

BETWEEN**BRENDAN O'ROURKE****PLAINTIFF****AND****DERMOT O'ROURKE, SECOND NAMED DEFENDANT,****PERLE O'ROURKE THIRD NAMED DEFENDANT****AND****ULSTER BANK IRELAND DAC****FOURTH NAMED DEFENDANT****DEFENDANTS****Addendum to JUDGMENT of Ms. Justice Bronagh O'Hanlon delivered on the 25th day of October, 2018**

1. The judgment was given on 25th October, 2018

2. The plaintiff seeks relief primarily as to two issues:

(a) Whether any or any alleged representations made to the plaintiff led him to the belief that the Furness Hall property, Naas in the County of Kildare was or would become the property of the plaintiff and of his wife Diane O'Rourke, formally the first named defendant in these proceedings, until she was released from the said proceedings by order of this Court on the 12th May, 2017?

(b) Whether the plaintiff undertook substantial works on the premises of foot of that belief and those representations?

3. The property in question is known as Furness Hall, Naas in the County of Kildare and is held by the second and third named defendants, parents of Diane O'Rourke, in their capacity as trustees of the Diane O'Rourke Discretionary Trust ("DORDT"). The fourth named defendant is Ulster Bank DAC, as successor to First Active plc.

4. It is not in dispute that on the 10th June, 2004, Dermot O'Rourke agreed to purchase Furness Hall in trust for a sum of €3.65 million. He paid a booking deposit of €70,000 and the contract for the sale dated the 9th July, 2004 shows the purchaser as Dermot O'Rourke (in trust).

5. A draft term sheet was generated by First Active (John Hunt, Head of Commercial Business) for a mortgage dated 13th July, 2004, which indicated that the property was to be acquired by Dermot O'Rourke and his wife Perle O'Rourke as trustees for the benefit of their daughter Diane O'Rourke, and the amount of the facility was to be €2.92 million. What is disputed is whether contemporaneous documentation shows that the use of the trust structure was motivated solely by tax considerations and not, as in accordance with the evidence of Dermot O'Rourke, out of concerns he had about the marriage between his daughter Diane and the plaintiff.

6. The plaintiff contends that it was clearly intended that Furness Hall would be transferred to Diane O'Rourke after three years and while this is disputed, nonetheless the plaintiff relies on an email of the 13th July, 2004 from Paraic Madigan solicitor of Matheson Ormsby Prentice solicitors to John Hunt of First Active (Core Book 1, p. 46).

7. The plaintiff asserts, that the wording that "the purpose of the proposed transaction is for Mr. O'Rourke to assist his daughter Diane in the purchase of a dwelling in a tax efficient manner and in particular to ensure that she obtained an exemption from Capital Acquisition Tax. The plaintiff relies on correspondence between P. Madigan solicitor as aforementioned, in relation to the second defendant's "wish to purchase a house for your daughter Diane" "Diane would then be given a licence to occupy the property on an annual basis and provided that she occupied the property for three years ... the property could be appointed out to her in three years free from Capital Acquisition Tax ("CAT")". A further document being an internal one First Active sent on 14th July, 2004 describes the transaction as the second defendant "is purchasing the property for his daughter through a discretionary trust as part of his tax planning". "We understand that after three years the trust can be collapsed and the property will pass to D. O'R.'s daughter."

8. Reference is made to the statement that "the planning behind his arrangement is to enable the beneficiary to receive the appointment of the property without a gift tax liability. In addition, exemptions from stamp duty and capital gains tax ... would also be available".

The Plaintiff's case and submissions

9. The plaintiff's case is that the evidence of Diane O'Rourke showed her acceptance that the intent of the whole process was that whatever property was purchased was going to be hers and her husband's in due course and she accepted that the purpose of the transaction was to assist in the purchase of a property in a tax efficient manner. It is asserted in the plaintiff's submissions that the use of the trust mechanism was motivated by tax reasons and not by any concern about the marriage of Brendan O'Rourke and Diane O'Rourke. The evidence of her father, the second defendant, was as follows:-

"I always intended I would buy a property for her to live in ... and after a period of years, the quantum of years is underdetermined – I would be in a position to determine whether in fact I should give the property to her. But in the interim time, until I knew the marriage was going to last – which I wasn't certain about – there would be no question of giving beneficial ownership to anybody". (Transcript Day 19, p. 31).

10. In this regard the plaintiff argues that it was always intended to transfer ownership of the property to the beneficiaries of the trust after three years although this is heavily disputed as between the parties.

11. The plaintiff in this regard relies on the evidence of Diane O'Rourke, his former spouse, who said that her father was buying a house for her and for Brendan O'Rourke, the plaintiff, to live in as opposed to simply buying a house for them.

12. The reality of this case is that Diane O'Rourke believed she had a licence to live there and set about establishing her home accordingly. The plaintiff makes many references to various alleged statements made by the second defendant and by Diane O'Rourke to the effect that the property was given to them as a gift by Dermot O'Rourke and to both Diane and to Brendan O'Rourke. This is heavily disputed throughout the evidence.

13. It is of great significance that the plaintiff claimed that he only became aware of the existence of a trust in 2009 because of an insurance claim in relation to the property and that he was told by his own solicitor in that context, that the property was in a trust but he claimed that it did not mean anything to him. By letter dated the 31st August, 2004, Natasha McKenna solicitor had written to Diane O'Rourke, setting out that the property was being purchased under a discretionary settlement and set out that in the event of Dermot or Perle O'Rourke ever being made bankrupt, that the property might be repossessed and she would not have any claim to it and that for all intents and purposes she would not have a claim to the property and that the situation might occur where Dermot and Perle O'Rourke need never transfer the property to her and that any monies spent on the house would be for the benefit of her parents and she would have no claim to same. The letter was summarised setting out that the property was theirs to reside in, that it was not theirs to own and that any money they expended they would not recoup. (Day 23 p. 102).

14. The plaintiff contends that Diane O'Rourke concealed the reality of this from her husband. Natasha McKenna solicitor indicated that she had not provided legal advice to Brendan O'Rourke (Day 23 p. 103). This solicitor did advise Diane O'Rourke by way of friendly advice suggesting that she and her husband take independent legal advice.

15. The plaintiff set out a number of complaints concerning the execution of documents at the time of the first mortgage on Furness Hall and in particular regarding his allegation that there was an absence of independent legal advice. The plaintiff however had involvement in a number of property transactions prior to his marriage and it is simply not credible that he thought that property could be gifted to him and a mortgage taken out on it (with reference to his then father-in-law's wedding speech) without documents being signed by him and without the requisite tax obligations being complied with. His evidence was to the effect that he did not believe that he considered the tax implications of a gift between strangers. Mr. Kelly, accountant gave evidence on behalf of the plaintiff that he was accountant to the business affairs and accounts of the plaintiff but the plaintiff himself indicated that his accountant had ceased to be his personal accountant for a period of eleven months after the marriage. This was coincidentally the same timeframe during which the relevant features regarding this case were taking place.

16. Previous transaction with which he had been involved included a property at Donadea in the County of Kildare and the evidence showed under cross-examination that it was for sale before there was any suggestion of marriage between the plaintiff and Diane O'Rourke. The plaintiff had owned that property since 2001 but had never had the property actually conveyed to him, rather had let it rest in contract over a three-year period and as a consequence did not have to pay stamp duty on the said property (Transcript Day 6, p. 56).

17. Further evidence was heard from Diane O'Rourke in respect of a property referred to as Old Town in the County of Kildare to the effect that it was an investment property purchased by the plaintiff. In replies to particulars dated the 31st October, 2014 these asserted that he made a loss of €100,000 on sale of that property, although it transpired in evidence that he had made a profit of €40,000 in respect thereof (Transcript Day 6, pp. 72ff). That property was sold by the plaintiff again without ever having had it conveyed into his name. In addition, the plaintiff's own solicitor Mr. Giles Kennedy gave evidence that his firm had provided legal services between 2009 and 2012 regarding Furness Hall to the plaintiff and that advice had been given on the basis that the second and third named defendants were the owners of the said property. The plaintiff continued to insist that he only realised in 2009 that Furness Hall was in trust but this begs the question as to why the issue was not raised with the plaintiff by Mr. Kennedy solicitor. A s. 68 letter was issued by Mr. Kennedy solicitor to the second and third named defendants on the 22nd December, 2009. In addition, Patrick O'Kane, quantity surveyor gave evidence on behalf of the plaintiff although he also carried out professional services for the second and third defendants on the basis that they were owners of the property, prior to this.

18. With regard to the claim the plaintiff makes that he got no independent legal advice, a Deed of Confirmation (p. 277, Core Book 1) sets out its title "consent to deed and confirmation" (p. 280 of Core Book 1). The latter document confirms that the property in question is Brendan O'Rourke's family home and it goes on to consent on behalf of said Brendan O'Rourke to the Deed of Confirmation for the purposes of the Family Home Protection Act; Paragraph 3 states "from the legal advice which I have independently received, I am informed and fully aware that by virtue of s. 3 of the Act of 1976, the within beneficiary cannot execute the within Deed of Confirmation in respect of such, if any, beneficial estate, right, title and interest as he/she has in the said property without my prior consent in writing", claims not to have seen the Deed of Confirmation to which the consent related. He claims that while the document says that it was signed in the presence of Vanessa Byrne solicitor, he claims she was not there when he signed it and further that he was never told that the First Active might repossess his family home if the loan payments were not kept up by the mortgagor and he was never told that there was a mortgage and he did not receive any legal advice in that regard and was not aware of the loan in respect of the mortgage.

19. The plaintiff asserts that he spent considerable monies on Furness Hall and he gave extensive evidence as to how he accumulated such funds. He said he sold a house at Donadea in the County of Kildare for which he obtained €403,000, and a house at 12 The Maudlins, Naas in the County of Kildare which generated €310,000. The plaintiff outlined his financial success as the owner of a horse called "Basilea Star" (Day 3, pp. 109-111). In replies to particulars, the plaintiff asserts that the total value of works carried out by him to Furness Hall came to €1,434,829.00. However, in an effort to expedite the prolonged hearing the second and third defendants conceded an approximate valuation of €250,000 on the works carried out by the plaintiff but contended that they did not in any manner concede that such works were in reliance upon any representation made.

20. The plaintiff asserts that the uncontroverted professional opinion of Mr. O'Kane QS is that the values of the works amounted to €1.6 million (Day 11, p. 40 and also p. 100). Mr. O'Kane had prepared a Schedule which gave a total of €1,622,204.10 plus an allowance of €242,844.93 in respect of design and build/site supervision giving a total of €1,865,049.03.

