**THE HIGH COURT**

**[2012 No. 1172P.]**

**BETWEEN**

**AIDEEN DOYLE (OTHERWISE CLODAGH WHITE)**

**APPLICANT**

**AND**

**NIAMH WHITE AND DERVAL WHITE**

**RESPONDENT**

**JUDGMENT of Mr. Justice Richard Humphreys delivered on the 1st day of February, 2017**

1. The plaintiff, who is one of seven beneficiaries in the estate of the late Mrs. Emily White, complains that the defendant's personal representatives have failed in their duty to the beneficiaries by not obtaining the best price on the sale of the deceased's home. The primary legal issue presented is whether the personal representatives are bound by the view of the majority of the beneficiaries in relation to how the estate is to be realised or whether they may be liable in negligence despite following the views of the majority.

2. As well as the oral and documentary evidence I had the benefit of submissions from Mr. Desmond Murphy S.C. Q.C. for the plaintiff and Mr. George Brady S.C. and Mr. Ciaran Foley S.C. (with Mr. Conor Cahill B.L.) for the defendants.

**Procedural issues arising during the hearing**

**Admission of documentary material**

3. In response to a request on behalf of the plaintiff, Mr. Brady agreed that a booklet of discovery documents relating to discussions regarding the possible sale of the property to Mr. Niall Mellon could be admitted in evidence as *prima facie* proof of their contents, although reserving the right to call evidence to correct certain points. In that regard it is worth mentioning that at least some of the documents have dates or figures that are either not completely accurate or are slightly ambiguous, but the thrust of the admitted documentation largely speaks for itself. Furthermore, the oral evidence on behalf of the defendants paints a broader and on occasion different picture than might be thought to emerge from some of the documents taken in isolation. In addition, on 14th October, 2016, Mr. Brady extended the concession so that two further documents which the plaintiff sought to rely on could be admitted on the same basis, as *prima facie* evidence of their contents, namely a minute of a meeting on 14th March, 2007, by Mr. Maurice Kelly and a memorandum of Mr. Stephen Maher of 9th March, 2007.

**Amendment of pleadings**

4. An unusual issue arose in relation to the relationship of the plaintiff to the White family. The plaintiff is one of seven children of the late Mrs. Emily G. White, but at some point developed the clearly delusional belief that she was not their biological child. Hence she appears to have adopted the alias of "*Aideen Doyle*" rather than her given name of Clodagh White.

5. Paragraph 1 of the statement of claim as originally delivered pleaded only that she was *treated* as a daughter of the deceased, rather than that she actually was a daughter.

6. It seems questionable whether this could be said to comply with O. 19 r. 3 of the Rules of the Superior Courts which requires pleadings to "*contain…a statement in a summary form of the material facts on which the party pleading relies for his claim*". A statement that one had been treated as a child of the deceased and that the defendants were estopped from denying that status does not seem to me to be a sufficient basis to ground a claim such as this in the absence of any legal submission that there is a legal doctrine whereby such past treatment gives rise to an entitlement to similar continuing future treatment irrespective of the true biological status of the plaintiff; or in other words that the defendants are obliged to keep giving the plaintiff money just because they made the mistake of wrongly giving her money before. Mr. Murphy made clear he was making no submission that merely having been treated as a daughter in the past would suffice to ground the action. It seemed to me therefore that in order to pursue the claim properly, the plaintiff would have to seek to amend para. 1 of the statement of claim to positively plead her status as a daughter of the deceased. Unless she is such a daughter, her claim must be dismissed.

7. Mr. Murphy duly applied for this amendment which was made on consent. No amended defence was required because the defence as originally delivered had already admitted that the plaintiff was a daughter of the deceased (a curious formulation given that this had not been originally pleaded).

8. The document produced to me as an amended statement of claim did not however comply with what Delaney and McGrath (in *Civil Procedure in the Superior Courts* (3rd ed.), pp. 310-311) call "*the universal practice*", whereby the new matter be underlined, the old matter struck through and an appropriate heading inserted identifying the pleading as an "*Amended*" statement of claim pursuant to an identified order of a particular date. I agree with the view of Delaney and McGrath as to the appropriate form of amended pleadings so I allowed the plaintiff liberty to deliver a further amended statement of claim to comply with this practice.

9. However, despite the unanimity of view on the pleadings that the plaintiff was the daughter of the deceased, the plaintiff's oral evidence did not come up to the mark. In reply to a direct question from her own counsel she only stated that she was the "*registered daughter*" of the deceased. I will return to this issue below.

**The position of Mr. Mellon**

10. By way of replying submissions after the close of evidence Mr. Murphy suggested that I should allow Mr. Mellon to intervene in the proceedings in order to vindicate his rights having regard to In re *Haughey* [1971] I.R. 217, by reference to the suggestion made on behalf of the defendants that he was lacking in funds and a maverick, and by reference to a stray comment by Mr. Foley in submission that inappropriately characterised Mr. Mellon's work in South Africa as "*building mud huts*". While I corrected the latter remark and it was promptly withdrawn, Mr. Murphy drew my attention to the fact that the remark was given some publicity in a newspaper report on Saturday, 26th November, 2016 (after the close of evidence). The allegation regarding his lack of funds arose in the context of the evidence and the appropriate time to deal with that allegation was during the evidence.

