

THE HIGH COURT

2004 19656 P

BETWEEN

PATRICK DARBY

PLAINTIFF

AND

**OLIVER SHANLEY AND MICHAEL SHANLEY
PRACTISING UNDER THE STYLE AND TITLE OF
OLIVER SHANLEY AND COMPANY SOLICITORS**

DEFENDANTS

THE HIGH COURT

2007 3061 P

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DECLAN DARBY

PLAINTIFF

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DEFENDANTS

JUDGMENT of Ms. Justice Irvine delivered on the 16th day of October, 2009

1. Factual Background

1.1 The proceedings named in the title hereto concern claims brought by each of the plaintiffs, who are brothers, arising from the alleged negligence on the part of the named defendants, a firm of solicitors, in relation to the professional advices and work carried out by them in respect of two particular transactions. The first of these related to the circumstances in which the last Will and Testament of the late Bridget Bird ("Bridie Bird") was prepared on 27th February, 1997, and the second to the transfer by her of certain lands to the first named plaintiff, Patrick Darby, by deed of transfer dated 17th December, 1998.

1.2 The first named plaintiff is a married man and is an upholsterer by profession. He resides with his wife and two children at Deanhill, Hayestown, Navan, County Meath. The second named plaintiff is the brother of the first named plaintiff. He is a farmer and also resides at Deanhill, Hayestown, Navan, County Meath.

1.3 The late Bridie Bird lived with her husband, the late William Bird, in a house on a substantial holding of land, estimated to have been approximately 36 acres, at Hayestown, County Meath. This house and the adjacent lands were formerly owned by Bridie Bird's family whose surname was Bowen. Bridie Bird and her husband had married late in life and had no children of their own. A close family relationship existed between the Bowen and Darby families and both of the plaintiffs had spent much of their young lives in the Bowen's household.

1.4 Bridie Bird died on 24th October, 1999. She was survived by her husband. He, in turn, died on 31st December, 2000.

1.5 The two transactions the subject matter of these claims, were both carried out by the late Bridie Bird with the assistance of the defendant firm of solicitors who, at all relevant times, practiced in that capacity at Academy Street in Navan, County Meath. Those transactions can be described as follows:-

(i) Last Will and Testament of Bridie Bird dated 27th February, 1997.

By her last Will and Testament, the late Bridie Bird appointed Theresa Darby, the mother of both plaintiffs, as the executrix of her Will. The relevant portion of her Will, as far as these proceedings are concerned, provided as follows:-

"I GIVE, DEVISE AND BEQUEATH my house and the contents of the house and land at Hayes, Navan, County Meath, comprising approximately 35 acres, to my Husband, William Bird for his day and after his

death to PATRICK DARBY AND DECLAN DARBY, sons of Thomas Darby and Theresa Darby of Hayes, Navan, County Meath, as tenants in common in equal shares."

The plaintiffs were also named as residuary legatees of the estate.

(ii) Transfer dated 17th December, 1998.

By deed of transfer dated 17th December, 1998, ("the transfer") the late Bridie Bird transferred to Patrick Darby, as a gift, a parcel of land described in the schedule thereto in the following terms, namely:-

"ALL THAT AND THOSE part of the lands of Carnuff Little, Hayestown in the Barony of Skryne and County of Meath, more particularly delineated on the map thereof attached hereto, being part of the property comprised in Folio 18111F of the Register, County Meath."

1.6 The land the subject matter of the transfer comprised approximately 3.5 acres. As can be seen from the map attached thereto, the said land was approximately 1.5 acres away from Bridie Bird's family home.

1.7 Shortly after the death of Bridie Bird on 4th October, 1999, her husband's solicitors, Messrs. Christie and Gargan, wrote to Oliver Shanley and Company by letter dated 16th December, 1999, advising the executor that, pursuant to the provisions of s. 115 of the Succession Act 1965, William Bird was electing to take his one half share of his late wife's estate in lieu of the life interest devised to him under the terms of her Will. By further letter dated 8th February, 2000, Messrs. Christie and Gargan wrote to the defendants raising concerns in relation to the validity of the transfer and the Will referred to above and indicating that it was their client's intention to challenge the validity of both.

1.8 Subsequently, William Bird instituted High Court proceedings ("the probate proceedings") under Record Number [2000 No. 4195 P] on 6th April, 2000. The defendants to those proceedings were Theresa Darby, the mother of the plaintiffs in these proceedings, who was the executrix of the estate of Bridie Bird and Patrick Darby to whom the lands contained in Folio 18111F of the Register of County Meath had been transferred.

1.9 In the probate proceedings, which were a hybrid type of action, William Bird sought to challenge both the validity of the last Will and Testament of Bridie Bird and also the transfer to Patrick Darby of the lands outlined in the Deed of Transfer dated 17th December, 1998. The following challenge was made to each of the aforementioned transactions. In relation to the last Will and Testament of Bridie Bird, it was alleged in the Statement of Claim:-

(a) That the testatrix did not have the relevant testamentary capacity to know and approve of the contents of her Will.

(b) That the last Will and Testament was not executed in accordance with the provisions of the Succession Act 1965.

(c) That the execution of the Will was procured by duress and/or undue influence exerted upon the deceased by the defendants, namely, Theresa Darby and Patrick Darby in the manner particularised at paragraphs 5(i) to (x) inclusive.

1.10 In relation to the Deed of Transfer, it was alleged as follows in the Statement of Claim:-

(a) That the presumption of undue influence arose against the defendants named in the proceedings and that the transfer was procured as a result of the actual undue influence of those defendants in the manner particularised at paragraphs 7(i) to (xi) inclusive.

(b) That the transfer was void in circumstances where the prior consent of William Bird, pursuant to the provisions of the Family Home Protection Act 1976, had not been obtained in advance of its execution.

(c) That the transfer amounted to an improvident and/or unconscionable transaction.

1.11 Amongst the reliefs sought by William Bird were orders declaring that Bridie Bird had died intestate, and that the lands the subject matter of the Deed of Transfer, were held by the second named defendant in trust and for the benefit of Bridie Bird's estate.

1.12 For the purposes of the probate proceedings, the first named defendant, Theresa Darby, as executor of the estate of the late Bridie Bird, was represented by Oliver Shanley and Company Solicitors. Patrick Darby, who had initially been represented by a local solicitor, was ultimately represented by Duncan Grehan and Partners.

1.13 William Bird subsequently died on 31st December, 2000. By order of the High Court dated 25th June, 2001, it was directed that the aforementioned proceedings be carried on by Michael Kavanagh in his capacity as executor of the estate of the late William Bird.

1.14 The evidence to the Court on the hearing of this action, which was not disputed, was that the executrix, Theresa Darby, was anxious regarding the risks faced by the estate arising from the probate proceedings and their potential costs if the action was permitted to proceed to trial. In like manner, Patrick Darby was concerned about the significant risk that the transfer might be set aside, having regard to the fact that he had, since the transfer, built his family home on that site.

1.15 In the aforementioned circumstances, and based on the advices received, the defendants compromised the probate proceedings following negotiations which took place on 8th February, 2007. The settlement was received by the Court on 6th March, 2007. The terms of that settlement provided (*inter alia*):-

(a) That the lands of the late Bridie Bird (excluding those transferred to Patrick Darby) would be sold.

(b) That from the proceeds of sale, the legal costs of all of the parties to the probate proceedings would be discharged, namely, those of the plaintiff, Theresa Darby and Patrick Darby.

(c) That, thereafter, the remaining monies, subject to the specific bequests contained in the Will, would be paid as to 50% to Michael Kavanagh, as next-of-kin of the late William Bird, and the remaining 50% equally to Declan Darby and Patrick Darby.

(d) That Patrick Darby would forego €70,000 of his entitlement under the Will of Bridie Bird in favour of William Kavanagh. The said €70,000 was the sum agreed to represent 50% of the value of the lands transferred to him by Bridie Bird in 1998. Thus, William Kavanagh received a sum equivalent to that which William Bird would have received on exercising his legal right to a one half share of his late wife's estate, had she not executed the transfer to Patrick Darby in 1998.

1.16 The within proceedings were instituted by Patrick Darby on 7th December, 2004. The statement of claim was delivered on 13th April, 2007, and the proceedings came on for hearing before this Court on 30th April, 2009. The claim of Declan Darby was instituted significantly later on 17th April, 2007, and was heard at the same time as his brother's claim.

1.17 In the proceedings in which Patrick Darby is plaintiff, the more significant of the allegations made against the defendants are as follows:-

(a) An assertion that the defendants failed in their duty of care, not only to the late Bridie Bird, but also to the intended beneficiaries of her Will, when advising her and preparing her Will in the manner specified at paras. (a) to (i) inclusive of the statement of claim.