21. Mr. O'Rourke Senior accepted that he had chosen to contribute an extra €1 million to the trust as additional settled property and not as a loan (pp. 310-314 of Core Book 1). The second defendant did however extract €1 million from the trust in June, 2007 and transferred it from the trust into his own personal bank account held with AIB and he admitted that he received the money but claimed that he did not know what had happened to the money thereafter. The bank facilitated the said transaction.

22. In addition, a further €2 million was claimed by the trustee to have been spent on refurbishment of the property and the trustees obtained further €1.3 million by refinancing the loan on Furness Hall and taking the proceeds thereof in the sum of €1,288,067.71,

having been transferred from Mason Hayes and Curran solicitors to the personal account of Dermot O'Rourke in AIB Naas on the 17th February, 2008. It is accepted on behalf of the second and third defendants that there had been a deficit in the trust of €200,000. (Day 2, p. 80).

23. Both Diane O'Rourke and Dermot O'Rourke accepted Dermot O'Rourke's claim that he spent over an extra €2 million on refurbishing Furness Hall as not being correct. Through his counsel Mr. O'Rourke Senior explained that he had attempted to persuade the bank to give him money based on the value of Furness Hall at the time. He pointed out on behalf of the plaintiff, that on the 26th January, 2008, the second and third defendants made a statutory declaration for the benefit of First Active to say that Furness Hall was their family home (Core Book 2, pp. 396-397). On the 7th April, 2008 however it is pointed out that they signed a First Active mortgage protection insurance waiver stating correctly that their principal residence was Keredem House in the County of Kildare.

24. It is the plaintiff's case that the obvious and transparent reason for the making of such a false statutory declaration was that to obtain a true family home declaration signed by Brendan O'Rourke would have necessitated informing the plaintiff of the transaction which was being concealed from him. The plaintiff makes much of the fact that the first piece of evidence given by the second named defendant was that he had previously been convicted of a fraud offence involving false accounting which he freely offered to the court at the start of his evidence. The plaintiff seeks to rely on this in asserting a lack of credibility on the part of the second named defendant and the plaintiff alleges that the second defendant was involved in conspiracy with the banks' lending officials to persuade the banks' credit committee to approve transactions in respect of his alleged €2 million refurbishment on Furness Hall.

25. Mr. O'Kane, quantity surveyor, was called to give evidence on behalf of the plaintiff and he explained that he had 30 years' experience as a QS and that between 2009 and 2011 he had between four and five meetings in relation to this case and that he had been involved in an arbitration concerning same. He claimed that there was a deterioration of between 15 to 20% since 2011 overall on the property. He claimed that although he participated in the arbitration on behalf of the second and third defendant that there was no conflict of interest and he said that Mr. Giles Kennedy gave him instructions on the two claims and then regarding this case. This witness admitted he was not aware as to whether the property had been in pristine condition in 2004 and he further admitted that when he was asked what contemporaneous vouching he had in relation to the works he said he had not seen any contemporaneous vouching/original vouching nor was he in a position to say what the material costs were, nor was he in a position to give evidence of the actual amounts. He accepted in the course of his evidence that the Mountview Company is not in being in 2004. He said in that regard he was relying on his solicitor. This witness admitted that he was not in a position to say how much Brendan O'Rourke spent on the property.

26. Mr. Giles Kennedy solicitor gave evidence that the second defendant on 21st September, 2006 at Killashee House in the County of Kildare indicated that the purchase of the property in question was a gift for his daughter Diane and son-in-law Brendan O'Rourke and that Brendan O'Rourke was a client of his at that time. This witness said he did not recall any mention of a trust at that time. This witness gave evidence to the effect that Diane O'Rourke never gave an indicator to him that she and her then-husband were not the owners of Furness Hall. He confirmed the position relating to the case he dealt with concerning a dispute with a painter and that the case ran over 3 or 4 days and that Lavelle Coleman solicitors were involved and that it settled finally in the plaintiff's favour. This witness said that had he found out that they did not own the property he would have written to the second and third named defendants. This witness said that the second defendant did not say anything about a trust and he said that at the time in 2006 he took instructions from Brendan O'Rourke and Diane O'Rourke to a lesser extent. The insured on the property in relation to the particular claim at that time where the second and third defendants. In relation to the first claim he accepts that he acted for the second and third named defendants and that there was a claim about a burst pipe but regarding the second claim he said problems arose on the trust and it was the first time the trust was raised. He did accept that he went to Barbados as a guest of the second and third named defendants to their property there.

27. This witness said that he acted for Brendan O'Rourke in a family law case and withdrew as there was a conflict in relation to the other matters. He said that he was not involved in family proceedings but at the time he entered an appearance in the equity proceedings. He said Brendan O'Rourke may have mentioned it to him in casual conversation but at that time he was acting for him regarding a separate dispute in the UK.

28. This witness was asked about the affidavit sworn on the 15th October and he said he saw the diary the property of Diane O'Rourke on the 30th November, 2017 and that it was the first time he had fully reviewed the file. He said simply that he did not know he had the missing diary in a box. This diary had been given to his office in respect of an entirely separate case by Diane O'Rourke.

29. Seosamh Green landscape contractor, said that he knew Brendan O'Rourke since 2004 and he was asked about Longwood Landscaping Ltd. and an invoice for €11,315 and he confirmed that he did the work in question, it concerned green waste and that Brendan O'Rourke paid him and that was in 2005/2006. He says that he gives documents to the accountant but that they were destroyed and he said that he invoiced in relation to the work and that all accounts were up to date and VAT was invoiced. He was asked about various works and he said he always got a cash or a cheque on time and that it was always the plaintiff who paid him, that maybe once or twice Diane O'Rourke paid him.

30. Mr. Anthony Ryan gave evidence of having worked as a general labourer for 20 years and he said that the place was very badly laid out for a car coming in and set out works he said he did on site and he claimed that the former spouse of the plaintiff indicated that the house was a wedding gift to them but not to say it to the plaintiff as he was too proud. This witness conceded that he had obtained a batch of signatures from people who had worked in the house but he said he did not meet Mr. Eugene Spratt and that he was given 20 of these documents and he got all the signatures but that Mr. Eugene Spratt was not at home at the time and therefore he signed Eugene Spratt's signature on the document and he knew at the time what the purposes of the letters were and he does not work for the plaintiff anymore. Mr. Eugene Spratt gave a statement dated 15th June, 2016 saying that he did not carry out any works in Furness Hall, Naas, except for a few doors which were sticking and he said he is not a contractor and did not carry out the works which were attributed to him and that it was not his signature on the document and he signed a statement for court and gave evidence to that effect. He did say that he had seen the plaintiff pay for wages for all the works which went on. He agreed that his conversation with Diane O'Rourke was a private one.

31. Mr. Kevin Keogh gave evidence as a former director of Brennans Hardware where he worked in Naas for 30 years. He agreed that the plaintiff paid for some items in cash and cheques from his builder's yard and that he would have been given receipts for roofing and timber and he said over two years it could have been €200,000 but that they only hold on to dockets for five or six years and he agreed that he did not have dockets.

32. Ms. Caroline O'Rourke Hayes sister of the plaintiff claimed that Diane O'Rourke had telephoned her to come and see the new home which she allegedly had said her father had bought for them as a wedding gift and that when she went to visit the house Diane O'Rourke reiterated that her father had bought the house as a wedding gift for her as a present. She later referred to the wedding for

herself and the plaintiff. She confirmed under cross-examination that her own father is a tax exile and that the property she lived in was not in her parents' name. Then she described her house as Wild Wood in Kilkenny as having burnt down and that had been in her husband's name and she described that as her home.

33. This witness agreed that she was not on friendly terms after the separation and that she did not want to get too involved. She denied regarding the alleged incident where files were taken from Furness Hall and put into her car. She denies any knowledge of that and said she would not go near anyone's personal documents even though it was put to her that would be confirmed in the evidence of Nicola Wright and that the documents were placed in her car.

34. Mr. Oliver Caffrey gave evidence as the prior owner of Furness Hall and he said that there had been substantial changes to the dining room, to the entrance to the driveway to the top house and that the coach house was substantially changed, that it was completely different house with balconies and terraces extended. He agreed under cross-examination that it was a very superior house but he argued that it was not finished on purchase. The contents of the brochure for sale were put to him where it was described by Lisney as in excellent condition and he said he was well aware that it was bought through a trust but did not remember the solicitor who had carriage of sale. He said that he had no idea that the second and third defendants bought the property but was evasive in not been able to remember if his solicitor explained to him the nature of the documents and agreed that it would have been his solicitor's duty to do so. In relation to his sworn declaration he said he signed without reading it and that he had no idea that the parents were the purchasers and no idea that there was a trust involved.

35. Agnes O'Rourke mother of the plaintiff gave evidence that before the wedding she attended at the family home and that she was invited to see it and told that by Diane O'Rourke that it was a present from her dad for herself and the plaintiff. She said that her son had done a lot of work to the property. She said she had no conversation with the first named defendant and she could not remember the removal of the computer and denied any involvement.

The Defence of the case and submissions

36. The second and third named defendants contend that it is clear that legal title to Furness Hall is and has been at all material times, in the names of second and third defendants. The second and third named defendants describe the within hearing as the second portion of a three modular series of actions as directed by this Court in the context of case management directions pursuant to proceedings Record Nos. 2015/63M ("the family law proceedings"), 2016/10451P ("the equity proceedings" – being the present proceedings) and 2012/9106P ("the bank proceedings"). As well as asserting a beneficial interest in the property based on his assertion of a gift to himself and to his former spouse Diane O'Rourke, equally, the plaintiff also raises the issue of proprietary estoppel. At para. 10 of the indorsement of claim he sets out "at all material times hereto, the plaintiff believed and was led to believe that the said premises belonged to the plaintiff and the first named defendant". As a consequence of this belief and acting on representations made to him by the second and third named defendants, the plaintiff claims to have undertaken either directly or indirectly, substantial works including repair and renovation works on the said premises.

37. It is common case that the second and third named defendants are a married couple who have one daughter Diane born in September 1979. The said daughter Diane O'Rourke commenced a relationship with the plaintiff in or about 2002 and commenced co-habitation with him in or about January, 2003, and married him on 7th August, 2004.