11. The newspaper article is headed "*Mellon was away* 'building mudhuts'" and gives prominence in the second paragraph to the suggestion that Mr. Mellon was a maverick and in the fourth paragraph to a suggestion that he was away building mud huts. The next paragraph refers to my having sought to correct this.

12. But the plaintiff cannot enforce the rights of a third party. In the absence of any application by Mr. Mellon (even assuming arguendo the perhaps questionable proposition that he could intervene in some fashion), In re *Haughey* does not arise. All I can do is emphasise again that the reference to Mr. Mellon building mud huts was inappropriate but Mr. Foley accepts this and withdrew it. The suggestions that he was a maverick or lacked funds are well within the legitimate arena of points that could be advanced by the defendants and would have had to be dealt with by the plaintiff in the course of the trial. "*Maverick*" is in any event not much of an insult and could be a compliment depending on your point of view. The mud huts issue is best dealt with by a gentlemanly apology; but my declining to invite Mr. Mellon to appear, as sought, does not infringe any rights of the plaintiff.

**Findings of fact**
13. In addition to the documentary materials referred to above I have heard oral evidence from the plaintiff and from the first named defendant and Mr. Barry White. I set out under this and subsequent headings of this judgment my findings of fact having heard and seen the witnesses, and having had regard to the documentary evidence and submissions.

**Background and run-up to the decision**
14. The late Emily G. White married Kevin White on the 11th February, 1942. Between 1943 and 1962, seven children of the marriage were born: Hilary, Barry, Niamh, Aideen, Derval, Clodagh and Cliodhna. The family home was a property known as "*Chimes*" on Mount Anville Road. In 1955 a family company, Robins White and Company was established, and became the owner of a property named "*Thendara*" adjacent to the family home.

15. The plaintiff was born in 1957 although as noted above she appeared to be of the view that the birth certificate produced for her was not her real birth certificate. She produced a copy of a certificate dated 5th August, 1966, and contended that her birth was not registered until then. Unfortunately there is no rational basis for that belief. The date in 1966 is simply the date on which that particular copy of the birth certificate was generated.

16. The plaintiff exhibited symptoms of epilepsy from around 1974 (aged 17).

17. In 1982 Kevin White had a stroke and in 1984 the plaintiff was looking after his property on his behalf.

18. The plaintiff suffered a first *grand mal* seizure in 1991. There were further seizures thereafter.

19. In 2000 she had treatment in Beaumont Hospital which involved the removal of a portion of her brain in the frontal lobe.

20. In terms of the material given in evidence, the plaintiff's history of complaint and allegation against a wide spectrum of parties appears to begin after these events. She subsequently launched personal injury proceedings against the hospital [2007 No. 41 P]. She also made a complaint to the medical council against various parties including her sister Aileen. The medical council did not take that complaint further, although the plaintiff implausibly denies that it was rejected.

21. At some point, not identified precisely, the plaintiff developed the delusion that she was not the child of her parents. The epistemological basis for this belief was idiosyncratic and obscure but was related to alleged conversations she had with shadowy advisers in particular a "*registered solicitor*", "*an artist in Shanganagh*" and an unnamed staff member in the Coombe who allegedly told her that her father was not her father, and that she was not the child on her birth certificate. On foot of this position, the plaintiff then adopted the alias of Aileen Doyle.

22. Emily White died intestate on 8th April, 2001. Her husband having predeceased her, the beneficiaries of her estate were the seven children in equal shares.

23. The plaintiff was let go from her job as a researcher in 2002 and left the family home *Chimes* in February, 2004. She went to live at an address in Dundela Haven which was rented accommodation.

24. In June or July, 2004 she made a complaint (never substantiated) to the Gardaí about Cliodhna in relation to how Mr. Kevin White's assets had been handled. Two Gardaí called to *Chimes* to interview Cliodhna on Christmas Eve as a result.

25. The plaintiff also wrote a letter to the Minister for Justice, copied to the cabinet, complaining about her brother Mr. Barry White. She also wrote a work of fiction, "*Web of Deceit*", whose characters bear some resemblance to her siblings, and where further scandalous suggestions of fraud are imputed to those characters.

26. In addition she maintains a blog which she says includes "*a combination*" of complimentary and derogatory matters in relation to her siblings. That is too innocuous a description because the blog propagates further scandalous allegations including a suggestion that a family member escaped bankruptcy proceedings through fraud.

27. At Christmas 2004, the plaintiff says Ms. Hilary White contacted her to invite her to Christmas dinner, which she refused as she said she was going away. She said that Hilary called her at other times.

28. The inland revenue affidavit was sworn on 24th September, 2005. (A later corrective affidavit relating to UK assets was sworn on 6th July, 2007.)

29. In November, 2005 Hilary and Barry White called to her house. She says she met Barry twice there and once in his own house "*at the suggestion of the Guards*".

30. On 16th February, 2006, letters of administration were issued to the defendants Niamh and Derval White.

31. On 27th February, 2006, the plaintiff wrote a letter to the probate office, liberally copied to various parties, complaining about the management of the estate and referring to "*my natural mother Louise Doyle/ Louise Walsh*", a mysterious presence in the case, being a person who she said in evidence was a director of FÁS while she was there. In reply to a direct question she said in evidence "*she is, I believe, my natural mother*". She identified further shadowy advisers, a Garda, a politician's spouse and a jewellery shop owner, as the sources of this information. The letter made absurd and scandalous allegations regarding what would amount to fraud in the administration of the estate and included fantastical allegations regarding non-existent assets in National Toll Roads and a company

called Baillie Gifford. I accept Ms. Niamh White's evidence that there were no assets of the estate in any such entity.