(b) That the defendants were negligent in their obligations to the plaintiff, who was their client for the purposes of the transfer, and also to Bridie Bird in relation to the manner in which they advised her in relation to the transfer, as particularised at paras. (a) to (k) inclusive of the statement of claim.

1.18 The defendants, in their defence to the claim of Patrick Darby, which was delivered on 5th October, 2007, denied that they owed the alleged or any duty of care to the testatrix and/or to the beneficiaries. They maintained that the last Will and Testament of Bridie Bird was drawn in accordance with her instructions, that it was clear, concise, and unambiguous, and in all respects complied with the provisions of the Succession Act 1965.

1.19 The defence further denied that the defendants acted for both Bridie Bird and the plaintiff in relation to the transfer. All particulars of negligence, breach of duty and breach of contract in relation to their professional involvement in the preparation of the Will and/or the transfer were fully traversed. Finally, the defendants denied all allegations of loss and damage. In an amended defence dated 23rd December, 2008, the defendants contended that the plaintiff's claim, insofar as it related to the last Will and Testament of Bridie Bird, was statute barred and/or defeated by reason of delay and/or *laches*.

1.20 In the proceedings instituted by Declan Darby on 17th April, 2007, he maintained that the defendants owed a duty of care, not only to the late Bridie Bird, but also to the intended beneficiaries of her Will, to ensure that it was drafted in accordance with her instructions and in accordance with the provisions of the Succession Act 1965. He maintained that subsequent to her death, a challenge was made to the validity of Bridie Bird's Will and that this was founded upon the provisions of s. 111 of the Succession Act 1965. Declan Darby contended that by reason of the defendants' negligence in failing to ensure that the Will took into account her husband's right to a one half share of her estate, that the Will would inevitably be challenged. He alleged that it was negligent on the part of the defendants to draw a Will in terms which were incapable of taking effect upon Bridie Bird's death, without the necessity for legal proceedings, and that those proceedings, when instituted and subsequently settled, caused his financial entitlement under the Will to be significantly reduced.

1.21 The defendants, in their defence of 5th October, 2007, traversed the positive obligations pleaded by the plaintiff. They denied that they owed any duty of care to the plaintiff, as alleged. They denied the negligence pleaded and maintained that any loss or damage sustained by the plaintiff did not arise as a result of any negligence on their part. By amended defence delivered on the 23rd December, 2008, the defendants raised a defence based upon the provisions of s. 11 of the Succession Act 1957.

2. The Evidence

2.1 Given that no stenographer was engaged by the parties, the Court will briefly set out a summary of the evidence given by each of the witnesses in the proceedings.

Mr. Patrick Darby

2.2 Patrick Darby advised the Court that he grew up approximately 400 yards from the Bowen family home. Bridie Bird was one of the eleven Bowen children. She married William Bird when she was approximately fifty years of age. The couple had no children and they moved into the family home to live with Bridie Bird's sister, Kathleen, who had inherited the old family home upon her parent's death. When Kathleen died, she left her estate to Bridie Bird.

2.3 William Bird had worked as a part-time meter reader for the ESB. Bridie Bird and her husband were hugely dependent upon the Darby family for their day-to-day needs. Patrick Darby and Declan Darby were like sons to Bridie Bird. They looked after her banking business, collected her pension and did her shopping. They took Bridie and William Bird any place they needed to go. Whilst Bridie Bird was physically frail, she was mentally alert. He described her as being "razor sharp". Bridie and William Bird appeared to enjoy a normal harmonious marital relationship. William Bird regularly accompanied Patrick Darby to local football games.

2.4 Patrick Darby told the Court that he had hoped to build his house on his own family's land. However, he could not get

planning permission due to problems with access to a site on that land. Accordingly, he investigated the possibility of obtaining planning permission for a site on Bridie and William Bird's land. He had been told by them that he and his brother, Declan, were to be left their property after their death.

2.5 Having ascertained that there was a likelihood of getting planning permission on a site on Bridie Bird's land, Patrick Darby approached Bridie Bird in the presence of her husband and asked her if there was any possibility of her giving him that site. Bridie Bird said that she was quite happy to give him the site as he was going to get it anyway after they died. Thereafter, he went to Paul Carroll, an architect, to have a map of the site drawn. He then went to the office of Mr. Shanley to have the transfer document prepared.

2.6 Patrick Darby told the court that he knew Mr. Shanley was Bridie Bird's solicitor. He also knew that the firm carried out all of the legal work in relation to land dealings in the area on behalf of Smyth's, the auctioneers who traded from the next door premises and, accordingly, felt that they would be suitable to carry out this work on his behalf.

2.7 Patrick Darby said that he did not meet Mr. Shanley himself. He dropped the map of the intended site in to Ms. Hayes, a solicitor in that office and with whom he had all his dealings. He recollected signing the transfer document. He remembered bringing Bridie Bird in to the defendant's offices to allow her sign the transfer. He remembered being there at the time she signed it with Ms. Hayes.

2.8 In January 1999, Patrick Darby received a letter from the defendants enclosing a form pertaining to the Family Home Protection Act 1976. He was asked to get the form signed by Bridie and William Bird and thereafter to return it to their office. The letter also advised that he should tell the couple to send back a copy of their Marriage Certificate, signed on its reverse side. He complied with this letter without knowing its relevance.

2.9 Patrick Darby paid the defendants a sum of €683 in respect of their legal work in relation to the transfer. He confirmed that he received no legal advice from the defendants and that Bridie Bird was given no advice regarding the transfer when she attended to execute the deed.

2.10 Following the transfer, Patrick Darby obtained a mortgage of approximately £75,000. He got a small contractor to build his family home on the site. William Bird regularly engaged with him in relation to his house when it was in the course of construction.

2.11 Bridie Bird died, rather unexpectedly, from a heart condition in October, 1999. Within a week after her death, Patricia Boyle and Michael Kavanagh, relatives of William Bird, took him to reside at Bettystown and locked up the old family home.

2.12 Shortly after Bridie Bird's death, Patrick Darby and his brother Declan Darby were called into Mr. Shanley's office for the reading of her Will. Thereafter, his mother, Teresa Darby, received a letter stating that William Bird was not happy with the provisions of his late wife's Will. When he was informed that he was being sued in legal proceedings, Patrick Darby sought advice from Pat O'Reilly, a local solicitor. Mr. O'Reilly felt that he might have a conflict of interest due to the fact that his colleague, Oliver Shanley, was involved in those proceedings. He accordingly advised Patrick Darby that he should find a Dublin solicitor to defend the proceedings on his behalf.

2.13 Patrick Darby had moved into his house in late 1999, and was residing there with his wife and two children, who were eight and five years of age respectively, at the time that William Bird's proceedings were due to be heard. He was afraid of the risk to his house posed by those proceedings and he was advised by his lawyers that there was a risk that the transfer could be successfully challenged.

2.14 By the time the proceedings were ready for hearing, William Bird had died, and the proceedings were being continued by his nephew, William Kavanagh. Patrick Darby and his mother were anxious that the proceedings would be settled. In order to achieve a settlement, it was suggested that he should relinquish a sum of money equivalent to 50% of the value of the site which had been transferred to him in 1998. The plaintiffs suggested that the value of the site was something in the region of €140,000–€150,000. He felt the valuation was conservative and this fact influenced his decision to settle the case. He, accordingly, agreed to waive his right to €70,000 from the assets of the estate. Patrick Darby told the court that at the time of the settlement, he had already issued the within proceedings, and that his lawyers advised him that he could, as part of that claim, seek to recover the €70,000 he was foregoing from the estate in that action.

2.15 Under cross-examination, Patrick Darby denied the possibility that Bridie Bird had received legal advice when she was with Ms. Hayes on the date the transfer was executed. He agreed that Bridie Bird was mentally sharp, that she was on good terms with her husband, and that her husband was aware of the fact that he was building his house on the lands concerned.

Evidence of Mr. Duncan Grehan

2.16 Mr. Grehan told the court that he had been a practising solicitor since 1980, and was a partner in the firm of Duncan Grehan, Solicitors. He first became involved with Patrick Darby in late 2006. He had been recommended to Mr. Darby by another client of his. At that stage, the probate proceedings were at an advanced stage. It took some time for him to take up the file from the solicitors who had previously represented the interest of Patrick Darby. Thereafter, he requested the defendants to furnish to him all documents pertaining to the transfer. The court was given copies of this documentation. From what he received, Mr. Grehan concluded that Mr. Shanley had been retained by Patrick Darby as his solicitor in relation to the transfer, and that the transfer could be successfully challenged on the grounds of undue influence. The transfer had been conducted in a most informal manner. Patrick Darby was legitimately entitled to be worried about the potential outcome of the proceedings, particularly in circumstances where his family home had been built on the land transferred to him.

