Neutral Citation Number: [2009] IEHC 631

THE HIGH COURT

NORTHERN CIRCUIT

COUNTY OF DONEGAL

EQUITY JURISDICTION

BETWEEN/

NEVILLE PRESHO

PLAINTIFF

AND

PATRICK DOOHAN AND OSTAN THORAIGH COMHLACHT TEORANTA

DEFENDANTS

RULING of Mr. Justice Roderick Murphy on preliminary issue delivered 29th April, 2009.

1. Background

Neville Presho, Civil Engineer and documentary film maker, purchased a dwelling house on Tory island in 1982 and was registered as the owner of Folio 13745F of the Register of Freeholders, County Donegal, on the 27th October, 1982. The property as described in that Folio contained a dwelling house with a septic tank attached. The vendors were Hugh and Mary Doohan who are not related to the first named defendant. Some four years later the plaintiff left Tory Island and resided in New Zealand for eight years until 1994, having boarded up and secured the house which was looked after by a neighbour.

During that time, in or about 1992, the defendants commenced the construction of a hotel premises at the rear of the plaintiff's property which was known as the Tory Island Hotel. The first named defendant employed John McGinty as contractor in late 1992 to November 1993. John McGinty and two of his workers occupied the plaintiff's dwelling house without the consent of the plaintiff while the hotel was being built.

Some time before the 14th January, 1993, during stormy weather an asbestos sheet blew off the house. It is common case that Mr. McGinty and Mr. Doohan with the latter's JCB digger, attempted to replace the asbestos sheet with one provided by the husband of the neighbour who looked after the house. This was not possible as the replacement sheet was broken as it fell on or was broken by the wheel of the JCB digger. There is conflict of evidence as to how the replacement sheet was broken. It is not controverted that at that stage the workman left Mr. Presho's house and stayed at the local hostel. Mr. McGinty said that he had removed the electricity supply fuses.

In the early hours of the morning of the 14th January, 1993, a fire substantially damaged Mr. Presho's house. Mr. Doohan was not on the island. The matter was reported to the gardaí by Mr. McGinty on 15th who said that his equipment and fuel had been destroyed.

Subsequently further damage was caused to the house. Mr. McGinty said that there was only one digger on the island. He said that he didn't see Mr. Doohan or anyone else remove stones.

Superintendent McGovern gave evidence of the complaint of Mr. McGinty, who was satisfied that the fire was malicious, which was recorded in a Crime Report Document. The first contact by Mr. Presho was on 27th July 1994 at Bunbeg garda station who could not point to a suspect.

Mr. Presho produced photographs which had been obtained from Donegal County Council. On 21st November 1994 Mr. Presho wrote to Sergeant Friel asking that the investigation not be pursued, that he forgave those who burnt his house. Sergeant Friel's report noted a "peculiar conversation" that Mr. Presho had a premonition that the roof would be blown off. It was an act of God.

However on 13th August 2003 Mr. Presho sent correspondence to the Garda Commissioner in relation to the investigation referring to difficulties with Mr. Doohan. The matter was referred to Detective Garda Moore in Glenties who met with Mr. Presho at Tarryfinn airport on 19th September 2003 where a first statement of complaint was made. Detective Garda Moore investigated the matter and interviewed all persons mentioned. Mr. McGinty declined to make a statement but swore an affidavit which corresponded to the evidence he gave to the court. Mr. Doohan wrote a memo. All 14 others declined to make a statement. There was no evidence to warrant any charge.

Mr. Presho then made a complaint to the Garda Complaints Board. On 12th May 2006 this complaint was deemed inadmissible on the basis of delay.

An internal review was undertaken by Superintendent McGowan and Sergeant Carroll who re-interviewed Mr. Doohan and others. A report was made on 7th November 2007 which concluded that there was no basis for a criminal investigation. By then all the gardaí involved had retired.

In cross-examination Superintendent McGovern said that none of the original records were available. There was no record of when the gardaí first visited the scene. There was no documentary evidence that anyone was spoken to in 1993. In July 1994 Mr. Presho had reported the disappearance of his house which was a different incident to the fire. A video and photographs were given to the gardaí. The latter showed building debris including large stones on the foreshore which was identified by Mr. Presho as part of the porch of his former house. There was no evidence to the contrary. The court is satisfied that part of the plaintiff's house had been moved to the foreshore probably mechanically.

