court, is not a man of means, I would assess the amount of aggravated damages in the sum of €30,000.”

31. The final observation by the judge merits comment insofar as it appears to suggest that the damages awarded against Mr. O’Gorman were less than they might otherwise have been having regard to the fact that counsel for Mr. O’Gorman indicated that he is not a man of means. At the hearing of the appeal, this issue was raised by the Court with counsel for Mr. O’Gorman having regard to the mandatory requirement for every practicing solicitor to have professional indemnity insurance, a necessary prerequisite to a Practicing Certificate. Counsel informed the Court that for various reasons, Mr. O’Gorman’s insurers declined to indemnify him in these proceedings and that is currently the subject of arbitration proceedings between Mr. O’Gorman and the indemnifiers. By contrast, the judge awarded a sum of €75,000 by way of exemplary and/or punitive damages against Pauline Gibson.

The appeal

32. Mr. O’Gorman’s notice of appeal essentially raises three substantive issues. The first, and main issue, and certainly the one primarily canvassed in oral submissions at the hearing of the appeal, is that the trial judge was wrong to award aggravated damages in the absence of evidence establishing that Mr. O’Gorman’s conduct contributed to the emotional distress suffered by Mrs. Gibson. Allied to this is a complaint that aggravated damages were neither sought nor pleaded on behalf of Mrs. Gibson.

33. Further grounds of appeal raised by Mr. O’Gorman are that the judge found him to have been guilty of “*gross negligence*” when this was never pleaded and further, that his assessment of the credibility of Mr. O’Gorman and Mr. Leahy was flawed.

34. I think it is possible to dispose of the latter two grounds quite readily. Although it is true to say that the judge referred to “*gross negligence*” in a number of passages in his judgment, there is of course no tort known to law of gross negligence as opposed to negligence. The addition of the adjective “*gross*” is merely a qualitative description that goes to the degree of negligence involved but does not alter the legal position attendant upon a finding of negligence. The fact that this was not expressly pleaded is therefore in my view neither here nor there.

35. With regard to the assessment of credibility of witnesses, this appears to me to be a classic *Hay v. O’Grady* [1912] 1 I.R. 210 situation where the judge made explicit findings as to the credibility of Mr. O’Gorman and Mr. Leahy and gave cogent and clear reasons for arriving at those findings, in themselves findings of fact that cannot be interfered with by this Court unless unsupported by any credible evidence. In my view, there was more than ample credible evidence to support these findings by the judge and there is accordingly no basis upon which they can be upset by this Court.

36. As already indicated, the main issue agitated at the hearing of this appeal was the judge’s award of aggravated damages. In essence, counsel for Mr. O’Gorman submitted that the judge had made an award of punitive or exemplary damages against Mr. O’Gorman which were not sought, and described them as aggravated damages. Under the principles enunciated in *Conway*, aggravated damages are intended to be compensatory and it was said that no link had been established between the injuries suffered by the plaintiff and Mr.

O’Gorman’s conduct, as distinct from that of Pauline Gibson, which warranted an award of aggravated damages.

37. The concepts of aggravated and exemplary damages have historically tended to sit rather uncomfortably together. The primary distinction is, in theory at least, that aggravated damages are intended to compensate the plaintiff for the additional hurt and upset occasioned by the nature of the conduct complained of, whereas exemplary damages are intended to mark the court’s disapproval of the conduct in question, unrelated to its effect on the plaintiff. Exemplary damages are therefore something in the nature of a windfall for the plaintiff.

38. While that is, in principle, the distinction between aggravated and exemplary damages, in practice that distinction has often been difficult to discern. In McMahon and Binchy’s *Law of Tort* (4th Ed.) the authors put the matter thus (at para. 44.77, footnotes omitted):-

“...[aggravated damages] constitute a conceptually incoherent category of damages ‘occupying a murky middle ground between normal compensatory damages and exemplary damages’. In spite of the consistent judicial characterisation in recent decades of aggravated damages as falling within the category of compensatory damages, in truth they strain against its confinement and seek to attain goals that are frankly punitive in character. The Law Reform Commission captures this ambiguity frankly:

‘Aggravated damages are classified as a species of compensatory damages, which are awarded as additional compensation where there has been intangible injury to the interests or personality of the plaintiff, and where this injury has been caused or exacerbated by the exceptional conduct of the defendant. It is because aggravated damages are awarded on the basis of the loss to the plaintiff that they are categorized as compensatory. However,

the requirement that the defendant's conduct must have been exceptional in order for aggravated damages to be awarded undermines the compensatory nature of aggravated damages, and suggests that they are, in part at least, awarded with reference to the moral quality of the defendant's action. Aggravated damages appear to be a hybrid of the compensatory and exemplary models of damages. In practice, and especially in England, they have often been used to perform the function of exemplary damages.' "

39. Analysis of many of the recent cases dealing with aggravated damages illustrates this discrepancy very well and suggests that in many cases, the aggravating factor leading to the award is less concerned with a clearly established link to the plaintiff's injury and more with the conduct of the wrongdoer.