2.17 Mr. Grehan told the court that a settlement meeting was arranged for early February, 2007. He was certain that, notwithstanding the issues set forth in the Order of the Master of the High Court, the validity of the transfer of the land to his client was being contested. He doubted the likelihood of successfully defending such challenge. He believed that in the circumstances of the case, a presumption of undue influence existed which it would be hard to refute. He further believed that the estate was hemorrhaging money because of the continuance of the proceedings. Accordingly, he

encouraged his client to agree to pay back to the estate half of the value of the lands transferred to him, which had notionally been agreed to have a total value of €140,000. He did not believe that his client had any choice. He advised his client that he could seek an indemnity in respect of that payment as an element of his claim in the present proceedings. He also concluded that the validity of the Will was at risk and hence, he advised that the proceedings be settled on terms which included in agreement that the estate would bear the legal costs of all parties.

2.18 Following the settlement, Mr. Grehan referred the court to a letter dated 13th December, 2007, from Oliver Shanley & Company, showing the distribution made to Patrick Darby and his brother Declan Darby out of the estate.

2.19 Mr. Grehan proceeded to advise the court on the duty of care owed by a solicitor to a client when preparing their Will, and/or preparing a Deed of Transfer in circumstances such as arose in the present case.

2.20 Mr. Grehan stated that when drawing a Will for a married person, a solicitor must make himself aware of the property which the testator/testatrix owns, and give them appropriate advice regarding the implications of s. 111 of the Succession Act 1965. The solicitor was obliged to explain how that provision would impinge upon any decision they made regarding their property. A testatrix, such as Bridie Bird, had to be advised of her husband's legal right and also of the fact that if she decided to seek to limit that right, there could well be a challenge to the validity of the Will. If the client, notwithstanding such advice, still wished to have the Will drawn in that way, the testator/testatrix should be advised to consult their spouse with a view to obtaining a surrender by them of their legal right, although the spouse in such circumstances would clearly have to receive independent legal advice to render that surrender valid.

2.21 Mr. Grehan advised the court that, where a client wished to have a Will drawn to leave their spouse less than their legal right, that the solicitor could reduce the prospects of a challenge to the Will by requesting the client, if elderly, to obtain a certificate from a doctor as to their testamentary capacity. Also, the solicitor, in such circumstances, was mandated to seek to strengthen the Will by taking a detailed attendance, demonstrating that he had advised his client as to the legal right of their spouse under the provisions of the Succession Act 1965, and noting that the client had, nonetheless, given instructions regarding the preparation of the Will against the backdrop of that advice. No such attendance had been prepared by Mr. Shanley.

2.22 Mr. Grehan contended that there ought to have been a cooling-off period prior to the execution by Bridie Bird of her Will. During that period, she would have the opportunity to reflect on her instructions, having regard to the advices of her solicitor as to the consequence of drawing her Will in a manner which did not provide for a one-half share in her estate to be left to her husband. Further, after she executed her Will, the testatrix should have been sent a copy of her Will and requested to confirm that the same had been drawn in accordance with her instructions.

2.23 Finally, in relation to the Will, Mr. Grehan told the Court that, in his view, Patrick Darby's interests would have been at risk if the probate litigation had been permitted to proceed. His instincts were in favour of a settlement because of the legal costs which were eroding the estate.

2.24 In relation to the transfer, Mr. Grehan advised the court that it was inappropriate for the defendants to have acted on behalf of both parties in respect of that transaction. He stated that, in the absence of the parties being represented by different solicitors, the presumption of undue influence would arise and that such presumption would be difficult to displace. Accordingly, the defendants had put the validity of the transfer at risk as the transferor could not be shown to have received independent legal advice.

2.25 The defendants' failure to refer Patrick Darby to a separate solicitor exposed him to the risk of an allegation that he had procured the transfer through undue influence exerted over Bridie Bird. They were further negligent in failing to advise Patrick Darby that if he did not attend another solicitor that there was a risk that the validity of the transfer might be challenged at a later date.

2.26 Mr. Grehan told the court that a solicitor, when taking instructions from a transferor, ought to have kept an attendance of the instructions received from his client, and also a note of the advice that was given regarding the transfer, to ensure that any allegations subsequently made could be defended.

2.27 Mr. Grehan advised the court that if the intended transferor was married, a solicitor had to be concerned as to whether or not the designated property might be a family home. It was necessary to get the prior consent of the spouse by reason of the provisions of the Family Home Protection Act 1976. That declaration had to be made before a Commissioner for Oaths. He nonetheless agreed that the lands transferred could not have been considered to have been part of the family home of Bridie and William Bird. The definition of a family home was one which was confined to a house and its curtilage.

2.28 Mr. Grehan stated that, save for a voluntary transfer between husband and wife, there were really no circumstances in which independent legal advice was not obligatory. Referring to the Guidelines of the Incorporated Law Society, he stated that this was a case where the parties ought to have been separately represented, particularly in circumstances where Patrick Darby was known to be intent on building his family home upon the site to be transferred.

2.29 Regarding the Will, Mr. Grehan agreed that it was normally a potential beneficiary who would seek to challenge a Will. He said that Mr. Bird should have been contacted and asked to sign a disclaimer of his legal right share.

2.30 Under cross-examination, Mr. Grehan agreed that he had not spoken to Mr. Shanley as to what evidence he could have given in the probate proceedings if they had proceeded to trial. He confirmed that Patrick Darby's evidence to the court in the present case was the same as the account that had been given to him prior to the settlement of the probate proceedings. He always understood that Patrick Darby was of the view that Bridie Bird knew what she was doing at the time she executed the transfer in his favour. The Bowen family and the Darby family had always been on good terms. He explained that he had not been in a position to deliver a statement of claim in the proceedings until the extent of Patrick Darby's losses had been ascertained, and that this had only occurred when the probate proceedings were settled. Similarly, until the outcome of the probate proceedings, the losses, if any, of Declan Darby were unascertainable. Hence, the delay in the issue of his proceedings.

2.31 Mr. Grehan reiterated that a solicitor drawing a Will in circumstances such as occurred in this case was mandated to seek to involve Mr. Bird in the transaction and had to make it clear to his client that the Will was not safe otherwise.

Mr. Declan Darby

2.32 Mr. Darby told the court that he was present at the negotiations which led to the settlement of the probate action in 2007. He was in attendance with his mother and Oliver Shanley. He was aware that the payment of €70,000 had come up for discussion and that his brother had given his consent to handing up €70,000 so that the case could be settled.

2.33 Regarding his own case, he stated that he had not known the terms of Bridie Bird's Will until he went into Mr. Shanley's office for the reading of the Will. He said that his house was built on the same lane as Bridie Bird's house, and that he became aware that William Bird was looking for half of her estate, either on the day that the Will was read or shortly thereafter. He knew his mother was being sued and that the validity of the Will was being challenged. He confirmed that he was not advised by Mr. Shanley at any time that he should get any advice regarding the probate proceedings, even though their outcome would clearly affect his distribution out of her estate. On the date of the settlement, Mr. Shanley told him it was best to get the proceedings over with. He confirmed that he ultimately received €111,662.86 from the estate, and that he first went to Mr. Grehan to take advice regarding his present claim in late 2007.

2.34 Under cross-examination, Declan Darby told the court that whilst he knew William Bird was claiming after his wife's death, he had no idea of precisely how this could affect his situation. He was aware, however, that if William Bird got more, that he would get less. He instituted his proceedings in April 2007, against Mr. Shanley, claiming negligence.

Mr. Oliver Shanley

2.35 Mr. Shanley told the court that Bridie Bird was a long-standing client of his firm. She was mentally alert. He had dealt with her previously in her capacity as the executrix of one of her brother's estates. She came in to his office to make her own Will in February, 1997.

2.36 The day Bridie Bird came in to make her Will, she was brought in by the plaintiff's mother, Theresa Darby. She told him she wished to leave her property to her husband "for his day" and then to Mr. Declan and Mr. Patrick Darby "her two lads". Mr. Shanley knew her husband was still alive. He told the court that it was his practice, where a wife would decide to leave her husband less than that to which he was entitled under the Succession Act, to inform her of his right to the appropriate share in her estate, and that ultimately, she could do nothing to stop him claiming that right after her death.

2.37 Mr. Shanley had no recollection of his actual meeting with Mrs. Bird when she came in to make her Will. Belatedly, in his evidence, Mr. Shanley stated that he had some notes regarding that meeting, but he did not refer to them in evidence. Instead, he advised the court as to his presumed dealings with Bridie Bird, based upon what was his standard practice at that time. Regarding his knowledge of William Bird, he stated that he had no reason to believe that he would not have gone along with Bridie Bird's wishes in relation to any decision she made regarding her land.