38. It is common case that between the second and third defendants that a contract for sale was entered into in respect of the property dated 9th July, 2004 where the then owner Ms. Yona Caffrey agreed to sell the said premises to the second defendant, which said contract was signed by the second defendant "in trust". The purchase price was in the sum of €3,650,000. "The Diane O'Rourke discretionary trust" was established on the 21st day of July, 2004 the settlor was the second defendant and the trustees were the second and third defendant and an initial sum of €100 was settled on the trust. The purchase of the property was funded by a €2,900,000 loan advanced by First Active (statutory predecessor of the fourth defendant) and a balance of €765,000 together with stamp duty and legal expenses (being a total sum of in excess of €1 million and furthermore all mortgage repayments were discharged by the second and third defendants), being funded by the second defendant. The loan offer from First Active in respect of this transaction by letter of 10th September, 2004 (Core document 1 immediately following p. 220), is made by Dermot O'Rourke and Perle O'Rourke as trustees of a discretionary settlement in relation to Furness Hall, Naas, Co. Kildare and is addressed "Dear Trustees". This loan offer was accepted on 13th September, 2004. The transaction closed and a deed of conveyance was executed on 16th September, 2004.

39. A number of documents were signed in connection with this purchase:-

- (i) Deed of conveyance – 16th September, 2004;
- (ii) Deed of mortgage – 16th September, 2004;
- (iii) Licence agreement – 16th September, 2004;
- (iv) Family Home Protection Act Declaration (Dermot and Perle O'Rourke) – 16th September, 2004;
- (v) Family Home Protection Act Declaration (Diane and Brendan O'Rourke) – 16th September, 2004;
- (vi) Document in relation to independent legal advice (Brendan O'Rourke) – undated;
- (vii) Deed of confirmation – 16th September, 2004;
- (viii) Consent to deed of confirmation – 16th September, 2004.

40. While the plaintiff at one point in his evidence challenged his signature on certain of these documents (having previously admitted same) and indicated an intention to call a hand writing expert in evidence, it was ultimately accepted by him that the signatures were his and no such expert was called. The plaintiff's dispute relating to these documents later related to the circumstances of their execution (venue and witnesses) but he did not dispute his signatures.

41. It is not disputed that an email was sent by Natasha McKenna solicitor of Mason Hayes & Curran Solicitors to E. Gill at Millenium Park. (the business premises of the second named defendant) on the 31st August, 2004. Three attachments were included i.e. the family home declaration document; family home declaration - Diana and Brendan.doc; memorial of deed of conveyance.doc (Core Book 1, p. 160). By letter of the 1st September, 2004, Natasha McKenna solicitor wrote to Messrs. T.P. Robinson (solicitors for the lender) stating "we refer to the above matter and confirm that we have all of the documents required in your Requisition on Title together

with the balance of the funds and stamp duty payable. In addition, all documents have been signed and sworn (but left undated) to facilitate the closing". (Core Book 1, p. 165). The referenced documents were not ultimately used in the closing of the sale due to the dating requirements of the Statutory Declarations Act, 1938. Natasha McKenna confirmed in her evidence that she was a qualified solicitor having qualified in July, 2002 and was working as an associate solicitor in property in Mason Hayes & Curran Solicitors in the summer of 2004. The first defendant advised her that he was buying a house on behalf of his daughter Diane for her benefit and asked would she do the transaction or conveyancing for it. She confirmed that the first defendant instructed her and provided her with all the loan offers with regard to the second and third defendants. Her colleague Rory Egan Solicitor who knew the defendants had initially asked her to do the conveyance, on his understanding at that stage that it was Diane who was buying the house and that he had been approached by the second named defendant to act for her. This witness confirmed in her evidence that it was always going to be a trust for the benefit of Diane although it was clear from her evidence at the planning stage that the actual structure was not fully worked out. This witness noted that there was correspondence from Rory O'Brien Solicitor, TP Robinson Solicitors who had been critical of the manner in which the conveyancing was being done and she said that everything from the 2nd and 3rd September, 2004 on was done very properly. She said she had made a mistake in getting certain documents sworn and left undated and declared it to Mr. O'Brien and she learned from her mistake in that regard. She said the day she walked around to TP Robinson's office subsequently with her closing document she said that the parties were there with her on that date. All were accepted on that dated and sworn on that date. This witness gave evidence that she certified that she knew the deponents and brought them to Mr. O'Loughlin solicitor for swearing and that Perle O'Rourke would always have stayed in the car and that it was Diane and Brendan O'Rourke whom she brought to Mr. O'Loughlin solicitor for the swearing although the evidence of Diane O'Rourke was that while she definitively met Vanessa Byrne she said there was a possibility that she may have met Natasha McKenna on one occasion this solicitor remembered meeting Diane O'Rourke. The witness confirmed that any documents signed in front of her would be explained to the individual and she said she doesn't go through matters paragraph by paragraph but she provides a synopsis as her normal practice in relation to the nature of the document and what they are signing. This witness also confirmed under cross-examination, in relation to the letter sent by her concerning the license that Diane O'Rourke would have in the property she indicated that she had advised Diane O'Rourke that what she was going to say was that maybe her husband and herself might talk about it, that this property was theirs to reside in, that it was not theirs to own and that any money they expended they would not recoup. She confirmed that she did this by way of friendly advice she was not acting with regard to that aspect and was bearing in mind that they were to get their own independent legal advice. Regarding the family home declaration and under cross-examination by the fourth named defendant concerning the family home declaration, this witness said that she gave advice to anyone in advance of them signing any declaration and that this is standard practice in this case and post this case. She said normally she would say that it is in favour of the bank as opposed to necessarily First Active but the bank who you are getting your mortgage from and she confirmed that she witnessed the execution of this family home declaration by both Diane O'Rourke and the plaintiff and she confirmed that this was in the offices of Mason Hayes & Curran Solicitors in Fitzwilliam Square. This witness confirmed that she recognised the plaintiff the minute she walked into the door she pointed to him, having been asked if she could identify him, although the plaintiff denies she ever met him. She confirmed under re-examination that the original contracts may never have been signed and she confirmed that she had seen the original document in relation to the full document pertaining to the family home declaration with the annex document and she clarified that she knew nothing of its execution but confirmed that this is the original document as was handed over whatever about the executed one. This witness confirmed that she would have executed about 400 documents in a given week at the time. This witness was asked about the original declaration at p. 380 she confirmed that that was the original of the document which the plaintiff's Counsel had opened to her with the two different reference numbers on the bottom. This document was handed in lest there be any question that the original document is not two separate documents and that this is what the bank holds.

42. The plaintiff and Diane O'Rourke resided together in Furness Hall from September, 2004. Diane O'Rourke surrendered possession to the fourth defendant in 2012. The plaintiff remains in possession at the current time and has had the benefit of the property for the last long number of years. The second and third defendants accept that the plaintiff expended monies on the property carrying out works of renovation, maintenance and repair. An approximate figure of €250,000 was accepted by the second and third defendants in this regard, without any concession regarding the issue of a gift or promise as alleged and the said figure is proposed as a "guestimate" figure.

43. The second and third defendants contend that Furness Hall was at no material time held in the name of the plaintiff or indeed of his wife Diane. The contract pertaining to the purchase (item 6 core book 1 p. 9) dated the 9th July, 2004 was signed by Dermot O'Rourke "in trust". The conveyance (item 79 core book 1, p. 240), dated the 16th September, 2004, states the purchasers to be Dermot and Perle O'Rourke. Mr. Ronan O'Brien solicitor, (who acted for the lender in the purchase transaction), referred to the normality of the existence of a trust being kept off title in a conveyancing context, which evidence was supported by the other professional conveyancing witnesses heard by the court. In terms of proof, Dermot and Perle O'Rourke purchased the property as trustees for the benefit of Diane O'Rourke discretionary trust. They referred to:-

- (a) the loan offer from First Active dated the 10th September, 2004 (core book 1 immediately following p. 220);
- (b) the mortgage dated the 16th September, 2004 (item 80 core book 1 p. 245);
- (c) the licence agreement dated the 16th September, 2004 (item 81 core book 1. p. 268);
- (d) the Family Home Protection Act, 1976 declaration of Diane and Brendan O'Rourke (item 83 core book 1, p. 274).

44. The second and third named defendants contend that that the plaintiff adduced no evidence of any completed gift having occurred, nor was any evidence ever advanced by the plaintiff that the property had in fact been gifted to him. This part of his claim as pleaded was not proceeded with and it is submitted that it could never have been as there was never any completed gift made. In terms of the evidence it is stressed on behalf of the second and third named defendants that there is no evidence by the plaintiff which supports an assertion of a completed gift in this case and the property was never transferred to the plaintiff nor to Diane O'Rourke. Contradictory evidence is available in the form of the assertion that no CAT return was made nor was CAT paid by the plaintiff. This contradicts the assertion by the plaintiff that he is a person with experience of property transactions nor did he adduce any evidence of documentation having been executed which resulted in the property having been transferred to him or Diane O'Rourke. He did sign documents however referring to the property being subject to a trust and licence and acknowledging that the document in question was for the benefit of the mortgagee. On behalf of the second and third named defendants, they stress that although the wedding speech by the second defendant clearly indicated that Furness Hall was purchased with the benefit of a mortgage (as a bank official from the lender was expressly mentioned and thanked for his role in the acquisition of the property), nonetheless the plaintiff put considerable reliance on this wedding speech in his attempt to prove that the property was gifted to him and Diane O'Rourke.

45. The defendants contend that, the words spoken by the second defendant could not support the meaning that the plaintiff sought to place on them i.e. that he had been gifted the property irrespective of any loan. It was clear from the text of the speech that

reference was made to the bank official dealing with the loan itself on behalf of the mortgagee. He conceded under cross-examination that the words in the wedding speech were contrary to his own assertions when he said "I was a bit surprised at that being brought up because I knew different, totally different. I didn't see the relevance of the house and it is just another way – sorry I'll rephrase that. First Active and John Hunt. I had never dealt with John Hunt in First Active, at that stage he was in commercial lending, as I believe he is". (Transcript Day 6, p. 142).

46. The plaintiff did give evidence of his own property dealing expertise and as such that he was aware that a person could not take out a mortgage in respect of a property owned by another party. While the plaintiff referred to meetings where a representation was made that the property or some property was being gifted to him and Diane O'Rourke, the evidence of the second defendant and Diane O'Rourke herself emphatically contradicted this. Their evidence was of a single transaction with the plaintiff after the contract was signed at which the second defendant explained that he was purchasing the property in a trust and their evidence was that it was indicated that a property was being bought for the married couple to live in but nothing further was promised.