40. This is to an extent exemplified by the fact that few, if any, of the cases where awards of aggravated damages were made delineate clearly the correspondence between the additional injury to the plaintiff and the aggravated damages component of the award. Most do, however, at least suggest that the injury was made worse because of the aggravating factors.

41. To be fair to Mr. O'Gorman, he makes no complaint of the fact that the aggravated damages awarded in this case were a multiple of the ordinary compensatory damages, and while that may be unusual, it is not unique. I think it important to consider the award of €35,000 for ordinary and aggravated damages in the round.

42. The judge identified a number of factors that led him to the award of €5,000 at paragraphs 48 – 50 of his second judgment quoted above. He referred to the “*great shock*” to Mrs. Gibson on discovering the situation regarding her only asset, her home, after the death of her husband in 2017. The judge said that Mr. O'Gorman's gross negligence

contributed to the interference with the plaintiff's right to the proper enjoyment of her home and her property rights, which were significantly affected and required her to bring proceedings which were still ongoing up to the time of her death.

43. He also drew attention to the fear that would have been instilled in the plaintiff, recently widowed, as a result of receiving correspondence from the Receiver's agent requiring her to vacate her own home. It seems to me that viewed in that light, the award of €5,000 was very modest indeed and the judge might well have been justified in awarding a substantially larger sum, albeit that there is no cross-appeal by the plaintiff in that regard.

44. When he turned to considering the question of aggravated damages, the judge identified a range of factors in relation to Mr. O'Gorman's conduct which, in the judge's view, justified an award of aggravated damages. It seems clear therefore that the basis for the award of aggravated damages was the conduct of the defendant as opposed to any additional injury to the plaintiff. To that extent it might be argued, as Mr. O'Gorman does, that the damages were in fact intended to be punitive as distinct from aggravated.

45. Having said that, I think the judge was careful to align the conduct which he felt merited aggravated damages with the categories set out in *Conway*. Of particular relevance in this case, in my view, is the first category expressly envisaging oppressiveness and outrage in the manner in which the wrong was committed. To describe the defendant's negligence here as "*gross*" is, to my mind, putting it at its mildest. At the risk of repetition, the most serious aspects of Mr. O'Gorman's conduct included:

- (1) The deliberate destruction of an original deed of transfer allegedly executed by his own clients, Mr. and Mrs. Gibson, without their knowledge or consent;
- (2) Falsifying dates on the original transfer to evade tax lawfully due by him;

- (3) Purporting to witness the signatures of his own clients by untruthfully stating that the document was executed in his presence;
- (4) Answering interrogatories knowingly incorrectly.

The gravity of this final matter needs to be understood. On 11 March, 2020, Mrs. Gibson's solicitors administered 22 interrogatories for the examination of Mr. O'Gorman. Eight of these (numbers 8, 9, 10, 11, 14, 15, 16 and 17) directly asked Mr. O'Gorman if he had witnessed the signatures of Mr. and Mrs. Gibson on the DCC transfer order of 15 March, 2010 and the transfer of 16 March, 2010 to Pauline Gibson and further, in each instance, whether Mr. and Mrs. Gibson had been in his presence when they signed the two documents. In each case, Mr. O'Gorman answered "yes", despite the fact that he knew these answers to be untrue.

46. In the normal way interrogatories should be answered on oath and the Rules of the Superior Courts provide accordingly a form of affidavit to be used for that purpose. The answers delivered by Mr. O'Gorman in November 2020 were not originally on oath but subsequently verified by him on affidavit. In that affidavit, Mr. O'Gorman swore as follows:

"1. I beg to refer to the contents of my replies to interrogatories that I delivered to the plaintiff's solicitors and dated the 23rd day of November 2020.

2. I say that the assertions, allegations and information contained in the said replies to interrogatories which are within my own knowledge are to the best of my belief true. I honestly believe that the assertions, allegations and information contained in the said replies to interrogatories which are not within my own knowledge are to the best of my belief true.