2.38 Mr. Shanley told the court that he would never consider requesting a husband to come into his office where his wife had asked him to draw up a Will in a manner which did not provide for his legal right share of her estate under the Succession Act. He felt that to do so would be unprofessional. Such action would breach the confidence of the client. He further advised the court that, in any event, a spouse could not waive their legal right share in their partner's estate prior to their death. He confirmed that he did not give Bridie Bird a copy of the Will which she executed on 27th February, 1997.

2.39 In relation to the transfer, Mr. Shanley told the court that he referred Bridie Bird to Ms. Hayes, his colleague. A number of weeks after Patrick Darby had left documents into the office, he recollected Ms. Hayes calling him up to her room to witness Bridie Bird execute the transfer. He had no concerns regarding the intended transaction nor any worries regarding Bridie Bird's capacity. Bridie Bird was the client of his office and her relationship with the transferee, Patrick Darby, did not concern him. He saw no reason why she should have been separately advised. Mr. Shanley told the court that there was no purpose in sending Patrick Darby to get independent legal advice as the only issue which could be of concern to him was the potential for gift tax. There were no other onerous conditions for the transferee. Nothing imprudent was done. His firm did what their client wanted done. Further, the transfer was consistent with Bridie Bird's earlier Will.

2.40 Mr. Shanley denied that there was any need to obtain from William Bird the relevant declaration pursuant to the Family Home Protection Act 1976, prior to the transfer. He stated that this was only required for the purposes of registering the transfer of the lands in the Land Registry.

2.41 Under cross-examination, Mr. Shanley stated that he could not have asked William Bird to renounce his legal right share of his wife's estate at the time he prepared Bridie Bird's Will. He did not know that this could be done under s. 113 of the Succession Act 1965, and therefore, he did not advise upon it.

2.42 Mr. Shanley agreed that the probate proceedings were based on an allegation that Bridie Bird had made her Will at a time when she was acting under actual undue influence of the Darby family and that she was susceptible to such influence by reason of two recent bereavements. Mr. Shanley did not accept that even though Theresa Darby brought Mrs. Bird in to make the Will, that her two sons were to be the major beneficiaries thereunder, and that her husband was to be effectively disinherited, that such circumstances mandated him to ask Mrs. Bird to attend a doctor so that he might certify her fit to make her Will. Mr. Shanley agreed that the Will was prepared in the space of half an hour and that no written advice was sent out to Bridie Bird afterwards.

2.43 Mr. Shanley advised the court that he believed his obligations were to carry out Bridie Bird's instructions, and he was not concerned about any potential obligation to the intended beneficiaries. He did not anticipate a challenge to the Will, based upon an allegation of undue influence, and therefore did not consider putting in place any safeguards to protect against such a challenge. He did not ask Bridie Bird to provide a Medical Certificate. He did not think about providing a cooling-off period after he received instructions to prepare the Will, nor did he consider furnishing her with any written advice after the execution of the Will. Mr. Shanley was not sure who paid for the Will to be drawn, and he believed he may not have charged for it on the basis that his fees would be taken from her estate when she died. With the benefit of hindsight, he agreed that he should have kept a detailed attendance.

2.44 Regarding the settlement, Mr. Shanley told the court that Theresa Darby was anxious to settle the probate proceedings. At the time of the settlement, he believed that the transfer to Patrick Darby was valid. He could not see any

reason why Ms. Hayes should have sent Patrick Darby to a different solicitor. He did not agree that he should have advised Patrick Darby that he was taking a chance in accepting the gift from Bridie Bird if both parties were represented by the same solicitor.

2.45 Regarding the presumption of undue influence referable to the transfer, Mr. Shanley agreed that if the circumstances surrounding the transfer to Patrick Darby raised a presumption of undue influence, that it was necessary, for the purposes of rebutting such a presumption, to be in a position to demonstrate that the transferor had received independent legal advice. He accepted that, had William Bird agreed to the transfer to Patrick Darby, and that agreement noted by Mr. Shanley, it would have made the subsequent challenge to the validity of the transfer difficult to sustain.

Evidence of Ms. Jane Hayes

2.46 Ms. Hayes qualified as a solicitor in 1973. She had practiced in the firm of Oliver Shanley since 1991. Patrick Darby had dropped in to see her during the summer months of 1998. He gave her a map of the site which she was told Bridie Bird was going to give to him. He asked her to draw up the transfer. On the day of the transfer, Patrick Darby brought Bridie Bird to her office. She told the court that she asked Patrick Darby to go downstairs so that she could speak to Bridie Bird on her own. She discussed the size of the site with Bridie Bird as she was surprised at the extent of it. Bridie Bird told her that the Darby boys were getting the land anyway, so the size did not matter. Regarding the capacity of Bridie Bird, Ms. Hayes told the court she had no concerns in this regard. She signed the transfer, which was witnessed by Mr. Shanley, whom she asked to come upstairs to witness her signature.

2.47 Ms. Hayes told the court that she viewed Bridie Bird as her client. She did not accept that she was obliged to advise Patrick Darby to obtain separate legal advice. Mr. Darby was getting a gift and she could not see how he could be prejudiced such that he should have been told to obtain separate legal advice. Mr. Darby was to be responsible for any expenses that arose from the transfer, and she stated that there was nothing unusual about that. She met Bridie Bird on this one occasion only.

2.48 Under cross-examination, Ms. Hayes told the court that the first day she saw Bridie Bird was the day she came in to sign the transfer which had been prepared in advance. She confirmed that she had been given instructions by Mr. Shanley to prepare the transfer, and that these were given in June or July of 1998. She had no written memo regarding any instructions given to her by Bridie Bird or of her interview with her, other than the notes in the transfer file. These broadly related to tax matters.

2.49 Ms. Hayes stated that she knew that Bridie Bird was an elderly lady and that she was married. She knew of her land but not of any other assets. She agreed that she only met Bridie Bird once, but that she had met Patrick Darby a number of times. When asked as to whether or not the possibility of undue influence ever crossed her mind, she stated that she was happy with the mental capacity of Mrs. Bird at the time of the transfer. She acknowledged with the benefit of hindsight that there were steps she could have taken to avoid a possible claim that the transaction resulted from undue influence.

2.50 Ms. Hayes told the court that she was aware of the fact that Patrick Darby was intending to build his family home on the site. She did not, however, think it was necessary to warn Bridie Bird of the risk that the transfer could be set aside if challenged. She did not warn Patrick Darby either of any such potential risk. She could see no benefit to sending Mr. Darby to a separate solicitor. Ms. Hayes advised the court that it was not unusual to act for both parties to such a transaction in 1998. She agreed that this was something she would not do now, principally because people are more litigious. She agreed that she had kept no attendance of any advice given to either Bridie Bird or Patrick Darby at the time.

2.51 Ms. Hayes rejected the suggestion that she should have considered approaching William Bird to ascertain his attitude to the transfer. She was happy that the lands transferred were not a family home. She knew that they had previously been let by Bridie Bird. She agreed with counsel for the plaintiff that it was irregular to send the statutory Family Home Protection Act declaration to Patrick Darby so that he might have it signed by Bridie Bird and William Bird. She knew that it would not be signed before a Commissioner. However, she felt that these facts did not invalidate the transfer. Finally, Ms. Hayes told the court that she did not anticipate the possibility, given that Bridie Bird appeared to be physically old and frail at the time of the transaction, that her extended family might sue.

Evidence of Mr. Lysaght

2.52 Mr. Lysaght is a solicitor who qualified in 1975. He is a Lecturer in the Law School in Blackhall Place and is a Senior Partner in Malone and Martin Solicitors who practice in Trim. Mr. Lysaght was engaged by the defendants, after the evidence in the proceedings had commenced, for the purposes of providing independent professional evidence regarding the appropriateness of the professional conduct of the defendants complained of by the plaintiffs in this action. Unfortunately, Mr. Grehan had completed his evidence by the time the defendants engaged Mr Lysaght. Accordingly, the evidence in the case was somewhat less than satisfactory, given that certain aspects of Mr. Lysaght's evidence were not put to Mr. Grehan in cross-examination.

2.53 In relation to the transfer, Mr. Lysaght told the court that in 1998, if a solicitor was dealing with an established client such as Bridie Bird who appeared to have her full faculties about her, and was intent on transferring a portion of land to an individual who was something akin to a son to her, then, in his opinion, it would not have been standard practice to advise that client or the intended transferee to obtain separate legal advice. It was not the function of the solicitor to challenge a client's decision, but it was their duty to respect their wishes. There was no indication that Bridie Bird lacked the requisite capacity to make such a decision.

2.54 Mr. Lysaght advised the court that the guidance from the Incorporated Law Society in 1998, was there for the purpose of seeking to ensure that the transferor was not coerced by a third party. He understood that Ms. Hayes had satisfied herself that Bridie Bird was not being coerced by Patrick Darby at the time of the transfer. This knowledge, when taken together with the fact that the proposed transfer was consistent with the Will which the client had previously made, negated any need for either party to obtain independent legal advice.