An appointment was made with Sergeant Friel to go to Tory Island prior to 21st November 1994 but according to Sergeant Friel's report was cancelled by Mr. Presho. There was no evidence that Mr. Doohan was involved in the removal of the house. It was noted on the garda file that, subsequently, he had a contract with Donegal County Council to remove the rubble from the road between Mr. Presho's house and the hotel.

There were theories as to what had happened but the gardaí could not react to suspicion.

In the absence of forensic investigation there was no evidence that the fire was malicious.

Mr. Charlie Cannon, executive engineer of Donegal County Council, had faxed a manuscript letter dated 19th January, 1994 to the first name defendant regarding the blocked County Road on Tory Island as follows:

> "Dear Pat,
>
> As per our telephone conversation of earlier today, I would be obliged if you could clear the blocked County Road on Tory Island as soon as possible using the excavator which you have available on site, all I want done is the road made passable, which would mean pushing the stones debris, (sic) into the side where the existing derelict building is. You can forward your bill to the above address for payment.
>
> Charlie Cannon."

On the 29th April, 1994, some fifteen months after the fire, Mr. Presho received a letter from Donegal County Council as follows:-

> "Re: Dangerous Building at Tory Island
>
> Dear Mr. Presho,
>
> It has been brought to out attention that a building owned by you on Tory Island is in a dangerous condition.
>
> There is a new hotel being built adjacent to this building and the owners are concerned that same will be a danger to the public as well as being unsightly (see attached photograph).
>
> Under the Derelict Sites Act 1990, Donegal County Council are required to take whatever action is necessary to render this building safe. Storm damage has also taken its toll on this building and considerable damage has been caused.
>
> I would be grateful if you could let us know what your intentions are regarding this property, before we proceed to enter the same on the Register of Derelict Sites.
>
> Yours sincerely,
>
> For County Secretary"

Mr. Presho said that he returned to Ireland on the 5th July, 1994, and, before going to Tory Island, wrote to Donegal County Council. A few days later he and his wife, whom he had married in April 1990, took the ferry to Tory Island. As they entered the harbour at Middletown where the house had been situated he could not see his house. It was not there. He did see the hotel which was to the rear of where his house once stood. He could not believe it. He had planned to stay in the house and stayed with their next door neighbour with whom they had previously stayed before they bought the house. He produced a photograph which he had taken from the front of the hotel which showed an uninterrupted view of the harbour. He superimposed a scaled card representing the outline of his house upon that photograph. This blocked the entire view from the hotel. In the absence of other evidence the court accepts that Mr. Presho's house would have impeded the view from the hotel.

A number of whitewashed boulders had been placed around where the house had once stood. The site including the site of the septic tank had been levelled.

He asked Mr. Doohan, the first named defendant, what had happened and was told to find out who had set fire to the house.

One of the islanders told him that it was better that he did not ask.

His neighbour to whom he had asked to look after the house and with whom he was then staying said she saw nothing and that the house had been sucked up in a whirlwind.

He had found out that the defendant's contractor, Mr. McGinty had reported the fire to the gardaí and that he had lost plant and equipment valued at £3,000 in the fire.

Mr. Presho's evidence was that Mr. McGinty had informed him that, at the early stages of the development of the hotel, Mr. Doohan had offered Mr. McGinty £1,000 to demolish Mr. Presho's house. Mr. McGinty's evidence to the court was to that effect but that he refused to do so until he was certain who owned the house. He said he was asked to price a new septic tank for the hotel but that Mr. Doohan used his JCB to do that work himself.

Mr. Presho said that the site of his house was being used as a car park and as the site for a septic tank for the hotel. Mr. Doohan denied such use.

The court is satisfied from the photographs of Mr. Presho that the site was available to the hotel for that purpose. The investigation and plans produced by the plaintiff's architects as to the route of the inflow to the septic tank, which appear to deviate from the grant of planning, are not contraverted and substantiate trespass.

He went to Donegal County Council offices in Lifford and met Cecelia McGovern who had written the letter on behalf of the County Secretary. She produced letters from people complaining of stones from his house on the road between his house and the hotel and the letter of the Council to Mr. Doohan dated 19th January, 1994, referred to above.