3. I am aware that it is an offence to make a statement in this affidavit that is false or misleading in any material respect and that I know to be false or misleading.”

As subsequently emerged, what is deposed to by Mr. O’Gorman in this affidavit is manifestly incorrect and known by him to be incorrect.

47. It need hardly be said that this is a serious matter for any person swearing such an affidavit, never mind an officer of the court. Accordingly, the defence of this claim was approached by Mr. O’Gorman on a basis that was deliberately false.

48. It is generally true to say that putting a plaintiff on proof of their case is not something that should give rise to an entitlement to aggravated damages - see *Noctor v. Ireland* [2005] IEHC 50 and *O’Donnell v. O’Donnell* [2005] IEHC 216. Indeed, this argument was made in the High Court and it was submitted that Mr. O’Gorman was entitled to defend the proceedings up until the point where his conveyancing expert conceded that Mr. O’Gorman had been negligent. However, as the judge pointed out, the nature of Mr. O’Gorman’s actions only became clear in the course of his evidence in court and, following that evidence, Mr. Lysaght was compelled to concede that Mr. O’Gorman had been negligent.

49. Accordingly, as the judge found, Mr. O’Gorman gave incomplete and misleading instructions to Mr. Lysaght. This was thus never simply a case where Mr. O’Gorman sought to put the plaintiff on proof but he actively misled Mrs. Gibson, her lawyers and indeed his own expert, including upon oath, as to the truth of the matter. The judge was therefore perfectly entitled to take account of this state of affairs as an aggravating factor in the award of damages. Mr. and Mrs. Gibson were clearly vulnerable people, as the judge found, and I cannot conceive how the Court could have regarded these matters as other than oppressive and outrageous in the sense used in *Conway*. Further, that conduct clearly also fell within the third category in *Conway* concerning Mr. O’Gorman’s conduct of the defence.

50. One of the authorities on aggravated damages in professional negligence proceedings that is apposite here is *Ryan v Philp* [2004] IESC 105. There the defendant doctor altered the plaintiff's clinical notes to make the defence of the case appear much stronger than it actually was. This became known to the defendant's legal team about a week before the trial, but it was not disclosed to the other side or the court. The High Court awarded general damages of €45,000 but declined to award aggravated damages. On appeal, the Supreme Court was extremely critical of the conduct of the defendant and his lawyers and awarded an additional €55,000 for aggravated damages.

51. This also provides a good example of a case where there was no particular evidence to suggest that the plaintiff's injury was made worse by the conduct in question. In fact, in his judgment, McCracken J. observed that the plaintiff had given no evidence about the effect the misinformation had on him, but he considered that the Supreme Court was perfectly entitled to infer its probable effect in awarding aggravated damages. I can see no reason why the High Court here was not entitled to arrive at a similar conclusion.

52. I am therefore satisfied that a clear basis had been established in the evidence before the High Court for an award of aggravated damages and no error of law has been made out by the appellant.

53. For these reasons therefore, I would dismiss this appeal.

The Cross-Appeal

54. The cross-appeal was brought by Mrs. Gibson in relation to the question of costs only. It was originally brought as a separate appeal because of time constraints but the Court was informed during the hearing that Mrs. Gibson had delivered a respondent's notice in relation to Mr. O'Gorman's appeal which included the cross-appeal. The original proceedings were,

as previously mentioned, brought against Mr. O’Gorman, Pauline Gibson and the Receiver. Promontoria was not a party to the proceedings during the first module. The plaintiff’s claim as originally framed claimed one relief only as regard the Receiver, which was “*an order preventing him from taking possession of the property or otherwise taking any steps to market and/or sell the property*”, in effect an injunction.

55. However, that was not proceeded with during the first module, which was confined to the issues between Mrs. Gibson and Mr. O’Gorman. The Receiver attended the hearing but took little active part and remained neutral in the context of the dispute. In his *ex tempore* judgment on the issue of costs given on 12 July 2023, the trial judge noted that the Receiver had taken no part in the dispute between Mrs. Gibson and Mr. O’Gorman but was entitled to attend as a named defendant. In those circumstances, the judge determined not to make any order for the plaintiff’s costs as against the Receiver.

56. With regard to the second module, it will be recalled that it was only after the conclusion of the first module that application was made to join Promontoria for the purpose of setting aside the charge that had been fraudulently registered at the behest of Pauline Gibson on her mother’s Folio. While Promontoria was, in advance of the third module, invited to concede the issue, it elected not to do so and to defend the claim. This was the main issue arising in the second module which also ran for three days.