47. The plaintiff agreed that under cross-examination that the second defendant had never offered to buy him a house mortgage free. Further it is pointed out that no such representation was ever alleged to have been made by the third defendant, the co-trustee. Diane O'Rourke was aware that she was a licensee in the property and the formal documentation supports that and that her actions were at all times consistent with that and that she believed she had licence to live there and she set about establishing her home accordingly. The plaintiff's evidence was inconsistent in this regard, in that he freely admitted he had previous dealings with property transactions yet would have the court believe that he thought property could be gifted to him and a mortgage taken out on it without documents being signed by him and without the requisite tax obligations being complied with.

48. Mr. Patrick Kelly accountant said that his daughter who is an accountant runs what was his practice and that he does not have to carry a practicing certificate, that he works in the practice and he said that he worked strictly for Mr. O'Rourke's company. Mr. Kelly, accountant confirmed on behalf of the plaintiff that he only done the business accounts but the plaintiff himself contradicted this somewhat in his evidence when he suggested that Mr. Kelly, while he had been his accountant, had ceased to be such for a period of eleven months after the marriage in terms of his personal accountancy work, and this was at the same time as the relevant features relating to this case were taking place. The plaintiff did confirm in his evidence that he discussed matters with his accountant, but that the issue of Capital Acquisition Tax did not appear to have been raised either by himself or his accountant.

49. The plaintiff admitted under cross-examination that his first house at Donadea was for sale before there was any suggestion of marriage between himself and Diane O'Rourke and that despite owning it from 2001 the plaintiff never had the property conveyed to him but let it rest in contract over a three-year period and did not have to pay stamp duty on same (transcript day 6 p. 56).

50. In respect of the property at Old Town, the evidence of Diane O'Rourke was that this was an investment and it did transpire that he had actually made a €40,000 profit in respect of same and again this property was sold on by him without ever having it conveyed into his name. The plaintiff disputed the execution of the documents concerning this case but reputable independent solicitors gave evidence of their involvement in the transactions concerned.

51. Mr. Giles Kennedy had acted as solicitor representing the plaintiff and it was his own firm which had undertaken legal services between 2009 and 2012 relating to the property on the basis that the second and third defendants were the owners of same. No explanation was forthcoming as to why if the plaintiff's alleged recollection from 2006 as he had indicated, as to the representations of a gift made then, this was not raised with the plaintiff in respect of the later services provided. Instructions were taken through the plaintiff and indeed Patrick O'Kane QS, who gave evidence on behalf of the plaintiff, had also carried out professional services to the second and third defendants on the basis that they were the owners of the property.

52. The second and third named defendants rely on evidence given by Diane O'Rourke who was 23 years of age at the time of her marriage and evidence given by the second defendant as to his concerns about her relationship with the plaintiff and the sustainability of that relationship. Evidence was heard about the breakdown of relations between Diane O'Rourke and her parents in the context of her relationship with the plaintiff and although after the engagement there was some improvement in her relationship with her parents, the second defendant's evidence told of his on-going significant reservation in that regard. In that context the plaintiff gave no reasonable explanation as to why the second and third named defendants would have gifted him a half share in an asset with a value of €3.65 million.

53. The second and third defendants contend that there can be no reliance if there is no representation on which the reliance rests. Their case is that the plaintiff carried out a retrospective review carried out many years after the event, absent contemporaneous vouching and further, that the quantity surveyor employed on behalf of the plaintiff had likewise carried out his task on the basis of the plaintiff's retrospective review.

54. The court heard evidence of Nicola Wright, the then childminder of the only child of the plaintiff and Diane O'Rourke, who confirmed the removal of files and other items of documentation from the family home by the plaintiff and by members of his family thereby, contradicting the evidence of the plaintiff's sister and mother.

55. The plaintiff has lived in the property for a long number of years at this stage and has carried on and continues to carry on business therefrom. He has housed employees in relation to his business and he and the company in which he has 100% shareholding have rented out portions of the property to third parties and received rents. Auctioneering evidence was adduced by the second and third defendants in relation to the occupation of the premises and the value of same to him in the sum of €609,966.00 up to 2017 which they say greatly outweighs any sum expended by the plaintiff in repair, renovation or maintenance.

56. The evidence relied upon by the second and third defendants as being false evidence adduced by or on behalf of the plaintiff included the following:-

(a) receipts were tendered from Brennan's Hardware in relation to which an agent of Brennan's Hardware testified were not issued by that company;

(b) documents were tendered to show a payment to a supplier, Brennan's Hardware, which an agent of the said company testified was not a genuine invoice and was on an obsolete letterhead;

(c) a witness for the plaintiff (Anthony Ryan) conceded that he had forged the signature of a purported supplier Eugene Spratt on an invoice generated by or on behalf of the plaintiff in 2014 and it is clear from Mr. Ryan's evidence that the plaintiff was complicit in this forgery (transcript day 21, pp. 13ff). It is clear from the evidence tendered that the number of invoices advanced by way of vouching of expenditure or were of like provenance to that tendered relating to Eugene

The submissions of Ulster Bank Ireland DAC – the fourth named defendant

57. The bank accepts that a number of matters are common case including, that the purchase of Furness Hall was to be, and was financed by €2,900,000.00 loan advanced by First Active, the statutory predecessor of Ulster Bank, and, as to the remaining, €765,000 (as well as stamp duty and legal expenses), by an advance to the trust by Dermot O'Rourke. The loan was duly advanced on foot of facility letter issued by First Active to Dermot and Perle O'Rourke on 10th September, 2004, and accepted on 13th September, 2004.

58. The closing of the purchase of Furness Hall occurred on 16th September, 2004. By deed of conveyance of that date, the said property was conveyed to Dermot and Perle O'Rourke in fee simple, although Perle O'Rourke was not a contracting purchaser but as in a typical conveyancing transaction, the purchaser is entitled to nominate any person to take the conveyance on closing.

59. By deed of mortgage of that date ("the 2004 mortgage"), Furness Hall was mortgaged in favour of First Active. Furness Hall was unregistered property and the mortgage pre-dated the Land and Conveyancing Law Reform Act, 2009 (which designates all mortgages thereafter to be charges on the lands), the mortgage thereof effected a conveyance of legal title therein by Dermot and Perle O'Rourke to First Active.

60. By a licence agreement between Dermot and Perle O'Rourke as licensors and Diane O'Rourke as licensee, Diane O'Rourke was granted a personal licence to reside in Furness Hall for one year with a licence to be terminable by one month's notice. By virtue of 2004 mortgage the interest retained by Dermot and Perle O'Rourke in Furness Hall was the equity of redemption or in other words, a right to a re-conveyance of Furness Hall into their names (or the names of their successors or nominees) on discharge of the sums secured by the deed of mortgage. This is the same right as most home owners of unregistered property under pre-2009 mortgages have, until the mortgages discharged by the mortgagee lender, typically following the last loan payment.

61. The Bank's contention is that in the possession proceedings, Brendan O'Rourke contends that these events concerning the remortgage vacated the 2004 mortgage, and he in terms of his locus standi in those proceedings depends on his establishing in the within proceedings, a beneficial interest in Furness Hall as against the title of Dermot and Perle O'Rourke. The plaintiff's primary claim is a claim to a beneficial interest in Furness Hall under the doctrine of proprietary estoppel. In this regard he argues that Dermot O'Rourke, although not Perle O'Rourke, make a gift of Furness Hall to him and Diane O'Rourke, and further that he expended money and carried out works on the property on the faith of that gift.

62. Reference is made to the defendant's claim in *Gonthier v. Orange Contract Scaffolding Ltd.* [2003] EWCA Civ 783 that expenditure of £51,846.33 was incurred in having works carried out and submitted among other documents were three items of evidence as follows:

- (a) Receipts from a company, A&B Fencing Works, for £2,500.00;
- (b) Documents purporting to show a payment to another supplier, Phillips Construction Limited, in the sum of £2,045.00; and
- (c) Oral evidence that another company, Sheppard Construction Limited, was paid £9,693.75.

Regard (a) above an agent of this company testified that the receipts were not issued by that company.

Regarding (b) an agent of that company testified that the document produced was not a genuine invoice and was on an out of date letterhead; under cross-examination, the defendant was forced to admit that he had paid Sheppard Construction Limited, £7,500.00 and not £9,693.75. The fourth named defendant point out that there is a striking parallel with the present case and the judgment of Lyndsey J. (Nem Diss) and the following passage is emphasised:

"the learned recorder [the trial judge] was plainly accepting that there had been documents (plural) produced by OCS (the defendant) but which had been "concocted". But there cannot be any principle by which the fabrication of documents produced to the court as part of a party's case may be excused or treated as other than serious on the grounds that the fabrication was done in order to portray "in broad terms" what the party believed to be the truth or what was the truth. A party unable to find any documentary support for the truth it wishes to assert can expect a very serious view to be taken of its conduct if, in order to suggest or support that truth, it fabricates documents. Still less can such conduct be excused, where the documents do not portray but exaggerate the truth and where their falsity is hidden from view until the very course of the hearing."

63. The fourth named defendant argues that the court is not confined to applying the clean hands maxim merely to reject false evidence, and the conduct prevents the equity, upon which the claim depends, from arising at all. Even if the plaintiff were to prove his claim in his action, the most the plaintiff could gain would be a 50% share in whatever equity remains in the property, after the Ulster Bank has been repaid the entirety of its loan which is of course a worthless claim at present, because the sums due under the loans are now a multiple of the value of Furness Hall. The Ulster Bank asserts that if the plaintiff were successful in these proceedings he then has to go to prove at the next stage, that such a beneficial interest also binds Ulster Bank or has priority over its interest as mortgagee in possession proceedings.

64. The fourth named defendant stresses that since no claim can possibly arise against Ulster Bank, if the plaintiff cannot even establish a claim against the second and third defendants for a beneficial interest, the issues have properly been divided up so that all issues of the priority of Ulster Bank's interest are dealt with separately and after these proceedings in the possession proceedings, and both this Court and the Court of Appeal have so held. In this module the issue is as to the claim advanced rather than regarding the priority of Ulster Bank title to the property.

65. The fourth named defendant contends that there was no promise or assurance and consequently there can have been no reliance. They further say that if any detriment were suffered it was more than compensated by the benefits associated with living in Furness Hall rent free for what is now a period of over thirteen years. Key elements of the evidence adduced by the plaintiff as to his and his advisor's knowledge of the ownership of Furness Hall and the borrowings thereon as well as to the alleged detriment suffered, has been shown to be unreliable and fabricated so that no equity favours his claim.