32. The plaintiff said that Ms. Hilary White came to see the plaintiff in Dundela Haven accompanied by Dr. Maureen Boyd. The plaintiff clearly did not welcome this visit and called the Gardaí while the visitors were at the door. The shadowy figure of a Mr. Tony Smaille, who the plaintiff describes as a "*lay litigant*" then enters the scene. She says that he advised her to take a private prosecution against Ms. Hilary White, which she did. One of the recurrent themes of the plaintiff's evidence was a denial of personal responsibility and a deflection onto other people of authorship of events and developments, of which pinning the idea for the private prosecution on Mr. Smaille was one example. Her evidence in this regard was evasive and contradictory and while she initially denied that it was a private prosecution she subsequently admitted this. The prosecution involved Ms. Hilary White having to attend the District Court for two days and having bail conditions. The plaintiff's recollection of this matter was selective and self-serving.

33. In August, 2006 Hilary White then made a second visit for the purposes of having the plaintiff afforded mental treatment. As a result the plaintiff became a patient in St John of God's from 8th August to 29th September, 2006.

34. A DNA test was conducted during her committal on 4th September, 2006, which showed, according to a letter from DNA Ireland to a doctor at St. John of God's Hospital dated 19th September, 2006, that Clodagh and Hilary White were full biological siblings to a 99.9987% probability. The plaintiff implausibly claimed in evidence that there was a second page to this document which contradicted this finding and further that the finding was contradicted by a document of instructions for the test, but neither document was produced. Again a shadowy adviser, "*a lecturer in DCU*", emerged in the plaintiff's evidence to allegedly say that the test is not proof.

35. Sometime after the plaintiff left St. John of God's she discovered that Hilary had been kind enough to pay her VHI for the period without her knowledge. The plaintiff phoned VHI to complain about this.

36. The plaintiff says that her "*former bank manager*" then suggested that she stop paying rent on her accommodation and "*see what happens*". That the plaintiff stopped paying rent appears clear; that she implausibly pins responsibility on a third party is all too characteristic of her evidence and mind-set. In terms of seeing what happened next, what happened was that landlord and tenant proceedings took place in relation to the matter. The plaintiff claims that her landlord brought a case to a tribunal; thereafter further proceedings took place in the Circuit Court on 20th December, 2006. She claims that the case was listed for 10:00 a.m. and she arrived at 10:07 a.m. to find it had already been dealt with. There then appears to have been an appeal to the High Court.

37. The upshot was that locks were changed and she was evicted on 16th January, 2007. She made no effort to contact her family. She denied that she did not want them to contact her and said they were obliged to do so.

38. It was decided to place "*Chimes*" and "*Thendara*" on the market, which was done on 21st February, 2007. The advisers to the personal representatives were Jones Lang LaSalle (JLL), principally Mr. Des Lennon of that firm, and the legal advisers to the personal representatives were Messrs. Daniel C. Maher and Co. (in particular Mr. Steven Maher) and Mr. Ciaran Foley S.C.

39. Around this time the plaintiff said she was living in bed and breakfasts and youth hostels. She said she was aware of the sale but was not told of a date. She said her solicitor, Daniel Montgomery of Thomas Montgomery & Son, was in contact with the estate. As of 29th January, 2007, she spent a couple of nights in a B & B on the Meath Road, Bray. She then spent two weeks in another B & B also on the Meath Road. Then she went to a B & B in Ulverton Road Dalkey for 7 to 10 days. After that she went to a youth hostel in Monkstown up to around 17th March, 2007. She ultimately accepted in cross-examination that with all this moving about, her family did not know where she was or have her phone number (having initially claimed in evidence that they had it). She did not contact them. Her solicitors did not make contact until their letter of 9th March which would have been received on Monday 12th March.

**Tenders open – Mr. Mellon's interest**

40. On or about 6th March, 2007, tender documents were sent out to approximately ten to twelve potential bidders.

41. On the same date a meeting took place between Mr. Lennon and Mr. Niall Mellon and his wife, at which Mr. Mellon indicated he wanted to put in an offer before the tender date. He stated (for whatever reason) that he never tendered in Dublin. Mr. Lennon said that the vendors expected strong bids on the day, that eight tender packs had been issued already and there were at least six serious runners.

42. Mr. Mellon offered €17m on the basis of a contract being signed within 24 hours. Mr. Lennon indicated that his clients had rejected an offer for €15m before the tendering process had begun. Eventually Mr. Mellon offered €18m which was to be open until 11am the following Friday. On 7th March, 2007, Mr. Steven Maher wrote a memo to file broadly to this effect.

43. A phone call took place on 7th March, 2007, between Mr. Lennon and Mr. Mellon during which Mr. Mellon indicated he "*might go to €18.5m*".

44. On 8th March, 2007, Mr. Maurice Kelly on behalf of the defendants wrote a memo indicating that he had spoken to Mr. Paul O'Connor, an employee of Mr. Mellon, who indicated that Mr. Mellon would not be "*running on the site*", which was understood to mean that he would not be tendering.