Mr. Presho in his evidence described how the incident had caused him distress. He said that "a switch had flicked in his mind" and

there was a knot in his stomach when he realised that his house had gone. He began to drink heavily.

He then went to Dublin with his wife to the Land Registry. The Folio was missing. He contacted the solicitor who had acted for him and whom he had known for ten years. He said that solicitor refused to take on his case. He had spent two months in Ireland away from his family. He said he felt he was coming up against closed doors and his mind had changed. His wife became extremely fearful of him.

On the 20th September, 1994, he went to his General Practitioner who referred him to a psychiatrist who diagnosed bi-polar mood disorder as the cause of his breakdown. He was committed to care in a psychiatric hospital and on medication for several months.

In 1995, his wife became ill and his remaining children were taken into care. He said he was barely able to cope with life. He became depressed and suicidal. He told the court he did not have the courage to do it and by 2000, felt he was like zombie having received electric treatment and being locked up in psychiatric units. He described the strong emotional effect of Tory Island on him. He was unemployable and not in a fit state mentally.

He stayed with his family in Northern Ireland and spent several periods in psychiatric care having been sectioned (certified). He was on medication. He was depressed and suicidal.

His wife felt that he needed closure but he did not have the heart to proceed as it was opening up old wounds.

Subsequently, in April 2000 he returned to Tory. He asked if any one knew what happened to his house. He gave evidence to the court that nobody would say anything. The site was covered with chippings and was then being used as a car park for the hotel. The septic tank of the hotel was where his septic tank was. He referred to photographs which he had taken subsequently.

There followed a curious agreement dated 4th October 2001 preceded by two short letters. The plaintiff had written to the first named defendant on 17th August, 2001, in the following terms:

> "A Chara,
>
> Can you please remove the two white stones immediately in front of Óstán Thoraigh, as they are resting on my house site, without my permission.
>
> Thanking you, in advance,
>
> Mise le meas,
>
> Neville Presho"

The following day the first named defendant replied as follows:

> "Dear Neville,
>
> Further to our conversation in the clubhouse last night I regret that I didn't come across the copy fax from Donegal County Council, but I can confirm that I cleared the road from rock, stones, and debris to make the road passable as instructed by Donegal County Council.
>
> Yours sincerely,
>
> Pat Doohan, 18/8/01."

The plaintiff's notice of his application to the planning authority was published in the "Derry People" in "Donegal News" on Friday, September 21st, 2001. It read:

> "I, Neville Presho, am applying for planning permission for the erection of a two-storey replacement dwelling at Middletown, Tory Island.

The agreement of 4th October, 2001, read as follows:

> "We, the undersigned Neville Presho and P. Doohan do hereby this day 2001
>
> enter into a binding agreement, where I P. Doohan will secure the land rights
>
> to the area shown shaded, for Neville Presho and will assign to him the land, rights and ownership
>
> of that area. In pursuance, I Neville Presho will simultaneously assign the land rights and ownership
>
> of the land known as folio 13745F in O.S. 6 Donegal to Patrick Joseph Doohan of Óstán Thoraigh.
>
> This is a straight swap transaction and does not involve any fanancial (*sic*) remuneration to either party.
>
> Agreed at Tory on 4/10/2001. signed Neville Presho
>
> signed P. Doohan.
>
> witnessed Angela Duggan, runai, Cumharchumann Thorai.

This was accompanied by a sketch signed by the three, the two parties and witnessed by Angela Duggan which showed a hatched round undetermined area beside the Community Centre.

Also included was a draft undated statement with the plaintiffs address in Hollywood, Co. Down and telephone numbers which stated as follows:

> "It gives me great pleasure, as proprietor of Óstán Thoraigh to fully endorse Neville Presho's plans for a Tory visitor centre (illegible). His ideas and enthusiasm will ensure that Tory becomes a major tourist attraction in Ireland.
>
> The ferry, the smooth operator TM will be 150 seat, state-of-the-art high speed wave (illegible) catamarand, designed to the specifications of skipper Jimmy Sweeney to suit the sea conditions around Tory. It will out trawl (?) time between Magherety to Tory from the current one hour to little under 20 minutes. In addition the ride in all sea conditions will be extremely stable.
>
> I was involved in Mr. Presho's film Oilean about life in Tory Island in 1976 and have enjoyed discussing ideas with him up to the present."