2.55 Mr. Lysaght expressed no concern that the fees for the transfer had been paid by Patrick Darby. This, he indicated, was common practice and was often adopted as an economic strategy to avoid two solicitors being paid for a single job.

He stated that since 2003, the advice of the Incorporated Law Society was that the parties should be attended by separate solicitors. This was honoured, however, more in the breach than in its keeping.

2.56 In relation to the manner in which the defendants acted at the time Bridie Bird's Will was prepared, Mr. Lysaght indicated that with an elderly client, it would be common practice for the solicitor to conduct a discussion in the course of which the solicitor would seek to ascertain the competence of the client. If they gave coherent instructions, it would be extraordinary to proceed to ask the client to have a doctor certify their capacity. Mr. Lysaght advised that if a client gave instructions to exclude their spouse from a Will, or to give them less than they were entitled to as a statutory right, that it was incumbent upon the solicitor to advise the client that their spouse could always claim that right after their death, in any event.

2.57 Mr. Lysaght did not agree that when a solicitor drew a Will providing for a spouse to be excluded, or given less than their statutory right, any cooling-off period should be provided for, prior to permitting the testator/testatrix to sign the Will. Mr. Lysaght told the Court that once a solicitor received clear instructions, it was acceptable for that solicitor to prepare the Will and have the client execute it there and then. He agreed that it might have been prudent to have given Bridie Bird time to consider her proposed Will and the advices in relation to the statutory rights of her spouse. However, if the client insisted, you could not fault the solicitor for proceeding on the same day that the instructions had been taken. If he did not adopt such an approach and something happened to the testator/testatrix during the cooling-off period, then their wishes would have been frustrated.

2.58 In relation to s. 113 of the Succession Act 1965, Mr. Lysaght gave evidence that he had never come across the use of this section other than in the context of Family Law proceedings and separation agreements. He would have thought it inappropriate for a solicitor acting on behalf of Bridie Bird to contact her husband to ask him to revoke his legal right share to her estate in the event of her death. He stated that it was not unusual in a country practice for one spouse to leave the other spouse a life interest in property, particularly where the property concerned had previously belonged to the testators/testatrix's family.

2.59 Under cross-examination, Mr. Lysaght stated that it was not always standard practice to take an attendance, noting the instructions given by a proposed testator. If a solicitor subsequently had to give evidence regarding the testator's instructions, the Will itself, he believed, would be the primary evidence as to the instructions given by the client. He was not in a position to state, in relation to the probate case, what documents Mr. Shanley would have been in a position to rely upon in the context of an allegation of lack of capacity and/or undue influence being made. Mr. Lysaght expressed no view on counsel's assertion that since 1984, a solicitor owed a duty to proposed beneficiaries under a Will, even though the solicitor was clearly not acting on their behalf at the time the Will was prepared.

2.60 Mr. Lysaght accepted that having regard to the fact that Bridie Bird was transferring a significant site to Patrick Darby that a solicitor handling that transaction should hasten slowly as the issue of undue influence could arise. He stated that he would have viewed Bridie Bird as the client of Oliver Shanley and Company. Patrick Darby would have been viewed by him as the proposed transferee and he was not, in his view, the client of Oliver Shanley and Company. Mr. Lysaght told the court that it would have been good practice for the attending solicitor to have taken a detailed attendance of the dealings with the client when preparing such a transfer. When asked about what steps he would have taken in similar circumstances to avoid a potential claim based upon undue influence, he stated that apart from taking a detailed note, it would have been appropriate for the solicitor to ask another solicitor from the same firm to attend upon the transferor at the time that legal advice was being given regarding the consequence of their intended action. He also advised that if the transferor was married, that the solicitor should ascertain if their spouse was in agreement with the proposed transfer and that he should keep a note of the client's response.

2.61 In relation to the circumstances in which the Will was executed, Mr. Lysaght told the court that where a solicitor received instructions which involved either disinheriting or leaving a spouse less than their legal right share, that it would be normal practice for the solicitor to ask whether or not the spouse was aware of and had approved their intentions. If the solicitor got no information regarding the spouse's approval, it would be his practice to tell his client to go home and talk to their spouse about their intentions. He felt that this was good legal practice and also good for harmonious relations between the parties.

2.62 Mr. Lysaght agreed that Mr. Shanley should have been live to the possibility that if Bridie Bird's Will was prepared as she directed that it might potentially result in a claim being made that she executed that Will whilst under the undue influence of the beneficiaries. He stated that Mr. Shanley was obliged to interview Bridie Bird about her families' circumstances. The fact that she was elderly would always give a solicitor cause for concern. Mr. Shanley would also have been expected to have had regard to any other dealings he might have had with Bridie Bird in the past. The taking of a detailed attendance would have been prudent but was not mandatory. Mr. Lysaght confirmed that he had not seen any attendance notes taken by Mr. Shanley recording her instructions, any queries made of her or details of advices given to her.

2.63 To avoid a potential claim in relation to a Will based upon an allegation of undue influence, Mr. Lysaght told the court that the counsel of perfection would be firstly, to take a detailed attendance of the client's instructions. Thereafter, the testatrix would be advised of their spouse's legal right. The solicitor would then ensure that the client was certain in her own mind as to how she wanted to proceed. The interview with the client would be critical in this regard. Mr. Lysaght did not believe that any recent bereavement in a family would necessarily impact on a testator's testamentary capacity. In many cases, it was precisely such an event that precipitated the making of a Will. He did not agree that it was mandatory for a solicitor to write out to their client after the execution by them of their Will advising them of its contents. Many clients would not wish that type of post to arrive to their home. However, if they came back concerned, he would send it out to them later. He agreed that if the circumstances were such that a claim of undue influence might potentially arise by reason of the provisions of the Will, then a prudent solicitor would, after its execution, send to the client a copy of their Will asking them ensure that the Will had been drawn in accordance with their instructions. He would only do this if there was some part of the picture missing that would concern him. If, for example, he had no knowledge of the husband's approach to the potential terms of the Will, then he would write out to the client asking them to insure that the Will was in accordance with their instructions.

2.64 He stated there was no obligation on Mr. Shanley to ask Bridie Bird to attend her General Practitioner to obtain a Certificate as to her mental competence. In any event, this was not a matter relevant to any potential claim based upon an allegation of undue influence.

2.65 Regarding the transfer, Mr. Lysaght told the Court that if Patrick Darby had been his client and he had brought Bridie Bird to him and asked him to prepare the transfer documentation that he would not, in 1998, have insisted that Bridie Bird obtain separate legal advice. He would have asked Bridie Bird if she had discussed the proposed transfer with her spouse and he would have been happy to prepare the transfer once her husband was happy with the same.

2.66 Mr. Lysaght confirmed that it would be normal to have more than one meeting with the transferor prior to the execution by them of the Deed of Transfer. The fact that the Deed was drawn up in the present case on Patrick Darby's say-so, would not have concerned him once he was satisfied that the nature of the intended transfer had been properly explained to Bridie Bird before she executed it. Mr. Lysaght accepted that he had seen no documentation prepared by Ms. Hayes other than a memorandum which principally dealt with the tax implications of the proposed transfer. He had not seen any documentation which might back up her evidence in court if any claim was made that the transfer had been procured by undue influence.

2.67 Mr. Lysaght agreed that if William Bird had been consulted regarding the transfer and had agreed to the same, no undue influence claim could subsequently have been brought in relation to that transaction.

3. The Issues

3.1 The first issue that falls to be determined is whether the claim of either plaintiff, insofar as it relates to the advices given by the defendants to Bridie Bird in relation to the preparation and execution of her Will, are statute barred. If the claims are not statute barred, it must then be considered whether the defendants owed to the plaintiffs, as beneficiaries under Bridie Bird's Will, a duty of care and if so, the nature and extent of that duty and whether it was breached in either case. The next issue to be decided is whether the defendants owed a duty of care to Patrick Darby at the time of the transfer, whether any such duty was breached, and if it was the nature of the loss arising therefrom.

4. The Statute of Limitations Issue

Counsels' Submissions

4.1 Mr. Nesbitt S.C., for the defendants, submitted that the claims of both plaintiffs, insofar as they related to allegations of negligence made regarding the advices tendered to Bridie Bird by the defendants at the time she made her Will, were time barred by virtue of the provisions of s.11 of the Statute of Limitations 1957 ("the Act of 1957"). That section provides for a limitation period of six years for, *inter alia*, actions claiming damages for negligence or breach of duty. He relied on the case of *Tuohy v. Courtney* [1994] 3 I.R. 1 in this regard. He noted that Mrs. Bird's Will was executed on 27th February, 1997, and that Patrick Darby did not issue proceedings until 7th December, 2004. In the course of the trial itself, Mr. Nesbitt contended that the limitation period of six years in respect of both claims commenced on the date upon which the defendants advised Bridie Bird in relation to her Will i.e. the date of its execution. In subsequent written submissions, in relation to Declan Darby's claim, the defendants contended that the six-year period commenced on 8th December, 1999, at the latest, that being the date upon which Mr. Bird had claimed his legal right share to his wife's estate.