45. At 2.46pm on 8th March, 2007, Mr. Lennon wrote to Mr. John Mulcahy, also of Jones Lang LaSalle, indicating that Mr. Foley believed that Mr. Mellon was "*bluffing*". He indicated that he was due to meet the Whites at 5.30pm that day to put a "*recommendation that they deal*".

46. At 4.20pm on the same day Mr. Lennon wrote a memorandum indicating that Mr. Mellon was offering €18.5m on condition that there would be no media coverage and that there would be a decision by that evening. Ultimately Mr. Mellon then reverted to 11 a.m. on the Friday.

47. Mr. Maher also wrote a memo on 8th March, 2007, in advance of a meeting of the White family, indicating that Mr. Lennon had phoned, was going to the meeting of the Whites which took place in *Chimes*, and was "*concerned*" if it would transpire that the Mellon offer was rejected and the tenders turned out to be lower. Insofar as such a concern was expressed I find that not in any way to establish actionable wrong on the part of the administrators in not accepting Mr. Mellons' offer. It was simply a concern. If fears as to weaknesses in one's position were to be elevated to evidence of actionable negligence, then only those possessed with absolute certainty and self-belief could put up a defence.

**The meeting of 8th March, 2007**

48. In preparation for the meeting in Chimes, the firm of Jones Lang LaSalle prepared a document entitled "*marketing update*" in which

they stated expressly that "*it does not appear likely that we are likely to get a clean unconditional offer in excess of €18m from the othe[r] parties who have expressed interest*".

49. They stated that reverting to Mr. Mellon after the tendering process would result in the €18m offer going off the table. The document referred to a "*significant change of sentiment recently*" in relation to residential property prices, and also to the "*lower demand, and in some cases falling values, of residential units*".

50. The recommendation of the defendants professional advisers at that point was "*to immediately engage with [Mr. Mellon] in an effort to secure a signed contract within the next 48 hours at an acceptable level on acceptable terms*". A draft letter was prepared asking him to increase his offer, provide proof of funds, and sign a contract and pay a deposit immediately.

51. A family meeting then took place in *Chimes* from 5.30 p.m. until 11 p.m. The plaintiff was not present. Mr. Mellon's offer was received with scepticism.

52. There was some difference in the documentary material as to what, if anything, was decided at this meeting, but the best guide to answering that question is to see what happened after the meeting.

53. The following day, 9th March, 2007, Mr. Maher wrote a memo indicating that at 10 a.m. Mr. Foley had phoned and stated that in discussing the Mellon offer of €18.5m, Jones Lang LaSalle had noted "*the lack of interest of other parties*". According to the memo, the offer was rejected and the family wanted an offer in excess of €20m. The only reason for the rejection appearing in the memo was a belief that Mr. Mellon was acting in concert with O'Malley Construction, who were proposing development of another site in the vicinity. The memo noted that Jones Lang LaSalle were obliged "*to follow clients instructions*", suggesting that the course of action being taken was not one they had recommended.

54. A slightly different account of the meeting was set out in a memo of a conversation between Mr. Lennon and Mr. Foley also dated 9th March, 2007, which stated that the meeting was "*inconclusive*" and that the family wished to confer with the two missing family members before deciding.

55. On 9th March, 2007, Ms. Derval White phoned Mr. Lennon at approximately 9:15 a.m. stating that the family were agreed that they would consider stopping the tendering process if the offer from Mr. Lennon was for over €20m. Mr. Lennon (who wrote a memo of the call) advised Mr. Foley of this, who indicated that he was disappointed because "*he had advised them…to take €18/18.5m*".

56. The really crucial point as to what was decided at the meeting is not so much the "fog of war" of the various memos but what actually happened as a result. What actually happened was that a letter was sent by fax at 10:24 a.m. on 9th March, 2007, in accordance with the draft in the Jones Lang LaSalle marketing update.

57. In the light of the fact that a letter as recommended by JLL was ultimately and indeed fairly promptly sent, I find that the administrators did in fact follow professional advices in relation to this matter. If one had to reconcile the memos with what did in fact happen I consider the most likely course of events was that the administrators may not have immediately given instructions to follow the JLL advice to send a letter, and may have needed time overnight to consider it, but they did so in the course of the following morning and therefore there was no failure to follow advice and no breach of duty in this regard.

**The ball back in Mr. Mellon's court**

58. Later that day, a conversation took place between Mr. Lennon and Mr. Mellon, in which Mr. Lennon proposed the subject of a €20m offer and Mr. Mellon said he was "*all out*" at €18.5m. The only sweetener offered was to pay the engineer's fee.

59. Mr. Lennon reported to Mr. Foley who expressed disappointment. He also phoned Derval White and told her that Mr. Mellon was out of the running and wished them well.

60. At 2:15pm, Mr. Foley phoned Mr. Maher and stated that Niamh White was "*now very worried*" and was of the view that "*everything that [Mr. Foley] had predicted has come true*". She was "*very worried about the position that Dodo [i.e. Derval] has now taken*". Mr. Foley advised her to resign immediately as personal representative and Mr. Maher stated that he concurred in this advice. The memo expressed concern that "*they have made a serious error*", and feared concerns that "*Dodo*" had made a decision without contacting all of the parties and had put the personal representatives in "*a position of recklessness*". Mr. Foley was also noted as expressing concern that there had been no board decision in relation to the rejection of the offer, given that the board of directors of Robbins White and Company also had an interest in the transaction. Again however this material does not establish negligence or breach of duty on behalf of the defendants. All it indicates at most is concern and nervousness at a particular point in time on the defendant's side. Such concerns do not undermine a party's case. "*There are many cases you cannot win; there is no case you cannot lose*" (C. Michael Abbott, in Ron Liebman, Shark Tales (New York, 2000), p. 95). Unless counsel are sweetly oblivious of litigation risk, concerns as to real or apparent weak points in one's case will always be part of one's thinking. That may give rise to giving written expression to such concerns and considering or taking measures by way of defensive risk-reduction, but the giving of thought to such measures does not go anywhere near establishing that a party's case is in fact weak or unfounded.