A further letter to the first name defendant from the plaintiff dated 20th June, 2003, from Hollywood, Co. Down read as follows:

> "Dear Patrick,
>
> This letter has been sent by registered mail.
>
> When I met you on Tory Island in October, 2001, we both signed a legally binding document in which you were to acquire a site (marked) on the island, in exchange for you acquiring my house site.
>
> As I had not heard from you since we signed that document on 4/10/01, I then wrote to you on 6/3/02 and again, received no response from you. You are hereby advised to expedite this matter within the next 21 days.
>
> Failure to do so, will result in this issue being taken out of my hands.
>
> Best wishes,
>
> Yours sincerely,
>
> Neville Presho.

A final letter dated 4th August, 2003, enclosed €100 which Mr. Doohan had lent Mr. Presho and referred to and enclosed a letter in relation to an unrelated matter.

He was referred to a solicitor and began investigating the cause of the removal of his house. A letter intimating legal action was sent to the defendants on 23rd December 2003. A plenary summons issued on 3rd January 2006 over two years later seeking, *inter alia*, an order setting aside the purported agreement of 4th October, 2001.

2. Pleadings
In that plenary summons, dated the 3rd January, 2006, the plaintiff claimed damages for trespassing and interference with his property together with unlawful and continued unauthorised use of his property; an order that the defendants restore the dwelling house and remove their septic tank. In addition the plaintiff sought an order setting aside and declaring null and void a purported agreement made between the plaintiff and the first named defendant concerning the plaintiff's property dated the 4th October, 2001.

In the statement of claim, delivered one year later on 13th February, 2007, the plaintiff pleaded that he had applied for outline planning permission to rebuild his house in September, 2001, and alleged that, shortly thereafter, on the 4th October, 2001, the defendant approached him and attempted to enter an agreement on that day purporting to be an exchange of land rights with no financial remuneration which was signed by the plaintiff whose signature was witnessed by the secretary of the Tory Island Co-Operative. The plaintiff alleges that at no time had he independent legal advice in relation to his agreement.

The plaintiff alleges that his house had been pushed over the bank "and on to the foreshore" and that boulders had been placed to form a boundary around the land for the purpose of securing a car park which was used for the benefit of the defendants' hotel without the consent and permission of the plaintiff. The plaintiff pleaded that the defendant was aware that the plaintiff's house blocked the sea view of the hotel. It was alleged that the defendant's servants and their agents had wrongfully, illegally and unlawfully removed the dwelling house of the plaintiff and taken possession of plaintiff's lands and property and were wrongfully claiming the said lands.

The plaintiff's reply to particulars stated that the manic depression of the plaintiff was first diagnosed in mid-September 1994 by a Dr. Tom O'Flynn. The plaintiff was never made a ward of court. Evidence of his psychiatric and medical condition and treatment would be provided at the hearing of the case. The document of the 4th October, 2001, was signed on that date by the plaintiff and the first named defendant at a time when the plaintiff was undergoing treatment.

3. Defence
By defence dated the 2nd January, 2007, the defendants pleaded that the plaintiff was not entitled to the relief claimed or any relief because of lengthy and inexcusable delay.

The defendants relied on the provisions of the Statute of Limitations as a bar to the plaintiff's claim. If the plaintiff did suffer the alleged or any damage or incurred loss so as to bar the plaintiff's claim against any other person then, it was pleaded, the plaintiff should be held to be responsible for the acts of such a person within the meaning of s. 35(1)(i) of the Civil Liability Act 1961 (as amended).

In passing the court observes that s. 35 relied on in the defence provides for the determination of contributory negligence by a plaintiff and extends to a person from whom the plaintiff is vicariously liable to include a personal representative being responsible for the contributory negligence of the act of the deceased or of a beneficiary. The provision relied on is as follows:

> "(i) where the plaintiff's damage was caused by concurrent wrongdoers and the plaintiff's claim against one wrongdoer has been barred by the Statute of Limitations or any other limitation enactment, the plaintiff should be deemed to be responsible for the acts of such wrongdoer."