4.2 Mr. Dwyer S.C., for the plaintiffs, submitted that the statutory period provided for by s. 11 of the Act of 1957, could not have commenced prior to the death of Bridie Bird on 24th October, 1999. It was only subsequent to that date that they became aware of the terms of her Will. The relevant date could not therefore have been the date upon which the Will was executed. Time could not be running against the plaintiffs without their knowledge. Mr. Dwyer maintained that both actions were brought within the six-year period provided for under the Act of 1957. The statutory period did not start to run against the interest of either plaintiff on the date of Bridie Bird's death. Neither did it commence on the date upon which the plaintiffs were first notified that a challenge was to be made to the validity of her Will. The relevant date for the purposes of s. 11 was the date upon which the probate proceedings were settled, that being the date upon which the loss deriving from the defendant's negligence had crystallized.

Decision

4.3 Section 11(2) of the Act of 1957, as amended by s.3 of the Statute of Limitations (Amendment) Act 1991, provides as follows:-

"Subject to paragraph (c) of this subsection, and to s. 3(1) of the Statute of Limitations (Amendment) Act 1991, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued."

The claims of Patrick Darby and Declan Darby are claims brought in tort and are thereby governed by the limitation period set forth above. Accordingly, unless their claims were instituted within six years from the date upon which their respective causes of action accrued, their claims must fail. The claim of Patrick Darby was instituted on 7th December, 2004, whilst the claim of Declan Darby was commenced on 17th April, 2007.

4.4 In *Hegarty v. O'Loughran* [1990] 1 I.R. 148 Griffin J., in discussing the time at which a cause of action accrues, stated as follows at p.158:-

"The period of limitation therefore begins to run from the date on which the cause of action accrued, i.e. when a complete and available cause of action first comes into existence. When a wrongful act is actionable per se without proof of damage, as in, for example, libel, assault, or trespass to land or goods, the statute runs from the time at which the act was committed. However, when the wrong is not actionable without damage, as in a case of negligence, the cause of action is not complete and the period of limitation cannot begin to run until that damage happens or occurs."

4.5 In the case of Patrick Darby, as already stated, he maintains two separate claims of negligence against the defendants. The first of these relates to the alleged negligence of the defendants whilst acting as solicitors for Bridie Bird at the time she prepared her Will in February 1997. The latter allegation of negligence relates to advices given by the

defendants in and about December 1998, at which date Bridie Bird executed the transfer. The plea of the defendants, based upon the provisions of s. 11 of the Statute of Limitations 1957, relates solely to the negligence claimed in relation to the circumstances in which the defendants advised Bridie Bird regarding the preparation of her Will.

4.6 Whilst both plaintiffs might well have anticipated or feared a potential loss following the receipt by the defendants of the letter from Christie and Gargan Solicitors dated 8th February, 2000, which indicated that William Bird intended challenging the validity of both the Will and the transfer, or from the subsequent issue of the plenary summons maintaining those claims, the cause of action in neither case was yet complete. The cause of action for negligence in relation to the preparation of Bridie Bird's Will was only complete upon the date on which the probate proceedings were settled, that being the date upon which it could be stated both plaintiffs had sustained a loss arising from the negligence alleged against the defendants. That loss was ascertainable from the terms of the settlement which, in providing that the costs of all parties would be paid out of the estate, significantly reduced the legacies received by Patrick and Declan Darby. Accordingly, the settlement having been agreed to on 8th February, 2007, the court concludes that Patrick Darby and Declan Darby had six years from that date to commence the present proceedings.

4.7 For the aforementioned reasons, the claims of Patrick Darby and Declan Darby contending for negligence on the part of the defendants in relation to their involvement in the preparation of the Will of Bridie Bird are not statute barred by reason of the provisions of s. 11(2) of the Act of 1957. I am satisfied that the case of *Tuohy v. Courtney* [1994] 3 I.R. 1, which upheld the constitutionality of s.11 of the Statute of Limitations, upon which the defendants relied, is not of assistance in circumstances where the proceedings were commenced prior to the expiration of the relevant statutory limitation period.

5. Duty of care regarding the Will

5.1 The court must now consider whether or not the defendants owed a duty of care to the plaintiffs, as beneficiaries at the time they were tendering advice to Bridie Bird in respect of the preparation of her Will.

Counsels' Submissions

5.2 Mr. Dwyer made the case that the defendants, as solicitors preparing a Will, owed a duty of care to his clients, as potential beneficiaries under the Will. He relied on the decision of Barrington J. in *Wall v. Hegarty and Anor.* [1980] I.L.R.M. 124. He submitted that a solicitor, when preparing a Will, must not only have regard to the technical aspects of the Will (i.e. the execution of the Will and drafting the Will in accordance with the instructions given), but that he must also have regard to such external factors as are known to him which may adversely affect the Will.

5.3 Mr. Dwyer relied upon the fact that Mr. Shanley admitted that he had been unaware that Mr. Bird could be asked to renounce his legal right share in writing under s. 113 the Succession Act 1965, as evidence of negligence. He noted that no documentation had been produced to support the evidence of Mr. Shanley that he had advised Mrs. Bird regarding her husband's legal right to a one half share in her estate on her death, irrespective of the content of her Will. He submitted that Mr. Shanley had been negligent, in that he had failed to advise Bridie Bird as to the possibility of a claim of undue influence arising after her death due to the contents of her Will and that he had not taken steps, other than his own discussions with Bridie Bird, to ascertain her mental capacity. He relied upon the evidence of Mr. Grehan and Mr. Lysaght to support his contention that Mr. Shanley was negligent in failing to have had regard to the possibility of a claim of undue influence after her death. He submitted, based on Mr. Lysaght's evidence, that following the execution of the Will, Mr. Shanley should have written to Bridie Bird enclosing a copy of her Will, explaining its terms and asking her to confirm that the Will had been drawn in accordance with her instructions, given that he did not know whether or not William Bird had agreed with his wife that the Will should be drawn in those terms. In addition, he submitted that a prudent solicitor would have discovered whether or not Mr. Bird would have been prepared to execute a renunciation of his legal right share.

5.4 On behalf of the defendants, Mr. Nesbitt acknowledged that a solicitor, in drafting a Will, might owe a duty of care to a beneficiary, as recognised in *Wall v. Hegarty and Anor.* [1980] I.L.R.M. 124, but as the instant case did not concern the drafting of a Will, rather the alleged failure of the defendants to advise the testatrix as to her husband's legal right share, that authority was not applicable in his submission. He referred to the decision of the House of Lords in *White v. Jones* [1995] 2 A.C. 207, and noted that although the majority of the House of Lords accepted that a duty did exist towards beneficiaries, that its scope was narrow, in that it only arose in circumstances where neither the testatrix nor her estate would have a remedy in respect of the negligence against the solicitor. The law in this jurisdiction, he submitted, was the same. He argued that an alternative cause of action by Mrs. Bird's estate lay in the present case.

5.5 The applicable standard of care, should a duty of care be held to exist, Mr. Nesbitt submitted, was "the degree of care to be expected in the circumstances from a reasonably careful solicitor" as per *Roche v. Peilow* [1985] I.R. 252. He argued that the law, however, did not require a solicitor who drafted a Will for a client of full capacity to indemnify a legatee against the entire loss that he might incur in the event of a challenge by a third party to that Will, on the grounds of undue influence on the part of that legatee over that testator.

5.6 Mr. Nesbitt also contended that any loss arising to the plaintiffs was neither caused by the defendants' negligence nor was it foreseeable. He stated that none of the matters determined at trial during the probate proceedings, and as addressed in the Order of the Master of 20th April, 2004, concerned the issue of Mr. Bird's entitlement to his legal right share of the estate. He submitted that it was not reasonably foreseeable that the Will would be challenged by Mr. Bird and that this was clear from the evidence of the plaintiff.

5.7 Mr. Nesbitt noted that there had never been any suggestion that the Will of Mrs. Bird was executed other than in accordance with the provisions of the Succession Act 1965. There was no evidence to show, he submitted, that Bridie Bird did not know of or approve of the contents of her Will, and the evidence of the plaintiffs in this case, he argued, clearly demonstrated that Bridie Bird knew what she was doing. He further submitted that the probate proceedings were compromised in 2000, on the incorrect premise that any loss as a result of that compromise could be recovered from the defendants in these negligence proceedings. Mr. Nesbitt contended that no steps were taken prior to the settlement of the 2000 proceedings to ascertain what evidence was available on the defendant's side to rebut the evidence that may have been given by the plaintiff, or any witness called on his behalf, in support of the claim for undue influence. In addition, in his submission, there was no witness available to William Kavanagh to controvert the evidence of Patrick Darby and Declan Darby on the issue of undue influence, and no regard had been given to the fact that William Bird, at

the time of the settlement, was dead. He argued, therefore, that the plaintiff in the probate proceedings could not have successfully challenged the validity of the Will on the grounds of undue influence.