66. In both the plaintiff's pleadings, (para. 8 of the Equity Civil Bill) and in an affidavit sworn by him on 20th November, 2013 paras. 2 and 5 he asserted that he was led to believe by the second named defendant, that he had purchased a family home Furness Hall for both the plaintiff and his then spouse as a wedding gift. Particulars in possession proceedings were admitted by agreement in these proceedings and he was refused permission to amend his Civil Bill on the first day of the hearing of this matter and the reason for that was that it was deemed by the court to be an attempt to introduce issues from the possession proceedings to circumvent the fact that both the High Court and Court of Appeal had rejected Brendan O'Rourke's attempts to link the present proceedings with the present action. It was pleaded that the following passage constituted a promise or assurance from the second named defendant to the plaintiff.

"[Brendan O'Rourke] has done extremely well in his own right. He just succeeded in selling a property of his own private house for a substantial amount of money. Paddy Jordan says that if I mention his name he will give you a rebate but ah no, no, things have gone very well and they have bought a beautiful new property and we wished them every happiness in it. I was going to thank John Hunt for putting a roof over their head but he's not a joiner now, he's just involved with the First Active and he said that if I mentioned First Active, he would definitely give them a reduction in the interest rate. So I don't know where we are going with that".

67. The fourth named defendants contend that what stands out in this speech is an attempt to make Brendan O'Rourke out to be the purchaser of Furness Hall where clearly he had not purchased Furness Hall but obviously he knew that much himself. It is submitted on the contrary that what the wedding speech did make clear was that the property was acquired with funding from First Active, a detail which Brendan O'Rourke chose to ignore.

68. Brendan O'Rourke led evidence on his behalf from Mr. Patrick Kelly the family's long standing accountant who was also a guest at the wedding. In relation to what the words of the wedding speech might mean and in continuing to state that the words used meant that he was being gifted a 50% share in Furness Hall the fourth named defendant contends that the credibility and reliability of the evidence of Mr. O'Rourke and his witness Mr. Kelly must be seen in the light of this attitude to the facts. Interestingly it is submitted that Brendan O'Rourke was led through detailed evidence suggesting a prior promise of Furness Hall which is interpreted by Ulster Bank as implying that the plaintiff's own legal advisors did not share the same view as himself of what the wedding speech meant. Such an alleged earlier promise belatedly formed part of the plaintiff's case and as such was contested by all of the witnesses alleged to have been involved, in particular Dermot O'Rourke and Diane O'Rourke.

69. With reference to Day 3 p. 24 of the transcript, the plaintiff admitted his signature on these documents but by day 6 of the transcript pp. 150-159 he had changed his evidence and denied all these signatures. On day 10 of the trial he changed his evidence again and admitted all of the signatures on the documents were his. (pp. 7-8, pp. 83-87).

70. The plaintiff attempted to say that the signing of these documents was to do with insurance and refused to accept that they were anything to do with the title of the property. Two solicitors were called while there was an attempt over a lengthy period to impugn their general credibility yet what all their attestation was concerned with was the execution of the documents and the plaintiff admitted that he had signed them. He disputes the location and time.

71. The fourth named defendants' case is that his evidence is incredible that he could have become co-owner of a house worth at the time €3.65 million without signing a single document pertaining to its title and only insurance documents on his case regarding the four properties he was very vague and he claimed that his solicitor did all the work and he was told to sign and that he paid those people he was told to pay. He said that Mr. Michael O'Neill was his solicitor in respect of those transactions but it is submitted that the said Mr. O'Neill solicitor did not present himself in court to give any evidence to support the plaintiff's proposition.

72. The banks contention is that had an actual gift of €3.65 million been given to the plaintiff and to his then spouse Diane O'Rourke, that would have led to a Capital Acquisition Tax liability of 20% on the value of the gift which would have been approximately €400,000 and that if it had been a gift there would have been Capital Acquisition Tax payable in 2005 and a return made. The plaintiff said that he made no tax return within that timeframe. The fourth defendant calls upon the court to draw the inference that the plaintiff knew full well he was not in receipt of any gift and that that could be the only explanation for the lack of a CAT return and further calls upon the court to note his lack of candour about his tax affairs and contends that this gives the plaintiff no shelter from such inference. Reference is made to his affidavit of the 7th May, 2013 in the possession proceedings, which was opened in the course of his cross-examination, showing that he was well aware of the tax consequences of property transactions. The fourth defendant referred to the evidence of the plaintiff when he said that in late 2005 he discussed with his then wife the possibility of selling Furness Hall and his explanation for no sale was that his wife had said to him it could not be sold for tax reasons involving her father and he then indicated that he let that matter drop. The fourth named defendant contend that it is open to this Court to find that inconsistent and incredible in that he would have let such a matter drop if he really believed that he was co-recipient of a gift.

73. The fourth defendant also referred to evidence given by the plaintiff of a conversation with his brother-in-law at that time David that Furness Hall had no realisable value yet despite David's view on that in conversation with the plaintiff, the plaintiff made no claim nor did he assert any claim whatsoever for another three-year period. The fourth named defendants note the credible situation where it is clear from the evidence that in 2009 Giles J. Kennedy & Co. solicitors gave advice in relation to Furness Hall in that that particular firm:-

(a) acted for the plaintiff's father for many years earlier and still do;

(b) acted for the plaintiff in family law proceedings;

(c) acted for plaintiff in the possession proceedings from 2014 on; and

(d) acted between 2010 and 2012 in insurance claims arising out of both flooding incidents in Furness Hall in 2009 for Perle and Dermot and O'Rourke as the insured owners of Furness Hall and as borrowers from Ulster Bank.

74. The fourth defendants contend that it is clear from the evidence that between 2009 and 2012 Mr. Kennedy solicitor took instructions from Dermot and Perle O'Rourke to act for them as owners of Furness Hall. He sent them a s. 68 letter on the 22nd December, 2009 which proves that he took instructions on their behalf and for them. The solicitor in question knew that Furness Hall was owned by Dermot and Perle O'Rourke and that the trust when he became aware of the trust sometime after the second flooding event, was a discretionary trust, meaning, as he will have understood, that the beneficiaries of the trust had no interest therein, only the hope that one or other of them might have had the property appointed to them in the future and he also knew that Furness Hall was mortgaged to Ulster Bank.

75. The fourth named defendant contends that it was in 2012 when the possession proceedings began that the plaintiff asserted any claim and changed solicitors despite Mr. Kennedy's detailed knowledge about Furness Hall and his then solicitors sent a letter dated the 6th July, 2012 and on 3rd August, 2012 which made no reference to any gift. The plaintiff admitted that he didn't instruct them that he was an owner or part owner of the property but simply that he had spent money on the property and considered himself entitled to a beneficial interest on that basis alone. He later asserted a gift and attempted to assert priority over Ulster Bank.

76. Mr. Kennedy's firm re-emerged as solicitors for the plaintiff, being the fourth set of solicitors in 2014, and the case is made running directly to the terms of correspondence from 2010 to 2012, on behalf of the plaintiff. He alleged further that his files were stolen but he never made a complaint to the gardaí in contrast to his then wife who immediately reported that the plaintiff had entered Furness Hall and removed all the files, to An Garda Síochána nor did Brendan O'Rourke cause any letter to be sent from his solicitor and no action of any kind was taken to recover this alleged documentation.

77. In relation to the issue of reliance and the second limb of the test the obvious involvement of First Active demonstrate that the plaintiff could not logically have relied upon the alleged assurance in deciding to carry out the works in question. On his own admission he came to know about bank borrowings in 2007 and the fact that there was no equity whatever in the property in 2009 yet it was only three years later that he voiced an interest in any claim to the interest in the property. It is submitted therefore that such works as he may have carried out such as maybe proved where the endeavour of a married couple for whom this property was their home. They lived there rent free for five years together and the plaintiff has enjoyed sole possession thereafter for a further eight years. It is submitted Brendan O'Rourke and Diane O'Rourke spent money on improving the property regardless of any mortgage because the improvement delivered immediate benefits to them and because they did not anticipate that the recession might set the value of those improvements at nought or that their marriage might fail. The court is invited to conclude as a finding of fact that the motivation for any works and expenditure carried out and incurred by Brendan O'Rourke was precisely the same as that which caused Diane O'Rourke supported by her parents, to expend equally substantial sums, not any promise or assurance that a gift had been made of Furness Hall, but rather the immediate enjoyment that such improvements brought to the property as well as the hope that Dermot O'Rourke's fortune would continue to improve and that he would in the future repay the mortgage loan due on the property and gift the property to them as a on un-encumbered asset. The benefits of the improvements were enjoyed by them both for a time and by Brendan O'Rourke for longer.

78. The plaintiff has had rent free occupation for thirteen years of the property where he has excluded all other persons, despite his alleged interest extending to just 50% of the title. In terms of vouching documentation only a fraction of witnesses came to give evidence in terms of proving documentation and under cross-examination the plaintiff agreed that far from being the documents of suppliers these were for the most part self-prepared narratives by the plaintiff and his friend Anthony Ryan ascribing values to the works as if they were quantity surveyors. The quantity surveyor engaged by the plaintiff to give independent testimony to the court as to the value of the work done, relied on that documentation given to him by the plaintiff in March, 2017 as the basis for his assessment – an approach which drew sharp criticism regarding Mr. O'Kane's role as an expert witness in other proceedings in which Mr. O'Kane gave evidence as a professional witness in 2016 and Mr. O'Kane in this case accepted that he had not carried out any examination of the vouching documentation but simply took Brendan O'Rourke's scope of works and valued it.

79. It is submitted that there are indisputable examples of fabrication of evidence and three examples in particular are highlighted by the fourth named defendants.

(a) The document put forward as evidence of business with Brennans Hardware was shown to have been created with an out of date stamp and a layout which Mr. Alfred Brennan of that company testified did not accord with a document emanating from that company.

(b) The admitted forging by Mr. Anthony Ryan of Eugene Spratt's signature on an alleged "vouching document" created by Brendan O'Rourke but presented as if it were Eugene Spratt's own. (transcript day 13, pp. 54-60).

80. It is urged upon the court that concocted documents, forged signatures, misrepresentations of expenditure opacity of testimony as to the sources of funds, should deprive the plaintiff of any indulgence of this Court. The court is asked to come to a factual conclusion on the following:-

(a) The plaintiff gave conflicting evidence himself as to when he discovered borrowings with First Active in relation to the property, at one point saying it was between 2011 and 2012, then 2010, then 2009 (transcript day 10, pp. 31-35) and this being starkly in contrast with an affidavit sworn by him dated 20th November, 2013 that he knew about the borrowings in 2007 even though he purported to rely on the transcript of the wedding speech back then which clearly indicated existence of borrowings from First Active.