As there is no defence of contributory negligence nor, indeed, any evidence of contributory negligence, it would appear that this defence is not relevant.

In any event no argument nor submission was made in relation thereto.

The defence admits that the first named defendant is the beneficial owner of the hotel premises the title to which is registered in the name of the second named defendant which is a company controlled by the first named defendant.

However, the defendants denied that the contractor employed by the first named defendant, John McGinty, was approached by the first named defendant and requested to knock down the house of the plaintiff for payment and to dig out the septic tank on the plaintiff's lands replacing it with a septic tank for the new hotel premises as alleged.

It was further denied that the first named defendant had placed his workmen living in the premises of the plaintiff without consent or authority of the plaintiff or that he or his servants or agents had removed roof sheets of the seaward side of the plaintiff's house and stopped intended repairs to the said house by Mr. McGinty the contractor, thereby allowing ingress of water to the plaintiff's house and making it inhabitable.

The defendants denied taking wrongfully or unlawfully possession of the lands or placing a septic tank on the lands for the purpose of the use of the hotel. The defendants further denied that they had unlawfully trespassed upon the plaintiff's property.

The defendants denied that the plaintiff's property was slowly and by degrees demolished by the first named defendant. Mr. Doohan did not approach Donegal County Council in an attempt to have the building fully demolished. He did not demolish the dwelling house or clear the site. The defendant admits however, that he cleared the stones or debris from the road at the request of Donegal County Council.

The defendants admitted that there was some discussion at one stage between the parties in relation to the document dated 4th October, 2001, but denied that these discussions took place at the behest of the first named defendant.

4. Statute of Limitations on delay
Counsel on behalf of the defendants had raised a preliminary issue regarding the Statute of Limitations.

The allegation made by the plaintiff was that the first named defendant arranged unnamed persons to set the defendant's house alight on 14th January, 1993. The first intimation of a proposed legal action was received on 23rd December, 2003. A plenary summons issued on 3rd January, 2006.

The defendants submitted that an action founded on tort could not be brought after the expiration of six years from the date on which the cause of action accrued.

The exception to the six year rule provided for by s. 49 of the Statute of Limitations 1957, relates to a person being under a disability including being of unsound mind. A person shall be conclusively presumed to be of unsound mind where he is detained in pursuance of any enactment authorising the detention of persons of unsound mind or criminal lunatics. (Section 48 (2)).

> Section 49 (1)(a) provides as follows:
>
> "If, on the date when any right of action accrued for which a period of limitation is fixed by this Act, the person to whom it accrued was under a disability, the action may, subject to the subsequent provisions of the section, be brought at any time before the expiration of six years from the date when the person ceased to be under a disability or died, whichever event first occurred notwithstanding that the period of limitations has expired."

There is no definition of unsound mind in the Act.

Rowan v. Bord na Mona [1990] 2 I.R. 425 followed *Kirby v. Leather* [1965] 2 Q.B. 367. In both cases the plaintiff suffered injuries because of an accident which gave rise to his cause of action. A plaintiff who was injured on the day by the tort can rely on section 49. In the present case, the defendant submitted that the reply to particulars stated that manic depression was first diagnosed in mid-September, 1994, which was the year following the fire and following the plaintiff's return to Tory Island on or about 5th July, 1994.

The plaintiff further submits that though the concept of unsound mind is undefined in statute, Kirby v. Leather referred to a proper and reasonable meaning for the phrase related to a person who by reason of mental disorder was incapable of managing and administering his property and affairs. The plaintiff further relied on *McDonald v. McBain* [1991] 1 I.R. 284.

It was submitted by the defendants that the plaintiff was suffering an illness of a temporary character. The onus rested on the plaintiff to prove that he was of unsound mind as these were matters which were peculiarly within the knowledge of the plaintiff. (*McGowan v. Carvill* [1960] 1 I.R. 330 at 336).

In relation to delay the defendant referred to Primor (1992 I.R. 459) and concluded that there had been inordinate and inexcusable delay.