57. In addition to the validity of the charge, the issue was also agitated during this module as to Mrs. Gibson’s entitlement to damages, and in particular aggravated damages. In reaching his determination on costs, the judge considered that approximately two thirds of the second module was taken up with dealing with the issue of the charge and one third with the issue of aggravated damages. He accordingly was of the view that the appropriate costs

order was that the plaintiff be entitled to one third of the costs of the second module against Mr. O’Gorman, and two thirds of the costs against the Receiver and Promontoria.

58. In her cross-appeal, Mrs. Gibson claims that she ought to have been entitled to the costs of the first module against the Receiver as well as Mr. O’Gorman and Pauline Gibson, and all of her costs of the second module against the Receiver and Promontoria. In addition, a motion was brought by the Receiver seeking to have the default judgment obtained by Mrs. Gibson against Pauline Gibson set aside but that motion did not proceed and no order as to costs was made. In her cross-appeal, Mrs. Gibson claimed that the costs of that motion ought to have been awarded in her favour.

59. In the grounds of appeal set out in the cross-appeal, no particular ground is advanced as to why the determination of the trial judge on the question of costs was wrong beyond a submission that it amounted to an error of law.

60. In submissions before this Court, the essential contention of counsel for Mrs. Gibson was that because she succeeded in full in her claim in modules one and two, she should have been awarded her full costs against all defendants.

61. There is more than ample authority for the proposition that in appeals against discretionary orders made by the High Court, particularly in the context of costs, an appellate court will be very slow to interfere with the exercise of the trial judge’s discretion. While the appellate court retains the jurisdiction to intervene where interference is warranted, that jurisdiction is one to be exercised sparingly. Once it is shown that the order made was one within the range of orders reasonably open to the High Court, an appellate court will not interfere. That position is by now so well established that I do not think it is necessary to refer to the many authorities quoted in the parties’ submissions.

62. Counsel for Mrs. Gibson argued that the trial judge exercised his discretion unfairly in relation to the first module based on a contention that he failed to adequately analyse or otherwise mischaracterised the level of participation by the Receiver. I cannot see how that is other than quintessentially a matter for the judge who heard the case and in substance and effect, what counsel invites us to do is to exercise our own discretion differently. However, I am satisfied that no basis has been put forward for this Court to do so.

63. In relation to the second module, again counsel for Mrs. Gibson contended that very little of the time, certainly less than one third, taken up by the third module was devoted to the question of aggravated damages and there might have been no third module at all if Promontoria had conceded the issue which it lost. As the judge found however, Promontoria was perfectly within its rights to contest the issue of the charge and having failed, was found responsible for the majority of the costs of the second module.

64. Counsel for Mrs. Gibson sought to argue that this operated unfairly against his client in the context that one third of all of the costs and not just those attributable to the hearing itself would not be recovered by Mrs. Gibson's estate and a much fairer outcome would have been to disallow the costs attributable to one day as against the Receiver and Promontoria. However, it seems to me that this is precisely the sort of calibration that the trial judge is best placed to carry out and he gave clear and cogent reasons for making the order under appeal.

65. I am not satisfied therefore that any convincing reason has been advanced why this Court should interfere with the properly exercised discretion of the trial judge in this matter. At a minimum, I am satisfied that the order made by the judge was well within the range of orders reasonably open to him to make and accordingly, there is no basis for this Court to interfere. This applies with equal force to the order in respect of the motion.

66. I would therefore dismiss the cross-appeal.

67. With regard to the question of the costs of the appeal and cross-appeal, as Mrs. Gibson's estate has been entirely successful against Mr. O'Gorman, it follows that Mr. O'Gorman should be responsible for the costs of the appeal. With regard to the costs of the cross-appeal, I am of the view that this added little to the overall duration or complexity of this appeal which was primarily concerned with the damages issue involving Mr. O'Gorman and thus, the justice of the case is best met by making no order as to the costs of the cross-appeal.

68. If any of the parties wish to contend for an alternative costs order, they will have liberty to deliver a written submission not exceeding 1,000 words within fourteen days of the date of this judgment and the other parties will have a similar period to respond likewise.

69. In default of such submissions being received, an order in the terms proposed will be made.

70. As this judgment is delivered electronically, Binchy and Meenan JJ. have authorised me to record their agreement with it.