(b) The conflicting evidence where he said he first got sight of the mortgage issue with First Active in discovery in 2014 but his own solicitor's letter two years earlier on 3rd August, 2012 referred clearly to the second mortgage.

81. He gave conflicting evidence in 2014 he asserted that was when he first became aware of the trust but following cross-examination he referred to 2009 as the year even though his affidavit of 20th November, 2013 referred to the trust as having been created as part of an alleged gifting process in 2004.

82. The documents surrounding the acquisition of Furness Hall and the trust show the bank borrowings including documents signed to confirm his understanding of the transaction. The plaintiff testified that he saw these for the first time in discovery in the possession proceedings in 2014, when in fact all of those documents were exhibited in an affidavit of Naomi Williams in the possession proceedings sworn on 20th February, 2013.

83. The conflicting evidence of the plaintiff and Patrick Kelly his own accountant and his failure to produce one single piece of evidence as to what if any tax returns of any sort were ever made by him, is deemed to be significant by the first named defendant.

84. The necessary conclusion that must be drawn from any finding that Brendan O'Rourke was the beneficiary of 50% of a gift of a house worth €3.65 million in 2004 namely that a fraud had been committed on the Revenue in as much as no Capital Acquisition Tax was paid on the supposed gift.

85. Evidence was adduced on behalf of the plaintiff to show his allegedly extensive earnings from a horse called "Balize Star". Much detail about the intricacies of betting on horses was put in evidence. This was to the effect that he had sufficient monies to spend what he claimed to have spent on Furness Hall. Much evidence was also adduced in relation what he says where loans to Smart Telecom and he mentioned his loan of some of the proceeds of the Donadea House which he sold for €400,000, to Smart Telecom but

that he could not identify from which accounts and he said all records had been stolen. With regards to the proceeds of sale of the property known as the Maudlin he described not living in it since 2001 yet between January 2003 and July 2003 he referred to it as "my home". He agreed that he moved to the cottage at Keredem House in July 2003 with Diane O'Rourke.

The law

86. Among the legal submissions made is the contention by the second and third named defendants to the issue that the plaintiff adduced no evidence of any completed gift having occurred, in circumstances where the plaintiff never advanced the case/evidence that the property had in fact been gifted to him although that was pleaded. Reliance is placed on *Re: Wilson, Grove-White v. Wilson* [1933] I.R. 727 where Johnson J. states:-

"A gift is a gift and of course if a donor, while expressing an intention to give something and taking certain steps in the direction of giving it has not gone the whole way, the expectant donee has no equity to compel the completion of the gift. This is good sense and good law." (at p. 739).

87. Proprietary estoppel is pleaded and in relation to the judgment of White J. in *Finnegan v. Hand* [2016] IEHC 255 (quoting from Biehler "*Equity and the Law of Trust in Ireland*" (2016) (6th Ed., p. 831):-

"As Lord Walker commented in *Thorner v Major* [2009] 1 WLR 776 at 786 the doctrine of proprietary estoppel is based on three main elements; a representation or assurance made to the claimant; reliance on it by the claimant; and detriment to the claimant in consequence of his (reasonable) reliance. However, as Robert Walker L.J. made clear in the course of delivering his judgment in the decision of the Court of Appeal in *Gillett v. Holt* [2001] Ch. 210 at 225, the doctrine cannot be treated as if it can be 'subdivided into three or four watertight compartments'. As he stated 'the quality of the relevant assurances may influence the issue of the reliance' and 'reliance and detriment are often intertwined'. While it must also be borne in mind that the doctrine of unconscionability has come to play an increasingly significant role."

88. In *Ramsden v. Dyson* (1866) LR 1 HL 129 the doctrine of proprietary estoppel was explained as follows:-

"If a stranger begins to build on my land supposing it to be his own and I perceiving his mistake abstain from setting him right and leave him to persevere in his error, a Court of Equity will not allow me afterwards to ascertain my title to the land on which he has expended money on the supposition that the land was his own. It considers that when I saw the mistake into which he had fallen it was my duty to be active and to state my adverse title and that it would be dishonest in me to remain wilfully passive on such an occasion in order afterwards to profit by the mistake which I might have prevented.

But it will be observed that to raise such an equity two things are required. First that the person expending the money supposes himself to be building on his own lands and secondly, that the real owner at the time of the expenditure knows that the land belongs to him and not to the person expending the money in the belief that he is the owner. For if a stranger builds on my land knowing it to be mine, there is no principle of equity which would prevent my claiming the land with the benefit of all the expenditure made on it. There would be nothing in my conduct, active or passive, marking it inequitable for me to assert my legal rights."

89. The 1880 authority of *Wilmot v. Barber* [1880] 15 Ch. D96 (cited by Finlay P. in *Smith v. Ireland* [1983] ILMR 300 and five criteria which had to be satisfied to give rise to the equity which were set down:-

- (a) The person relying on the alleged equity must have made a mistake as to his legal right;
- (b) That person must have spent money or done something on the faith of his mistaken belief;
- (c) The person entitled to the legal right must be aware of his own rights;
- (d) That person must know of the others mistaken belief as to his own rights;
- (e) That person must have encouraged the other in the expenditure of the money or in the doing of other acts, either directly or by refraining from asserting his own legal rights.

90. They assert therefore that the plaintiff must prove that a representation or assurance was made to him and was relied upon by him and that he suffered detriment in consequence of such reasonable reliance that each of these three elements must be proved by him if a beneficial interest arising from proprietary estoppel is to be established although the interplay between each requirement will vary dependent on the facts arising and each case is fact dependent. No evidence is led of any representations made by the third defendant although the plaintiff does allege representations made by the second defendant. Spencer Bower considers the issue of:

"Whether an equity is generated where one or more, but not all, of the trustees are responsible for Is change of position. The general rule is that trustees must all join in decisions if they are to be binding on their beneficiaries."

91. In *Felidan v. Christie-Miller* [2015] EWHC 87 Sir William Blackburne confirmed the unanimity principle in relation to the trustees it was found that it was not sufficient to plead that an individual appeared "to be speaking on behalf of all three trustees".

92. It is submitted that any representation being made by the second defendant would be insufficient to bind the other trustee in respect of whom there was no evidence of any representation or assurance. In McGuinness J. in *C.D. v. JDF* [2006] 1 ILRM 37 where she found that "there must actually be a promise or at least a reasonably clear direct representation or inducement of some kind" and that it was not sufficient to assert that something was permitted to happen or that third parties looking at this situation thought that a particular outcome was likely. Walker cited with approval the dictum of Hoffman L.J. in *Walton v. Walton* Court of Appeal 14th April, 1994 "the promise must be unambiguous and must appear to have been intended to be taken seriously. Taken in its context, it must have been a promise which one might reasonably expect to be relied upon by the person to whom it was made."

93. Blayney J. in *Haughan v. Rutledge* [1988] I.R. 295 where he said:-

"I consider that the plaintiffs laid out money on the construction of the track in the hope and expectation that the defendant would continue to make lettings of the track to them, but as that hope and expectation was not created or encouraged by the defendant, the plaintiffs have no claim which can be enforced at law or in equity."

94. The defendants contend that the words spoken by the second defendant could not support the meaning that the plaintiff sought to place on them i.e. that he had been gifted the property irrespective of any loan. It was clear from the text of the speech that reference was made to the bank official dealing with the loan itself on behalf of the mortgagee. He conceded under cross-examination that the words in the wedding speech were contrary to his own assertions as already referred to herein.

95. It is further submitted that since proprietary estoppel is an entirely equitable doctrine and relief is discretionary, it is vulnerable to all the usual equitable defences and that thus in seeking equity, one must do equity, one must come with clean hands and must not be guilty of laches *Haughan v. Rutledge* [1988] I.R. 295 is referred to already herein and indeed Hardiman J. in *Shelly-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232 which is referred to in dealing with the general application of these principles in respect of false or exaggerated claims where he stated:-

"It appears to me that a plaintiff who is found to have engaged in deliberate falsehood must face the fact that a number of corollaries arise from such finding:-

(a) the plaintiff's credibility in general, and not simply on a particular issue, is undermined to a greater or lesser degree;

(b) in a case, or an aspect of a case, heavily dependent on the plaintiff's own account, the combined effects of the falsehoods and the consequent diminution in credibility mean that the plaintiff may have failed to discharge the onus on him or her either generally or in relation to a particular aspect of the case;

(c) if this occurs, it is not appropriate for a court to engage in speculation or benevolent guess work in an attempt to rescue the claim, or a particular aspect of it, from the unsatisfactory state in which the plaintiff's falsehoods have left it."

96. No claim is or could be lawfully made by the plaintiff to a beneficial interest in the property based on contribution simpliciter. The law in respect of acquisition of a beneficial interest in property by way of a resulting trust based on contributions towards works on premises including works of repair and renovation is clear and requires specific agreement as between the parties that the party carrying out the works will be compensated for it and there is no evidence of any such agreement in the instant case. Additionally, there is no inequity in the present instant in circumstances where the plaintiff personally and to his business, has had the benefit of the property for almost fourteen years including, as he accepted in his evidence, the receipt of rental income therefrom. In the context of the proven falsehoods the case put up by the plaintiff, these must carry significant weight in the assessment of the case in circumstances where the second and third named defendant take the point of view that the plaintiff's case should be dismissed in full. Their position is that none of the elements of the equitable claim which he asserts is present and in addition and without prejudice to same, the plaintiff tendered false evidence to the court showing lack of clean hands and a false exaggerated claim which has extended the hearing over a prolonged period which ought to preclude him from succeeding in any such equitable claim.

97. In the context of the fourth named defendant's case, outlining the law relating to proprietary estoppel also, it is contended that there must be an assurance or promise made or given to the plaintiff by the owner of the property that the plaintiff had or would get such interest in the property and secondly, it must be shown that the plaintiff relied on that promise. Thirdly, it must be shown that the plaintiff has acted to their detriment in relying upon the assurance such that it would be unconscionable for a promisor to resile from the promise or assurance in reliance upon their strict legal rights. *Thorner v. Major* [2009] 3 E.R. 945 at 951 has been approved in this jurisdiction. (*Naylor v. Maher* [2012] IEHC 408 O'Keeffe J. and *Finnegan v. Hand* [2016] IEHC 255 White J.) as a clear statement of the principles applicable.