61. The plaintiff then enters the picture. By letter dated Friday, 9th March, 2007, Mr. Montgomery, the plaintiff's solicitor, wrote to Mr. Maher objecting to any suggestion that the plaintiff was unable to manage her affairs and complaining that she had not been consulted in relation to the company. This letter, posted on a Friday, would not have arrived until the following Monday, 12th March, 2007. The letter contained a threat to issue proceedings under s. 205 of the Companies Act 1963. The plaintiff accepted that this could have jeopardised the sale but stated that she gave no such instructions and the letter was issued without her knowledge (another example of her deflection of responsibility on to other parties). It is implausible that a letter threatening legal action would have been sent without instructions, especially where the action would have held up sale of a property that was at an advanced stage of tendering. I am of the view that the probability is that the letter was indeed based on instructions. The instructions so given by the plaintiff were clearly seriously inaccurate in that the letter claims that a substantial asset, a house in Galway, had not been included in the inland revenue affidavit. This house was included in the affidavit.

62. On Monday, 12th March, 2007, at 12 p.m., Mr. Mellon and Mr. Lennon had a further phone conversation during which Mr. Mellon indicated he would increase the offer to €19m but would not tender. Mr. Foley discussed the idea of asking Mr. Mellon to sign a contract at that point. Ms. Derval White was of the view that it was "*too late and too difficult to get everybody together at this late stage*".

63. At 2:05 p.m., Mr. Lennon was in telephone contact with Mr. Maher. He stated that he had spoken to Mr. Foley. "*Dodo*" White was of the view that the offer "*should be utterly rejected*".

64. At 3:50 p.m. that day, Ms. Cliona White left a message for Mr. Lennon. Mr. Lennon spoke to Mr. Foley about 6 p.m. who advised him not to reply because the family were meeting later as a group.

65. At around 4:30 p.m., Mr. Mellon unilaterally signed a contract to purchase the property for €19m and handed over a cheque for a deposit. He enclosed a letter from the Irish Nationwide Building Society confirming that funds "*will be made available*" subject to general terms and conditions. A post-it note on the contract stated that it was subject to acceptance by 7 p.m. that day. It was also signed "*in trust*" for an unidentified principal.

66. Subsequent to receipt of this document, Mr. Lennon and Mr. Foley had a discussion during which Mr. Foley expressed certain concerns, namely that the letter from the building society was not proof of funds, the contract was signed "*in trust*" and the deadline condition was not witnessed.

67. Mr. Foley spoke to Mr. Barry White around this time who noted that they would probably reject it and wait as Mr. Mellon "*was the only person who really wanted to buy it*".

**The meeting of 12th March, 2007**
68. A further family meeting then took place on the evening of Monday, 12th March, 2007. Again, the plaintiff was not present.

69. Ms. Niamh White gave evidence that she followed the advice of her solicitor Mr. Maher in not accepting the Mellon offer and I accept her evidence. I find as a fact that the administrators did properly follow professional advice given to them in this respect. Insofar as it was suggested by Mr. Murphy that the administrators disregarded JLL advice (as opposed to legal advice) on the 12th, by not following the original marketing update, that suggestion fails to have regard to the fact that the administrators were in constant communication with JLL in the evolving situation. The marketing update of the 8th was not the totality of the advice from JLL and it has not been shown that the administrators failed to apply the advice given on the 12th. In any event the legal advice was clear and was followed and that had priority over any contrary advice from JLL, if there was any.

70. Furthermore Mr. Barry White gave evidence that another factor was the plaintiff's history of allegations against family members; and that in effect it was better to play the tender process by the book, because if it was derailed in favour of Mr. Mellon there would probably be an allegation of impropriety made. I accept the reasonableness of that approach and, while this evidence was given by Mr. White rather than the administrators, I consider that to the extent that it could have influenced the decision-making process of the latter by reinforcing the conclusion they were led to by legal advice, that was a reasonable and lawful concern to have had. The plaintiff by her own conduct in her history of outrageous false allegations against family members had made it significantly more likely that the defendants would adopt a risk-averse approach.

71. One of the mysteries of the case is as to why Mr. Mellon did not actually submit a tender. I consider as a matter of probability that it was because he did not in fact have the funds immediately available, which is consistent with the terms of the letter provided and with his seeking further time to get proof of funds. But even if I am wrong about that, I find that it was reasonable for the administrators and their advisers to have suspected that to be the case and to not have accepted his offer on that basis.

72. While some of the documentary material suggested that the decision adverse to Mr. Mellon was 4:2 amongst the beneficiaries, having heard the witnesses I accept the evidence on behalf of the defendants that it was in fact unanimous.

**Fallout from meeting of 12th March, 2007**
73. On Tuesday, 13th March at 9:03 a.m., Ms. Niamh White informed Mr. Lennon that the decision was not to accept the offer.