5. Consideration of preliminary issue
5.1 On the question of unsound mind, Lord Denning M.R. in Kirby v. Leather [1965] 2 Q.B. 367 held:

> "It seems to me that the words 'unsound mind' in a statute must be construed in relation to the subject matter with which the statute is dealing. In *Whysall v. Whysall* [1959] 3 WLR 592, Phillimore J. held that the phrase 'unsound mind' in a statute relating to the dissolution of marriage must be taken to describe a mental state which would justify a dissolution of the marriage tie, that is, mental incapacity such as to make it impossible for a couple to live a normal married life together. So here it seems to me in this statute a person is of 'unsound mind' when he is, by reason of mental illness, incapable of managing his affairs in relation to the accident as a reasonable man would do. It is similar to the test where a guardian ad litem or next friend is appointed under the new R.S.C. Ord. 80, r.1. That states that a person under a disability means 'a person who by reason of mental disorder is incapable of managing and administering his property and affairs.' So here it seems to me that David Kirby was of unsound mind if he was, by reason of mental illness, incapable of managing his affairs in relation to this accident."

In determining if mental disorder or illness amounts to a disability for the purpose of the Statute of Limitations, the test is whether or not the plaintiff was capable of managing his affairs in relation to the alleged wrong. Managing his affairs includes the protection of his

legal rights.

5.2 Counsel for the defendant argues that the date of the accrual of the cause of action was the 14th January 1993, the date on which the plaintiff alleges that the first named defendant arranged for unnamed persons to set the defendant's house alight.

Counsel for the plaintiff submits that the cause of action for damage to the plaintiff's property accrued at its earliest in July 1994 when the combination of evidence gave rise to a legitimate concern that the defendants were responsible for the damage. The Plaintiff bases this argument on the fact that he did not know of the malicious nature of the fire or the destruction of his property.

The plaintiff was told by the defendant, Mr. Doohan that "he should find out who burnt his property". He found out, on visiting the Garda station in Bunbeg on the 20th July 1994, that a report of malicious damage had been made. He met Mr. McGinty the subcontractor and heard what he had to say. He visited Donegal County Council offices and established that they were not involved in demolishing his house.

In this regard, the Plaintiff relies on Section 71(l)(b) of the Statute of Limitations which states that in certain cases of concealment time does not begin to run. He submits that the real issue is not when the fire occurred or when the property was demolished and levelled but on what date it could be said that the Plaintiff knew that the fire or levelling was malicious. The Plaintiff relies on the judgment of Morris J. in *McDonald v. McBain* [1991] 1 IR 284, a case involving a malicious house fire, where he held:

> "It is my opinion that if the circumstances were such that the plaintiff in the present case had her property destroyed by fire deliberately by a third party and that third parry, either by stealth or silence, succeeded in hiding that fact from the plaintiff, and she was left in complete and total ignorance of the identity of the wrongdoer, then that conduct on the part of the wrongdoer would amount to fraud within the meaning of the Statute of Limitations."

I am satisfied on the facts before me that the Plaintiff is correct in submitting that the cause of action did not accrue before he returned to Tory Island in July 1994. Indeed the cause of action could not accrue until he discovered the identity of the wrongdoer.

There was evidence of concealment by way of silence by those interviewed in the garda investigation. There was further evidence of concealment, to some extent, in April 2000 when the plaintiff returned to the island and got no answers from the unidentified islanders with whom he spoke.

This postponed the accrual of the action against the defendants in general or against the first named defendant in particular as malicious intent can only be imputed against a corporate body through its director(s).

McDonald v. McBain applies to the extent that the plaintiff was left in complete and total ignorance of the identity of a wrongdoer. The evidence that the plaintiff "got the whole story" in July 1994 from Mr. McGinty was to the effect that Mr. McGinty had been approached by the first named defendant to demolish the house but not as to who maliciously destroyed it. This was denied by that defendant.

Moreover, the attitude of the plaintiff regarding the purported agreement of 4th October 2001 between the defendant and himself does not indicate that that defendant was identified as a wrongdoer at that time.

While it may be that the plaintiff was not in "complete and total ignorance of the identify of a wrongdoer" in the words of *McDonald v. McBain* there is no doubt that there is an overlapping issue as to whether the plaintiff was under a disability at the time the cause of action occurred.