98. Walker J. in the case of *Gillette v. Holt* [2001] CH. 210 at 225 said that it was important to note that the doctrine of proprietary estoppel cannot be treated as subdivided into three or four water tight compartments "... the fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of that doctrine. In the end the court must look at the matter in the round".

99. Reliance is placed on *Sledmore v. Dalby* [1966] 72 P&CR 196 which stresses the need for proportionality relying on *Commonwealth of Australia v. Verwayen* (1990) 95 ALR 321, to the effect that the end result must be a just one having regard to the assumptions made by the party asserting the estoppel and the detriment which he has experienced.

100. In *Sledmore v. Dalby* the court decided that it would be unreal to say that the defendant had suffered any injustice in that he expended money over a two year period upon his then family home and he and his wife fully enjoyed the benefits of such expenditure and that he enjoyed fifteen years of rent free occupation of the property by the same token it could not be properly said that there anything unconscionable about the plaintiff in those proceedings seeking the possession of the property in question.

101. With reference to Scarman L.J. in *Crabb v. Arun District Council* [1976] CH. 179 (at 198) and repeated in countless later decisions, the appropriate remedy is noted as the minimum equity to do justice to the plaintiff.

102. The fourth named defendant argues the court is not confined to applying the clean hands maxim merely to reject false evidence; the conduct prevents the equity, upon which the claim depends, from arising at all.

103. The fourth named defendants also rely on *Shelly-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232 as set out in para. 98 herein and on *Goldsmith v. Sperrings Ltd.* [1977] 1 WLR 478 and *Arrow Nominees v. Blackledge* [2000] 2 BCLC 169 and he noted that the courts have a power and duty to protect their own processes from being made the vehicle of unjustified recovery and in a proper case this can be done by staying or striking out the plaintiff's proceedings.

Findings of Fact

104. The court accepts and it is not in dispute that on the 10th June, 2004 Dermot O'Rourke (in trust) "agreed to purchase Furness Hall for a sum of €3.65 million". It is not disputed that he paid a booking deposit of €70,000 and the contract for the sale dated 9th July, 2004 show the purchaser as Dermot O'Rourke (in trust). This Court accepts that the draft sheet as generated by First Active (John Hunt, Head of Commercial Business) for a mortgage dated 13th July, 2004 indicated that the property was to be acquired by Dermot and Perle O'Rourke as trustees for the benefit of their daughter Diane O'Rourke and the amount of the facility was to be €2.92 million. This Court accepts the evidence in full of Dermot O'Rourke particularly with reference to his evidence that he had concerns about the marriage between his daughter Diane and the plaintiff (Transcript Day 19, p. 31).

105. The second named defendant made it clear that there was a possibility of a transfer in the future but that until he was sure the marriage would last there was no question of him giving beneficial ownership to anybody. This is very credible evidence in the light of

the acceptance by the plaintiff that Diane O'Rourke, at the time she began cohabiting with the plaintiff, was estranged from her parents for a considerable period of time. This Court accepts that in all these circumstances the fact that the house was purchased in trust was completely understandable. This Court accepts the evidence of Diane O'Rourke that she understood that she would have been given a licence to occupy the property on the terms set out in correspondence from Paraic Madigan solicitor of Matheson Ormsby Prentice solicitors as referred to in para. 6 of this judgment. It was a property which was to be purchased in a tax efficient manner. This Court accepts the evidence of Ms. Natasha McKenna Solicitor and the documentary proof thereof dated 31st August, 2004 that she had written to Diane O'Rourke explaining the situation that there was to be a discretionary settlement and explaining the full implications of that if Dermot or Perle O'Rourke had ever become bankrupt, that the property might be repossessed and she would not have any claim to it and that for all intents and purposes she would not have a claim to the property and the situation might occur where Dermot and Perle O'Rourke might never transferred the property to her and that any monies spent on the house would be for the benefit of her parents and she would have no claim to same. The letter was summarised setting out that the property was theirs to reside in, was not theirs to own and that any money they expended they would not recoup. (Day 23, p. 101).

106. This Court notes the evidence of Ms. McKenna that she did not provide legal advice to Brendan O'Rourke and does not accept the contention that Diane O'Rourke concealed the reality of this from her husband. At that time, the husband had a long history of involvement in property transactions and in running a business and business affairs and this Court does simply not accept that he was not aware of the import of him having signed documents which occurred. Mr. Kelly accountant stressed that he was an accountant to the business affairs and accounts of the plaintiff.

107. This Court finds that it was quite clear from the evidence that the plaintiff's Donadea property in the County of Kildare was for sale before there was any suggestion of marriage between himself Diane O'Rourke. The fact that he let that property rest in contract for three years and therefore did not have to pay stamp duty on the said property shows an awareness of property dealings.

108. Another element of inconsistency arises in the replies to particulars of the 31st October, 2014 in the bank proceedings which asserted a loss of €100,000 regarding the Old Town property, but in evidence the plaintiff accepted that he had made a profit of €40,000 in respect of the property. Again he managed to sell that property without having had it conveyed into his name.

109. Inconsistency further arises in that Mr. Giles Kennedy solicitor agreed that he was giving legal services regarding Furness Hall between 2009 and 2012 to the second and third named defendant. This belies a notion that the plaintiff did not realise until 2009 that the property was in a trust and further the court notes that Mr. Kennedy acted for the plaintiff in these proceedings in those circumstances and sent a s. 68 letter to the second and third defendants on the 22nd December, 2009.

110. It is hard to understand how Patrick O'Kane quantity surveyor who gave professional services to the second and third defendants on the basis that they were the owners of the property, attempts to give evidence on behalf of the plaintiff ignoring the possibility of a conflict of interest.

111. This Court finds that both the plaintiff and Mr. O'Kane QS produced documents without any or any appropriate level of evidentiary proof in relation to what they say was expended by the plaintiff on the property. Estimates without proof are simply of no use.

112. This Court accepts that the first piece of evidence given by Dermot O'Rourke was that he had had a difficulty and was appropriately sanctioned in relation to a financial matter in the past. The witness made no attempt to disguise the issue and was totally up front setting it out at the start of his evidence. The court accepts that while he borrowed a further €2 million and claimed to have spent it refurbishing the property, the court accepts that the trustees obtained €1.3 million by refinancing the loan on Furness Hall and taking the proceeds of €1,288,067.71 and that that was transferred into his personal account in AIB Naas on the 13th February, 2008 and he accepts that there is a trust deficit of €200,000 approximately, and that same was accepted on Day 2 of this hearing.

113. It is quite clear that the legal title to Furness Hall is and has at all material times been in the name of the second and third defendants. The role of this Court in this case must centre on whether the plaintiff had put forward a valid claim.

114. This Court accepts the background facts as set out as not been disputed or common case at pp. 10, 11, 12, 13 and 14. The court notes that the plaintiff does not accept the concessionary figure of €250,000 as representing monies expended by him on the said property and has a claim of approximately €1.8 million in respect of works allegedly carried out by him and monies expended.

115. This Court notes and finds that the property was never transferred to the plaintiff or indeed to Diane O'Rourke. Neither of them paid CAT on the property for example. There was no completed gift. The evidence of Diane O'Rourke and of her father is accepted in relation to the manner in which the trust was set up which was a place for the married couple to live in and nothing further was promised. Diane O'Rourke's behaviour at all times in relation to the property is consistent with her belief which this Court accepts, that she had a licence to live there. The manner in which she returned the keys to the fourth named defendant is consistent with that belief in all the circumstances. The plaintiff contention is inconsistent and is simply not believable that he thought the property could be gifted to him and a mortgage taken out on it without documentation being signed by him and without the requisite tax obligations being complied with, had he actually received such a gift.

116. This Court accepts the evidence of Nicola Wright who was then a childminder of the only child plaintiff and his former spouse who confirmed the removal of files and other documentation and items from the family home by the plaintiff and members of his family directly contradicting what was evidence which this Court found evasive on the part of both of the plaintiff's sister and of his mother in this regard as fact.

117. Anthony Ryan, conceded that he had forged the signature of a purported supplier Eugene Spratt on an invoice which was generated by or on behalf of the plaintiff in 2014 and it is clear from Mr. Ryan's evidence that the plaintiff was complicit in this forgery (Transcript Day 21, pp. 13ff). Eugene Spratt provided a statement signed by him refuting that he had carried out the works attributed to him and confirming that he had not signed the document presented as his signature by the plaintiff.

118. It is quite clear that the closing of the purchase of Furness Hall occurred on the 16th September, 2004 when the property was conveyed to the second and third defendants in fee simple, although the third named defendant was not a contracting purchaser but as in a typical conveyancing transaction, the purchaser is entitled to nominate any person to take the conveyance on closing.

119. The 2004 mortgage of Furness Hall was in favour of First Active Building Society. It was unregistered property and it pre-dated 2009 Land and Conveyancing Law Reform Act which designates all mortgages thereafter to be charges on the land and the mortgage effected a conveyance of legal title by the second and third named defendants to First Active.

120. This Court accepts that by a licence agreement between the second and third defendants as licensors and Diane O'Rourke as licensee, she was granted a personal licence to reside in Furness Hall and this Court finds that the interest which the second and third named defendants retained in the property was the equity of redemption i.e. a right to a reconveyance of Furness Hall into their names (or into the names of their successor or nominees) on discharge of the sums secured by the Deed of Mortgage.

121. This Court accepts that what happened subsequently was the settling of €1 million on the trust on the 13th July, 2006 and then later by facility letter of the 14th January, 2008 a replacement loan consisting of a facility in the sum of €2,920,000.00 which was a renewal of then existing facility and further an equity release of €1,300,000 to be secured on the property and that offer was actually accepted on the 29th January, 2008. €4,220,000.00 was then drawn down to replace the previous facility in 2008 with a further mortgage on the 18th February of that year when they again mortgaged Furness Hall in favour of First Active.

122. This Court accepts the contention of the fourth named defendants that there was neither promise nor assurance nor reliance nor was any detriment suffered on the part of the plaintiff and that the balance of compensation by benefits associated with living in the said property rent free for a period of 13 years. Unfortunately for the plaintiff his evidence is unreliable, and in some instances as set out herein is fabricated and no equity could favour his claim.