5.8 There appears to be a duty of care owed by solicitors, not only to testators and testatrices, but to legatees in certain circumstances. This is apparent from the decision of this court (Barrington J.) in *Wall v. Hegarty and Anor* [1980] I.L.R.M. 124. In that case, the plaintiff executor sought to recover damages from the defendants, a firm of solicitors who were engaged by the testator to draw up his Will. It was accepted that the Will had been improperly attested and was, as a result, invalid. The plaintiff sought the value of the legacy of £15,000 he would have received, had the Will been valid, together with the expenses he had incurred in attempting to establish the Will. Barrington J. held that a solicitor owed a duty of care to a legatee to draft the Will with such reasonable care and skill as was required to ensure that the wishes of the testator would not be frustrated and the expectancy of the legatee thereby defeated. He held that the damages claimed by the plaintiff were recoverable. Barrington J. was of the view that the reasoning in the decision of the English High Court in *Ross v. Caunters* [1980] Ch. 297 (where a solicitor was found to owe a duty of care in drafting a Will to a proposed legatee) was "unanswerable". He determined that the decision of the Supreme Court in *Finlay v. Murtagh* [1979] I.R. 249, which established that a solicitor owes a duty in tort to show reasonable professional skill in attending to his client's affairs, was applicable. The following passage from the judgment of Barrington J. is noteworthy:-

"I fully accept the reasoning of Sir Robert Megarry [in *Ross v. Caunters*] that, in a case such as the present, there is a close degree of proximity between the plaintiff and the defendant. If a solicitor is retained by a testator to draft a will, and one of the purposes of the Will is to confer a benefit on a named legatee, the solicitor must know that if he fails in his professional duty properly to draft the Will, there is considerable risk the legatee will suffer damage. To use Sir Robert's words, his contemplation of the plaintiff is 'actual nominate and direct'.

Likewise, I accept Sir Robert's reasoning that there can be no conflict of public policy in holding that a solicitor has a duty to take care in drafting a Will, not only to the testator but also to a named legatee in the Will. There is no possible inconsistency between the duty to the testator and the duty to a legatee. Recognising a duty to a legatee tends to strengthen the chances that the testator's wishes will in fact be properly expressed in the Will. The two duties march together.

The authorities are, as I said, analysed by Sir Robert Megarry with consummate ability in his judgment in *Ross v. Caunters*, and it would be otiose for me to repeat here the exercise which he has carried out in his judgment. Suffice it to say that I am satisfied on the basis of the decision in *Finlay v. Murtagh* that a solicitor does owe a duty to a legatee named in a draft Will, to draft the Will with such reasonable care and skill as to ensure that the wishes of the testator are not frustrated and the expectancy of the legatee defeated through lack of considerable care and skill on the part of the solicitor."

It appears from the above, that the precise duty owed to a legatee is to act prudently so as to ensure that the wishes of the testator or testatrix are not frustrated such that the legatee may be wrongfully deprived of their expectancy.

5.9 In *White v. Jones* [1995] 1 All E.R. 691, the testator had quarrelled with his two daughters, the plaintiffs, and executed a Will, cutting them out of his estate. Having later reconciled with them, he sent a letter to his solicitors indicating that he wished a new Will to be drawn up to include gifts of £9,000 to the plaintiffs. A month later, the solicitors' managing clerk requested the firm's Probate Department to draw up a Will or codicil as per the new instructions. Two weeks later, the clerk made arrangements to visit the testator. However, the testator died before the new dispositions were put into effect. The plaintiffs brought an action for damages against the solicitors for damages for negligence. The majority of the House of Lords held that where a solicitor accepted instructions to draw up a Will, and as a result of his negligence, an intended beneficiary under the Will was reasonably foreseeably deprived of the legacy, the solicitor was liable for the loss of the legacy in circumstances in which there was no confidential or fiduciary relationship, and where neither the testator nor his estate had a remedy against the solicitor. If this were not to be the case, an injustice would occur because of a *lacuna* in the law and there would be no remedy for the loss caused by the solicitor's negligence, unless the intended beneficiary could claim. Therefore, it appears that counsel for the defendants is correct in his submission that this case is authority for the view that a solicitor will only be liable for a loss if there is no alternative remedy available. On the facts of the instant case, it does not appear, however, that the estate would have had a remedy against the defendants.

5.10 If a solicitor, having drawn a Will in accordance with his client's instructions, fails to have that Will properly attested, it is a straightforward exercise for a court to identify the negligence on the part of the solicitor and the foreseeability and quantum of the loss to the intended beneficiaries arising from that negligence. Similarly, if a client gives instructions to their solicitor to prepare a Will leaving a specific sum of money to a third party and the solicitor does nothing to implement those instructions and the client thereafter dies before the Will is executed, it is again easy to identify the negligence of the solicitor and the foreseeability and quantum of the loss to the intended legatee. However, the nature of the alleged negligence in the present case, and the foreseeability of the loss allegedly arising therefrom, is of much greater complexity. Because the authorities relied upon principally relate to delay on the part of a solicitor in implementing a client's instructions or a failure to have a Will properly executed, I believe the court must be careful as to the extent of any duty it might impose on solicitors in relation to their obligations to intended beneficiaries concerning matters unconnected with the proper and prompt execution by a testator/testatrix of their Will.

5.11 The basis for the duty of care owed by a solicitor to a potential beneficiary is predicated upon the duty of the solicitor to ensure that his client's wishes are not frustrated. It is important, in the context of this case, to note that the frustration of the wishes of the testatrix principally occurred by reason of the fact that, unrelated to any proceedings, Mr. Bird elected to seek his legal right share of his wife's estate following her death. That election took place prior to the institution of the probate proceedings and any loss arising from such election cannot be attributed to any negligence on the part of the defendants. In this regard, the court accepts that the defendants followed Bridie Bird's instructions, having advised her that her husband would be entitled, irrespective of the content of her Will, to claim his legal right share to a one half interest in her estate on her death.

5.12 What was at issue in the probate proceedings instituted on 6th April, 2000, was the validity of the Will itself i.e. whether Bridie Bird had the appropriate testamentary capacity to make that Will, whether it was executed in accordance with the Succession Act 1965, and whether it had been procured by reason of undue influence exerted upon the

testatrix. It is the foreseeability of a challenge of this nature that must be considered against the backdrop of any negligence on the part of the defendants.

5.13 On the basis of the case law referred to earlier, the court must conclude that the defendants, in the present circumstances, did owe a duty of care, not only to the testatrix, but also to the intended beneficiaries named in her Will. They were obliged to act prudently to ensure that her wishes as expressed in her Will were not frustrated. To the forefront of those obligations, having regard to circumstances in which they were asked to prepare Bridie Bird's Will, was a requirement that they would seek to satisfy themselves that her instructions had been given to them independently of any influence that might have been exerted upon her by those who were to be the beneficiaries under her intended Will.

5.14 Assuming that the defendants acted prudently so as to insure that their client's instructions had not been procured as a result of any undue influence upon her by the intended beneficiaries, the defendants were under an obligation to seek to ensure that her wishes were not frustrated and that her Will was validly executed in accordance with the requirements of the Succession Act 1965.

5.15 In the present case, the duty of care owed to the testator and to the intended beneficiaries were different but nonetheless complimentary to each other.

5.16 The real question for the court in both of these cases, is whether there was a breach of the aforementioned duty and if there was whether the losses claimed by the plaintiffs were the foreseeable result of that breach.