5.3 It follows that it is necessary to determine the extent to which the plaintiff was under a disability by reason of being of unsound mind on the date of accrual of the cause of action whatever that date might have been. In this regard the evidence of the two psychiatrists is relevant.

Dr. Clifford Halley, clinical director of Donegal/Letterkenny Hospital where the plaintiff had been under his care from mid-January 2009, gave evidence of his contact with Dr. Watson, a consultant from Northern Ireland who had treated the plaintiff. He concurred in her diagnosis that the plaintiff had been in a manic state consistent with bi-polar disorder, that he was depressed, disruptive and suicidal and his judgment was impaired.

He said that while the first documented diagnosis of this illness was in 1994, he was of the view that it was quite unusual to have the onset in mid-forties as Mr. Presho then was rather than in early to mid-twenties to thirties.

Dr. Halley said the plaintiff had suffered from a very severe episode and was seriously ill. The signs were hard to detect. They were more irrational and hard to present matters in a logical and coherent manner. It was a relapsing illness very vulnerable to different life situations. There was also evidence of a failure to adhere to treatment.

In its manic phase a patient feels super-human with urgent action required and exceeds socially unacceptable behaviour. In the depressive phase the smallest problems can be insurmountable.

It was not possible to manage that illness in an open ward. Medication to control mood swings was necessary. The plaintiff had to be detained against his will.

There was no single factor triggering bi-polar disorder but psycho-social triggers affected one's behaviour.

The phrase "a person of unsound mind" was not often used outside courts and was not therefore helpful.

Medication requires close monitoring and he was required, when in Northern Ireland, to be hospitalised. Dr. Halley said he saw him in an episode of mania. His thoughts were grandiose, that he had a special mission in life and religious beliefs became overwhelming. The evidence relating to the interpretive centre was symptomatic and would make one worry about the mental health of the plaintiff.

In cross-examination he said that he took the history from Dr. Watson but had not contact with the psychiatrist in New Zealand. Dr. Watson had dealt with the plaintiff over the last five years.

Dr. Halley said he couldn't get the plaintiff's consent at first to access the records from Dr. Watson.

He said the depressive phase could be more prolonged and required months' hospitalisation: in the worst case scenario it could be six months every year in a depressive phase while the patient would be able to get along in a normal way, unless there were permanent damage which had not been prepared. Dr. Halley said it was difficult to pronounce on in his mental state in 1993.

He said that a solicitor might refuse to act if the case did not make sense. In July 1994 having realised that his house was gone his drinking was a pathway to severe illness and highlighted the instability. It was unlikely that one could then do normal business.

Dr. Brian McCaffrey, consultant psychiatrist, gave evidence on behalf of the defendants.

Dr. McCaffrey said he didn't have access to records other than that he knew that the plaintiff had bi-polar disorder in 1994. When he interviewed him he queried the late onset of the illness. The plaintiff was helpful and intelligent and described his childhood illnesses. His father, a Presbyterian Minister, had gone from Glasgow to Hollywood, Co. Down when the plaintiff was ten. At age fourteen he had a head injury, was depressed for four months but recovered. He studied civil engineering but, Dr. McCaffrey believed, would have been better conceptually in architecture.

He described his films. In 1974 the "Summer Silver" documentary in Bunbeg was a success but his mood took a nose dive. He had been severely depressed in 1984 – a ten year cycle.

In 1994 he was in a mental health facility in South Island, New Zealand and recovered. By 1999 things deteriorated when he was in Northern Ireland where he as sectioned (committed) and was put on medication with which he was not compliant. Continuous treatment was necessary to decrease the severity and frequency of his illness.

The plaintiff's evidence regarding the description of his illness was clear. The only difference he had with Dr. Halley's evidence was that he believed the onset to be earlier than 1994. Dr. Halley had commented that late-onset was unusual and that's why Dr. McCaffrey went back further. He was satisfied that the plaintiff was not malingering. He had lost three out of thirteen years through depression. He believed that recovery could be complete between illnesses. He felt frustrated. His mood swings veered from desperation to forgiveness.

In cross-examination he agreed that no single event caused bi-polar disorder. It need not last a life time and can sometimes burn out. It required ongoing management and assessment, sometimes as frequently as weekly or bi-monthly.