123. Unfortunately for the plaintiff despite his plea at para. 8 of the Equity Civil Bill and despite an affidavit having been sworn by him at paras. 2 and 5 of that affidavit of 20th November, 2013 he attempts to prove that the second named defendant led him to believe that Furness Hall was purchased by Dermot O'Rourke for both Brendan O'Rourke and Diane O'Rourke as a wedding gift. The particular passage relied upon from the speech, of Dermot O'Rourke at the said wedding, the transcript of which is agreed and admitted as an agreed note make it clear that it is an attempt to make Brendan O'Rourke out to be the purchaser of the property where he clearly had not purchased same but he knew that himself. As well as the fact that it alludes to First Active and the fact that the property was acquired with the assistance of First Active which cannot be ignored.

124. As the case progressed this Court found that the plaintiff no longer disputed, as he had earlier, that he executed three documents relevant to the conveyancing transaction in 2004 and he finally admitted that he was a signatory on three important documents:-

(a) the family home declaration dated 16th September, 2004;

(b) a consent to Diane O'Rourke's deed of confirmation incorporating confirmation of having taken independent legal advice dated 16th September, 2004; and

(c) a further undated confirmation of independent legal advice."

This admission that he had admitted all the signatures on the documents is finally made on Day 10 of the trial (Transcript, pp. 7-8, 83-87).

125. This Court accepts and finds that the plaintiff had to have known what the documents referred to because he was of full-mind and was a fully mature adult at the time and that he is bound by what he signs even if he does not read the documents. This Court therefore finds that the plaintiff signed documents plainly referring to the existence of the trust, the existence of a licence, and the fact that First Active were involved which he knew anyway from the wedding speech in relation to the purchase of Furness Hall. The plaintiff despite the fact that the two solicitors involved were questioned as to their credibility, the reality of the situation is that documents were executed and the plaintiff admitted that he had signed them although he continued to dispute location and time.

126. This Court takes into account in coming to this conclusion the fact that the plaintiff has been in business since the 1990s and that he had bought and in some cases sold a number of houses prior to his wedding and was therefore involved beforehand in the execution of deeds of title, mortgages, loan agreements, statutory declarations and the court therefore rejects his claim to be ignorant about signing documents around conveyancing transactions. The court notes and gives some weight to the fact that the plaintiff did not call Mr. Michael O'Neill his then solicitor in respect of the aforementioned transactions.

127. This Court draws the inference that Brendan O'Rourke knew full well that he was not in receipt of any gift in relation to Furness Hall and that that is the only explanation for the lack of a CAT return and his lack of candour about his tax affairs gives him no shelter from the said inference. His affidavit of 7th May, 2013 in the possession proceedings which was open in the course of his cross-examination shows that he was well aware of the tax consequences of property transactions.

128. The court sees a further inconsistency in his argument that in 2007 he said that he wished to sell the property and discuss same with his wife but that she explained to him that it could not be sold because of tax reasons involving her father and that he let the matter drop. This is inconsistent with his contention that if he had believed at that point he was co-recipient of a gift that he would have let the matter drop in that manner.

129. In addition, the court finds that between 2009 and 2012 given that his present solicitor Mr. Giles Kennedy acted for the second and third named defendants in relation to the second insurance claim, he could not have been unaware of the existence of the trust.

130. The plaintiff's position changed somewhat over the years in that he caused a letter to be sent dated 6th July, 2012 and a further letter on the 3rd August, 2012 which made no reference to any gift and he admitted that he did not instruct his solicitors at that time that he was owner or part-owner of the property but simply considered himself entitled to a beneficial interest on the basis of what he said he allegedly spent on the property but yet he later asserted a gift and attempted to assert priority over Ulster Bank.

131. This Court notes and accepts that the former spouse of the plaintiff had made a complaint to the gardaí about the removal of documents from Furness Hall but even though the plaintiff complained that files were stolen he made no complaint to the gardaí about this, nor did he cause a solicitor's letter to be sent nor did he take any action of any kind to recover any such documentation. This Court concludes that no gift or promise or assurance equating to such a gift was made in relation to Furness Hall by the second and third named defendants.

132. This Court draws an inference from the fact that although the plaintiff claims to have come to know about bank borrowings in 2007 in relation to the property although there was no equity whatsoever in the property in 2009, it was only three years later that he voiced an interest in any claim in an interest to the property. This Court is entitled to infer and so infers that the reason for the expenditure by both the plaintiff and his wife on the property such as it was, was for their immediate enjoyment that such improvements brought to the property as well as the hope that in the future Dermot O'Rourke might repay the mortgage loan and might gift the property to them as an unencumbered asset. They both enjoyed these improvements for a few years and the plaintiff

for many years thereafter, living rent free in occupation for thirteen years of the property where he has excluded all other persons despite his alleged interest extending to just 50% of the property.

133. Unfortunately for the plaintiff the fabrication of evidence, the creation with an out-of-date stamp which Mr. Alfred Brennan, Brennans Hardware testified did not accord with a document emanating from that company, and the further admitted forgery by a Mr. Anthony Ryan, of Eugene Spratt's signature on an alleged vouching document "created by the plaintiff but presented as if it were Eugene Spratt's own, amount to concocted documents, forged signatures, representation of expenditure, all of which must deprive the plaintiff of any indulgence of this Court.

134. Unfortunately for the plaintiff who waived in his evidence saying that between 2011 and 2012 later, referring to 2010, then, 2009 all of which contrasted with an affidavit sworn by him of the 20th November, 2013, as dates when he asserted he knew about the borrowings in 2007 even though he relied on the transcript of the wedding speech which clearly indicated borrowings from First Active. Unfortunately, the plaintiff's evidence makes no sense when at one point he said he got sight of a mortgage issue with First Active in discovery in 2014 yet his own solicitor's letter dated 3rd July, 2012 referred to the second mortgage.

135. The plaintiff's affidavit of the 20th November, 2013 referred to the trust having been created as part of the alleged gifting process in 2004. The plaintiff gave conflicting evidence when he asserted that in 2014 it was the first he became aware of the trust although he referred back under cross-examination to 2009 as the year despite the existence of his affidavit of the 20th November, 2013.

136. The court has noted that in the possession proceedings the affidavit of Naomi Williams sworn on the 20th February, 2013 referred to all the documents regarding the transactions in relation to the acquisition of Furness Hall and the trust including the documents signed to confirm his understanding of the said transaction.

137. Following the reasoning of Hardiman J. in *Shelly-Morris* it is certainly not in order for the court to engage in speculation or guess work in an attempt to rescue a fraudulent claim such as this is. The plaintiff's falsehoods have left it in a sorry state. The plaintiff is simply not a credible witness nor are many of the witnesses called on his behalf and this case stands dismissed for the reasons set out above herein. The plaintiff is not able to sustain the case he brought, the court must reject false evidence, and considering the clean hands maxim such court prevents an equity upon which the claim depends, from arising at all. This case notes the findings of Hardiman J. in *Shelly-Morris v. Bus Átha Cliath* [2003] 1 I.R. 232 and the principles contained therein.

138. The plaintiff has failed to establish that there was any representation made to him to lead him to believe that Furness Hall, Naas in the County of Kildare was or would become the property of the plaintiff and his wife Diane O'Rourke. Diane O'Rourke clearly accepted that all she had was a licence. The evidence of Natasha McKenna was quite clear that it was Mr. Rory Egan solicitor who actually introduced her to Dermot O'Rourke as her client in relation to the transaction and it was quite clear from her evidence that Dermot O'Rourke had not decided at the commencement of this process how the property would actually be held. His wish was to buy a property in a tax efficient manner where his daughter would be given a licence to occupy the property on an annual basis and provided that she occupied the property for three years the property could be appointed out to her in three years free from CAT. It is quite from the evidence that there was no question of any beneficial interest being given to either Diane O'Rourke or to the plaintiff at that stage, whatever might have occurred had matters worked out well going forward. There is absolutely no guarantee in existence or given that such an eventuality might come to pass and the total power in relation to the trust rested with the second and third named defendants.

139. In relation to the question posed at 1B, as to whether the plaintiff undertook substantial works on the premises on foot of that believe and those representations? It is clear to this Court that whatever monies were expended by Diane O'Rourke and/or by her husband were for their immediate enjoyment of the property. This Court simply does not accept the evidence of the plaintiff that he never met Natasha McKenna solicitor and that he never met Vanessa Byrne solicitor. Both solicitors explained in detail to the court their own involvement in these transactions and further when they were asked to do so each individually were able to point out and identify the plaintiff as Brendan O'Rourke, in the body of the court and both confirmed that they had met him prior to the court date. Unfortunately for the plaintiff he has asserted in this case a case which he could not prove and the onus of proof is on the plaintiff. He had a solicitor of his own Michael O'Neill whom he did not chose to call to give evidence and he also had the assistance of Mr. Kelly accountant. There is a contradiction between the evidence of the plaintiff and the said Mr. Kelly where the plaintiff tried to say that for an eleven-month period that accountant was not available to him although this appears to be disputed by Mr. Kelly who said that he looked after the businesses and business affairs of the plaintiff.

140. It is simply not credible that Brendan O'Rourke was under any illusion but that the property in which he was residing with his wife who had a licence in same was held by a trust. Despite various changes in his evidence he finally confirmed that he accepted his own signatures although his evidence waived on this point for some time prior to him actually accepting the signatures on the various documents were signed by him.

141. It is clear that Diane O'Rourke surrendered the keys of this property to the fourth named defendant sometime back and it is clear that it is accepted by the second and third named defendants that the property is now in negative equity. It is also clear that the plaintiff has had the use of the property and has excluded all others from same for a long number of years, using same both for rental purposes as admitted by him and also for use by his business. No doubt the plaintiff has found it highly convenient. The court has accepted the commercial evidence available as to the rental value he has obtained from his occupation of the property.

142. The reality of this case is that the plaintiff has failed to show this Court that there were any representations made to him and if he undertook substantial works on the premises it was not on foot of any alleged representation as clearly the legal position was well established. Looking at all of the evidence and his capacity as a business man with property dealings in the past, it is inconceivable and simply not credible that the plaintiff was not fully aware of the circumstances in which he was moving into the said property and residing there on foot of his wife's licence in same. It is only if the plaintiff had managed to establish positively such representations that the court would then have to deal with the issue of beneficial interest. The plaintiff however insisted in elongating this trial despite being asked on many occasions to stick to what was relevant. The court also notes that the second and third named defendants had absolutely nothing to benefit from defending this case and yet have made themselves available over a long period of time to ensure that the case was fully defended. This Court dismisses the plaintiff's claim on the grounds set out in this judgment, having fully accepted the submissions of the second, third and fourth named defendants, this Court therefore dismisses the plaintiff's claim.

143. The court makes the following amendments typographically/human error issues now corrected.

Ms. Justice Bronagh O'Hanlon

Judge of the High Court