74. On 13th March, 2007, Mr. Maher advised Ms. Derval White that he had had a call from the plaintiff's then solicitors and had advised them that that day was the tender date and he should wait and see what happened rather than proceed with some form of High Court application as being threatened at that point (as set out in a letter dated 13th March from Mr. Maher to Ms. Derval White). Mr. Montgomery did in fact take up that suggestion and did wait and see. So the plaintiff was in fact informed of the situation with the tender process prior to the opening of tenders. As noted above, the plaintiff in the witness box denied instructing Mr. Montgomery to threaten s. 205 proceedings. I find her evidence unconvincing and characteristic of the ducking and weaving of the plaintiff's account.

75. Mr. Lennon made a note of a phone conversation with Mr. Foley at 7:45 a.m. on 13th March, 2007, indicating that the time factor did not help with the offer, the letter from the building society was insufficient, and the signature "in trust" was not accompanied by a declaration of trust. The view was that Mr. Mellon should tender for the property and Mr. Foley advised Mr. Lennon to contact Mr. Mellon and inform him of the situation. Thus there was a decision to actually revert to Mr. Mellon before the tender process was completed. That would have given him an opportunity to make a further intervention if he saw fit.

76. Subsequent to this, Mr. Lennon wrote to Mr. Mellon returning the cheque.

77. Tenders were opened at 12:00 p.m. on 13th March, 2007, at which point one tender had been received for €15.3m. On foot of this, Mr. Mulcahy and Mr. Lennon reported to the personal representatives indicating that "*the market continues to soften*" and current levels of value "*may not be available in the future*". The recommendation was to negotiate with the highest bidder.

78. A further family meeting took place on 14th March, 2007, at 7 p.m. Mr. Maurice Kelly of JLL wrote a minute of this meeting in which it was noted that Mr. Mulcahy of JLL had indicated that it was not unusual that only one tender would be received from 10 sent out, and that "*market sentiment and uncertainty about the road*" [i.e., the proposed Eastern by-pass at the back of the lands] had the effect of causing a significant shortfall from the asking price.

79. The JLL advice was to engage with the tenderer and see if the position could be improved and only if the tender failed should they revert to Mr. Mellon. Thus the failure to revert to Mr. Mellon after the 14th March was on foot of professional advice.

80. Ultimately, the sale was concluded at €16.45m, the vendors having negotiated up with the successful tenderers.

81. The plaintiff learned of the sale after the event, not having been invited to meetings. In direct evidence she said that "*they had my mobile number*" but under cross-examination she admitted that her number had changed from time to time. It is clear that the family did not have her number although they did know of the most recent of a number of solicitors acting for her and had corresponded with them.

82. In late 2007, Mr. Mellon bought the property from the successful bidders.

83. The shareholding of the company at this time was 999 shares held by the estate of Emily White and 1 share each held by each of the 7 children. The directors were all of the children except Aideen and Clodagh.

84. Towards the end of 2007 or early 2008, the company was wound up and the assets distributed to the shareholders.

85. These proceedings were instituted on 7th February, 2012.

**What needs to be established for a verdict in favour of the plaintiff?**
86. It seems to me that the plaintiff needs to establish the following in order to succeed:

a. that the plaintiff is a daughter of the deceased (and therefore entitled to an equal share with the other children in the estate of the deceased);

b. that the defendants failed in their fiduciary duty to the plaintiff to maximise the value of the estate;

c. that any such failure is not excused in the circumstances by reference to the defendants having acted in accordance with the wishes of a majority of the beneficiaries;

d. that the plaintiff suffered loss thereby.

**The plaintiff's status as a daughter of the deceased**
87. As noted above, in this case the plaintiff only stated in evidence that she was the "*registered*" daughter of the deceased but at the same time she maintained in evidence that her birth registration was inaccurate.

88. When asked if she was the *actual* daughter of the deceased, she evaded the question and ultimately professed not to know. She conveyed to me in a myriad of ways the clear impression that she does not believe herself to be the daughter of the deceased despite expressly denying having a belief one way or another, and I consider her expression of open-minded uncertainty is more likely than not to be a convenient dilution of her actual beliefs; a dilution which I infer is due to some form of awareness of the possible legal consequences of stating those actual beliefs. She referred, distastefully, to the Whites as "*that family*", "*those people*" or "*the White family*", very much putting herself outside that group. "*I lived with those people*" is the rather repugnant way in which she described her childhood. In any event, the onus of proof being on the plaintiff, the issue arises as to whether it is sufficient to say "*I don't know*" in response to a question as to whether an essential proof in order to succeed exists – in this case whether she is the daughter of the deceased. Under cross-examination she went further and stated that the basis of her case was that she was treated and regarded as a daughter, and inferentially that the basis was not that she actually was a daughter. That effectively amounts to a repudiation of the case as pleaded.

89. In correspondence she stated that another person was her birth mother and at one point in her oral evidence she positively gave it as her belief that another person named Walsh/ Doyle was her "*natural mother*". Overall, it seems to me that a party carrying the onus of proof cannot equivocate on whether an essential element of their case exists, and a fortiori cannot deny that element. But for the fact that the defendants did not appear to wish to take this particular point against her, I would have dismissed the action on that ground alone.