He agreed that Mr. Presho had an intensity of attachment in relation to his relationship with islands generally and Tory in particular. The return to the island and the finding of the property gone was very damaging to his mental health. He would query his mental health in 1994. From 1994 to 2000 there was an indication of severe medical illness but he didn't talk of this. His children had been taken into care and his wife was ill. He deteriorated in 1999. He was sectioned (certified) in Northern Ireland and was afraid that he would be kept locked up for the rest of his life.

Dr. McCaffrey described his two hour interview as a snapshot which he believed would require two to three days. He remarked that Mr. Presho said that it would require two to three weeks.

Dr. McCaffrey believed that the written agreement of 4th October, 2001, with Mr. Doohan after a night of exposure on the hill on Tory Island was a sign of mental illness.

6. Decision on preliminary issue

Evidence was heard by the court by the Plaintiff that he was diagnosed as suffering from bi-polar disorder in September 1994, when he had returned to New Zealand. He was then in his 40s. Dr. Halley thought it was unusual to have such a late onset of such illness. Dr. McCaffrey, having met Mr. Presho for some two hours and who had probed his early history was of the opinion that the condition pre-dated the diagnosis. Both psychiatrists described the key features of mania being a frantic outburst of activity combined with a failure to have the energy to see tasks through. The Plaintiff himself gave evidence of having been shocked by the incidents of July 1994, describing this as a "switch having flicked in his mind" and leading him to drink heavily. He had spent two months in Ireland away from his family and when he returned to New Zealand his wife was fearful of him. He sought medical help in September 1994. Between 1994 and 2000, the Plaintiff suffered from mental instability, repeated hospitalisation, detention, and ongoing medication and alcohol dependency. His children were taken into care and only returned on condition that the Plaintiff agreed to be deported from New Zealand. Throughout this period, the Plaintiff was incapable of meaningful employment.

Dr. Halley was of the view that it was possible that he may not have made any sense when he consulted a solicitor.

I am satisfied from the medical evidence that it is probable that the plaintiff had suffered the onset of bi-polar disorder before the discovery of the disappearance of his house on Tory Island.

If I am incorrect in this finding it is clear that from his own evidence and the surrounding circumstance of his visit to the island in July 2004 that this disorder manifested itself at the time of that discovery as the flicking of a switch. *Kirby v. Leather* and *Rowan v. Bord Na Mona* applied.

His reactions and behaviour in relation to the causation of the fire, demolition of the house, trespass on the site and seeking redress varied from frustration to forgiveness. The letter to the gardaí on 21st November 1994 to halt the investigation and the cancelling of the prior appointment with Sergeant Friel, in addition appeared to be wholly irrational.

Nonetheless he did instruct his solicitor to write a letter to the defendants and to issue a summons two years later on 3rd January, 2006. The court expresses a concern regarding his reply to particulars he stated that he was not diagnosed until September 1994 as suffering from bi-polar disorder. Notwithstanding the court accepts that it was probable that the onset was earlier.

On the evidence before me, it appears that, by reason of his mental illness, the Plaintiff was incapable from the date of accrual of the cause of action at least to the date of his instructions to his solicitor which resulted in the letter of 23rd December 2003, of functioning to a degree that would enable him to protect his legal rights in relation to his property as a reasonable man would do. In this regard, I am guided by the finding of the Court of Appeal in *Kirby v. Leather* [1965] 2 QB 367, where the plaintiff therein had also approached a solicitor within the limitation period but had not, by reason of mental illness, taken the step of commencing an action in relation to the incident. It is clear in the current case that the Plaintiff's illness, characterised by periods of mania alternated with periods of depression, meant that he was not in a fit state to look after his affairs and to vindicate his legal rights.

In the event of the findings of concealment and if disability the court concludes, on the preliminary issue that the defendants are not

entitled to an order dismissing the plaintiff's claim on the grounds of delay.

Having heard the evidence and considered the submissions on the merits of the case the court is satisfied that the second named defendant has and continues to trespass on the plaintiff's property and that the submissions in relation to delay have no bearing on that claim.

The court invited the parties to consider an amendment to the pleadings, on such terms as the court may deem proper, to consider whether, and to what extent, any remedy for unjust enrichment may be appropriate.