**Whether the defendants failed in their duty to the estate**
90. Personal representatives have a number of fiduciary duties to the beneficiaries (see e.g., *In re Tebbs* [1976] 1 W.L.R. 92, *Shaughnessy v. Shaughnessy* [2016] IEHC 303 (Unreported, High Court, Gilligan J., 25th May, 2016)) including due diligence (*In re Tankard* [1942] 1 Ch. 69), the duty to act with the care that might reasonably be expected from a careful person in the prudent discharge of his or her own business (*In re Gunning; Little v. Governors of Co. Down Infirmary* [1918] 1 I.R. 221) and a duty to maximise the value of the estate. In the course of a very able submission on behalf of the plaintiff, Mr. Murphy contends that there are a number of failures in duty by the personal representatives as follows.

91. The first complaint is failure to take the advice of the estate agents and lawyers in relation to not accepting Mr. Mellon's offer on 8th March, 2007. Mr. Murphy submits that the JLL advice was to deal with Mr. Mellon's offer and they did not do that. As set out above I have found as a fact that there was no failure to take and appropriately follow legal and JLL advice on the 8th March.

92. It should also be noted that the argument was not based on the proposition that the advices given were themselves negligent (which they did not appear to me to be on the evidence in any event). The issue was whether the advices were followed. I am satisfied on the balance of probabilities that it is not the case that there was a failure to heed or follow professional advice. As regards the first allegation, on the evidence before me it is not the case that the advice of professional advisers was rejected. The advice on 8th March, 2007, was essentially to engage with Mr. Mellon and to seek proof of funds and a higher offer; but that is what happened. The advice in the JLL marketing report of 8th March was not rejected. There was no breach of duty.

93. The second complaint is, having been advised on 8th March of the market difficulties (advice Mr. Murphy says "*was still in force*") and having had only one tender offer by that stage and no updated evidence that an additional tender was likely to appear, the personal representatives decided to gamble on 12th March, 2007, by "*concocting reasons*" to reject Mr. Mellon, their views being "*coloured by the obsession that the property was worth €20m*". As set out above I have found as a fact that the administrators did follow professional advice on the 12th March.

94. No "*gambling*" has been established. The plaintiff's case is merely an exercise in hindsight. I am satisfied on the balance of probabilities that, on the evidence, the defendants were acting on legal advice in rejecting the Mellon offer based on the fact that the contract was signed in trust and that funds were not actually in place. This was a reasonable approach and was not negligent or in breach of duty. Mr. White referred in evidence to the possibility that Mr. Mellon could be buying the property on behalf of a company with no assets and that the estate could be left high and dry in those circumstances. No declaration of trust was produced. I accept that evidence and that it was reasonable for the administrators to have been concerned about such a contract. The 8th March advice was not "*in force*" in the sense in which Mr. Murphy submits because the defendants were in constant touch with JLL and legal advisers. In any event legal advices had priority. The allegation that the defendants were concocting reasons or obsessed with a belief in the property's value of €20m is not made out in evidence.

95. The third complaint is failing to go back to Mr. Mellon after the tender was received on 13th March, 2007. This breach was not in fact pleaded and therefore the plaintiff cannot succeed under this heading but in any event the professional advice from JLL on 14th March, 2007 was to pursue matters with the successful tenderer and to go back to Mr. Mellon only if that failed. Thus there was no breach of duty relating to a failure to follow advice. Furthermore, on 13th March, 2007, JLL decided to revert to Mr. Mellon to inform

him of the situation which would have allowed him to make a further intervention if he was so minded.

96. The fourth complaint is the suggestion that the personal representatives failed in a duty to consult the plaintiff although Mr. Murphy accepted in submissions that this did not give rise to a cause of action as such but rather was a factor to be taken into account in relation to the other matters. As the other matters do not establish a breach of duty, the failure to consult the plaintiff does not arise; but even if it did, the plaintiff's history of scandalous allegations against family members meant that any failure to consult her in such circumstances was reasonable. The plaintiff by her conduct detached herself from the family by a course of conduct over a period of years, including but not limited to writing scandalous letters, publishing a book with scandalous innuendo, and making frivolous and vexatious complaints against family members. I accept Mr. White's evidence that none of her complaints had any substance. The plaintiff's evasive and misleading evidence given initially that the other family members had her mobile number was later resiled from. The plaintiff did not furnish contact details to family members and insofar as she was not consulted I find that she effectively locked herself out of the situation. The administrators cannot be faulted in the circumstances for not seeking to contact her through Mr. Montgomery who was but one of a series of solicitors through whose hands the plaintiff has passed over the years.

97. Having seen and heard the witnesses and having regard to the nature of their answers I accept the evidence of Ms. Niamh White and Mr. Barry White as honest and reliable. Insofar as the oral evidence on behalf of the defendants could be seen to differ in any way from the position that could emerge from the documentary materials considered in isolation I prefer the oral evidence on behalf of the defendants because it explained and contextualised the broad situation in a manner that isolated concerns recorded in a limited number of documents do not accurately represent. Overall, and in particular where it conflicts with that on behalf of the defendants, I reject the plaintiff's evidence as not only frequently evasive and unreliable but unfortunately deluded in many respects. Regrettably I am satisfied that her lengthy history of launching allegations is the work of a fantasist.

98. There was no breach of duty by the administrators as alleged or at all.

**Is any conduct of the administrators protected by section 50?**
99. If I am wrong as to the foregoing, the issue arises as to the inter-relationship between s. 50 of the Succession Act 1965 and the fiduciary duties of personal representatives and in particular whether any possible breach of duty by the administrators is excused by reference to their acting on the basis of the wishes of a majority of the beneficiaries.

100. Mr. Murphy submits that s. 50 amounts merely to a duty to consult and does not involve a duty to follow the wishes of the majority. However that is not what the section says.

101. Mr. Brady relies on s. 50 of the 1965 Act as a complete defence to the proceedings. The section requires that the personal representatives are to comply with the wishes of the beneficiaries, by majority of value, as far as practicable.

102. When does this become impracticable? Mr. Foley relied *on P.P. v Health Service Executive* [2015] 1 I.L.R.M. 324 in relation to the use of that phrase in Article 40.3.3° of the Constitution, although that was a case where there was no real possibility of vindicating the interests of the (unborn) rights-holder in question so it is not hugely illuminating in the present case.

103. In the s. 50 context, *M.K. v. J.B.* [1999] IEHC 117 (Unreported, High Court, Carroll J., 26th February, 1999) is one such case, where an underage beneficiary who objected to the sale of his childhood home was overruled by Carroll J. who held that it was not "*appropriate or practicable to give effect to [his] wishes*." One can note in this phrase a stealthy expansion of s. 50 to cover the view that upholding such wishes was not "*appropriate*". The child's aunt, who wanted to sell the house over the wishes of the child and his father, had a litany of reasons for doing so which do not seem hugely convincing in the cold light of retrospect. Particularly unimpressive was her objection that "*if he has an attachment to the property it is unhealthy*" (because of his allegedly troubled childhood therein). If Dante were writing today he might well reserve a special circle for those who launch objections to other people's attachments to particular real or personal property. To be attached to a particular house for example is a part of what social geographers and urban planners would now call a sense of place. To be attached to a particular location and property is a prerequisite for an advanced society, because "*civilization can never grow up on the move*" (Dr. Jacob Bronowski, *The Ascent of Man* (London, 1973) p. 60). The attachment to particular real or personal property is part of the emotional identity of the individual and deserves to be respected as such. One cannot help feeling that the views of the beneficiary were too readily overridden in *M.K.*, particularly because it was not at all clear that giving effect to those wishes was impracticable, that is, incapable of being put into practice. *M.K.* is not a decision from which huge assistance can be derived for present purposes and does not provide a basis in principle to override the views of beneficiaries of full age and capacity, or a majority by value of them.

104. In *Kennedy v. Kennedy* [2007] IEHC 77 (Unreported, High Court, 26th January, 2007), O'Neill J. emphasised that beneficiaries who are also personal representatives cannot favour their own interests over an individual beneficiary (p. 19). Of course that is not what happened here in the sense that all the siblings got an equal slice, albeit that we now have at best the speculative possibility in retrospect that the pie could have been bigger if the personal representatives made a different decision.

105. Thus, the majority of beneficiaries cannot act in a manifestly unreasonable way which has the effect of diluting the size of the estate. Such situations could arise in cases of conflict of interest, bad faith, or negligence.

106. Personal representatives must act in good faith and should not follow the majority wishes if they consider that to do so would be negligent (for example, by not resulting in maximum value for the non-consenting beneficiaries). But if they incorrectly but in good faith think that following the majority view would not be negligent, the mandate to comply with the majority as set out in s. 50 seems to me to provide an implicit protection for the personal representatives unless the negligence is gross. However I emphasise that there is no protection under the section in the absence of good faith.

107. Thus mere negligence without more that arises due to following in good faith and without conflict of interest the wishes of a majority of beneficiaries by value seems to me to be protected by s. 50 as long as it is not so manifestly unreasonable as to constitute gross negligence.

108. In the present case I am satisfied on the evidence that even if there was some form of breach of duty by the administrators (which I do not accept), it was not so manifestly unreasonable as to oust the protection of s. 50. Nor was there any absence of good faith.

109. *Re Weiner's Will Trusts* [1956] 2 All E.R. 482 illustrates the limits of the doctrine that one can follow the views of the majority. That however dealt with a quite different situation, namely where a particular beneficiary was unconditionally entitled to have certain assets transferred to him. The wishes of a majority of the other beneficiaries not to do so (because the transfer would dilute the

value of the shareholding in the company) could not prevail against such a right. A comparable situation does not arise here.

**Proof of loss**

110. If I am wrong about all of the foregoing, the question of loss arises. Most of the alleged breaches of duty could not be said to have given rise to loss anyway because Mr. Mellon was never closed off from competing; he came again on a couple of occasions, and the defendants communicated with him right through to the 13th March, 2007. More fundamentally, the plaintiff has failed to prove any loss emerging from the matters complained of because it has not been established in evidence that Mr. Mellon was actually in a position to complete the contract or would have been someone from whom damages could have been recovered had he signed but not completed it. The fact that he ultimately bought the property at a later time is not something from which such a conclusion could be drawn without positive evidence as to his financial condition at the time of the offer to which this action relates. There was no such evidence.

**Order**

111. For the reasons explained, and leaving aside the plaintiff's status as a beneficiary (with which no issue was taken), the action fails under each of the headings which the plaintiff is required to prove: breach of duty by the defendants, ouster of the protection afforded by s. 50, and proof of loss. Any one of those failures independently would have been fatal to the action. An accumulation of such failures in combination reinforces that result. Accordingly I will order that the action be dismissed.