Conclusions

5.17 The court received divergent advice from Mr. Grehan and Mr. Lysaght as to the duty of care owed by the defendants to the testatrix and/or the intended the legatees at the time they advised Bridie Bird in relation to the preparation of her Will. The more significant aspects of their evidence, is set out earlier in this judgment. Having considered all of the evidence, the legal authorities relied upon by the parties and the submissions of counsel, the court has reached the following conclusions, namely:-

- (i) There was no obligation on the defendants to ask their client, merely because she was physically old and frail, to attend her doctor to certify her capacity, given that the evidence was that she appeared to all concerned to be "razor sharp" at the given time.
- (ii) There was no obligation on the defendants to contact Mr. Bird, having received their client's instructions, to request him to renounce his legal right share to the testatrix's estate. The court accepts Mr. Lysaght's evidence that s. 113 of the Succession Act is rarely used, save in the context of Family Law proceedings.
- (iii) There is ordinarily no obligation on a solicitor to provide for a cooling-off period so that a client is given time to consider fully the import of the instructions given to their solicitor prior to executing their Will. In this regard, the court accepts the evidence of Mr. Lysaght that once a solicitor is satisfied that a client is competent to make their Will, and has fully understood the advices given, the Will should be executed with fairly immediate effect. To do otherwise, could permit the testatrix's intentions to be frustrated due to death or ill-health occurring during the cooling-off period, as happened in the case of *White v. Jones* referred to earlier in this judgment.
- (iv) Having regard to the circumstances in which Bridie Bird presented to make her Will, and the nature of the instructions given by her, and also having regard to the fact that she was to execute it on the same date as that upon which she gave her instructions, the defendants, as prudent solicitors, were obliged to:-
 - (a) seek to satisfy themselves, by making appropriate inquiries of their client, that she was not acting under the influence of the Darby family, and to keep a full note in relation to those inquiries lest the Will ultimately be challenged on the grounds that it was procured by undue influence;
 - (b) explain to their client that the life interest which she proposed providing for her husband in her Will was less than that to which he was entitled under the provisions of the Succession Act 1965, and that following her death he might elect to take his legal share in lieu of the interest bequeathed to him;
 - (c) keep a full note of the advices given to their client regarding her spouse's legal right under the provisions of the Succession Act 1965, and of her instructions to them following receipt of that advice;
 - (d) explain to their client the possibility that, in drawing her Will in the manner in which she intended, the Will might ultimately be challenged on the grounds that it had been procured by reason of undue influence, unless her husband knew and approved of the contents thereof; and
 - (e) send to Bridie Bird a copy of her Will after its execution, enclosing an explanation as to its contents and asking her to revert if the Will did not reflect her intentions, having regard to the fact that they had no knowledge as to whether or not her spouse approved of the content of her Will. A prudent solicitor had to be mindful of the possibility of an ultimate challenge to a Will by a spouse who was going to receive less than the legal right share to which they were entitled under the Succession Act.

5.18 Assuming that the defendants were satisfied that Bridie Bird was not acting under the undue influence of the Darby family, they owed a duty of care to the testatrix to seek to ensure that her intentions, as expressed in her Will, were not frustrated. They also owed a duty of care to the intended beneficiaries who might foreseeably suffer the loss of their legacies in the event of being wrongly accused, after the testatrix's death of having procured their legacy by exerting undue influence over her. That duty obliged the defendants to ensure:-

- (a) That the Will was validly executed by the testatrix at a time when she had the appropriate capacity; and
- (b) that they would not through any act or omission cause proceedings to be instituted challenging the validity of the Will on any ground including that of undue influence which would not, absent that negligence have been

instituted.

Did the defendant's negligence result in the institution of proceedings to challenge the validity of the Will which would not, absent that negligence, have been instituted?

5.19 Having heard the evidence, the court does not accept that Bridie Bird was a long standing client of the defendants' office. Whilst her family may have had regular dealings with Mr. Shanley, she herself, had only once dealt previously with Mr. Shanley and that was in relation to the estate of one of her siblings. Her next dealings with Mr. Shanley were on the day she asked him to prepare her Will. Notwithstanding this fact, the court accepts Mr. Shanley's evidence that at the time Bridie Bird gave him instructions in relation to her Will, she appeared entirely competent and capable of giving those instructions. The court is also satisfied that Mr. Shanley did advise Bridie Bird of the fact that her husband could, if he so wished after her death, claim a one-half share in her estate *in lieu* of the life interest which she had decided to leave to him in her Will.

5.20 The court, from the evidence, has concluded as a matter of law that the defendants complied with their duty of care to the testatrix in some respects, but not in others. In particular, the defendants failed in their obligations as set out at para. 5.17 (iv) (a), (c), (d) and (e). Notwithstanding this fact, the court is not satisfied that the plaintiffs have established, as a matter of probability, that the proceedings challenging the Will of Bridie Bird were instituted as a result of that negligence. The court concludes that those proceedings, on the balance of probabilities, would have been instituted, irrespective of any such breach of duty on the parts of the defendants. Further, any such breach of duty has not, in the opinion of this court, led to the loss and damage which the plaintiffs seek to recover in the present proceedings. Also, insofar as it may be relevant, the court concludes that the breaches of duty found could not have justified the compromise of the probate proceedings on the terms agreed.

5.21 It is common case that Mr. Shanley gave no consideration to the possibility that Bridie Bird could have been acting under the undue influence of the plaintiffs. He considered that she was completely in control of her faculties and that her intentions were entirely understandable. Her actions appeared to him to be consistent with what other clients of his had done in similar circumstances, particularly where the property concerned had belonged to the testator's family. He, accordingly, was negligent in that he made no inquiries of Bridie Bird as to whether or not she was acting under the control of the Darby family. Neither did he give her any advice, assuming that he was satisfied that she was not acting under the influence of the Darby family, regarding the possibility that there might be a challenge to her Will on the grounds of undue influence after her death.

5.22 On the evidence, Mr. Shanley advised Bridie Bird as to her husband's legal right to a half share in her estate on her death. Faced with Mr. Shanley's advice, Bridie Bird, nonetheless, proceeded to leave her husband the life interest as per her original instructions, rather than the interest to which he was entitled under the Succession Act 1965. Accordingly, it seems probable that Bridie Bird, irrespective of the advices of her solicitor, seemed determined to try to ensure that the plaintiffs would succeed to the entirety of her estate following her husband's death.

5.23 It is clear from the evidence that the defendants failed to explain to their client the possibility that, in drawing her Will in the manner in which she intended, the Will might ultimately be challenged on the grounds of undue influence unless her husband knew and approved of its contents. However, the court is not satisfied that even if the defendants had complied with their obligations in this regard, that Bridie Bird, on the balance of probabilities, would have altered her Will. In this respect, the court pays particular regard to the fact that Bridie Bird did not change her instructions to Mr. Shanley on being advised that her husband, following her death, might undermine her plans for the future of her estate by electing to take a one half share in her estate at that time. The probability is that she would have left her instructions as already indicated, thus leaving the risk of a challenge to the Will open to her husband and/or his family.

5.24 In coming to its conclusions that the probate proceedings were not, as a matter of probability, instituted as a result of any negligence on the part of the defendants, the court has taken into account that at the time William Bird instituted his proceedings challenging the Will, it would not have been known to his legal advisors the extent of any advice furnished by the defendants to his late wife, what investigations they carried out or what notes they retained in relation to either matter. Consequently, any negligence on the part of the defendants in failing to advise their client regarding the risk of a challenge to her Will on the grounds of undue influence, on the balance of probabilities, did not result in the frustration of the testatrix wishes by causing the defendants to institute to the probate proceedings.

5.25 In reaching this conclusion, the court pays significant regard to the booklet of pleadings in the probate proceedings. These pleadings demonstrate that William Bird, at the time he instituted the proceedings challenging the Will, had very limited knowledge of any facts or evidence which might have supported a challenge to the Will based upon an allegation of undue influence. He certainly did not know that the defendants had not investigated this issue with their client, and that they had no memorandum of their advices to the testatrix. In particular, the court has had regard to the following matters that appear from the pleadings, namely:-

(i) The reluctance on the part of William Bird's solicitors to provide any particulars to back up the undue influence claimed in their replies to particulars delivered on 26th October, 2000 and 27th July, 2001.

(ii) By letter of 20th December, 2001, William Bird's solicitors sought discovery of certain categories of documents. This tends to suggest that they had no knowledge as to whether or not any notes had been kept by the defendants as to the instructions given by the testatrix, or advices given to the testatrix prior to the preparation of her Will.

(iii) It was not until 20th December, 2001, that William Bird's solicitors sought particulars of all work carried out by the defendants on behalf of the Darby family before the date upon which Bridie Bird executed her Will.

(iv) It was not until 2nd April, 2002, that Michael Kavanagh's solicitors sought particulars of all legal transactions or business carried out on the instructions of Bridie Bird prior to the execution of her Will on 27th February, 1997.

5.26 From all of the above facts, it seems clear that the response of William Bird to his wife's Will was to issue

proceedings on the basis that he expected to be left the entirety of his late wife's estate as per the statement of claim which stated as follows on his behalf:-

"(vii) The Deceased had no reason not to leave all of her Estate to her husband as one might expect her to do. There was no unhappy differences between the Deceased and her husband."

For these reasons, the court cannot draw an nexus between any negligence found against the defendants in relation to the preparation of Bridie Bird's Will and the institution by William Bird of his proceedings challenging that Will.

5.27 Whilst the court is satisfied that Mr. Shanley was negligent in failing to send to Bridie Bird a copy of her Will, after its execution with a letter asking her to confirm that its contents were in accordance with her instructions, once again, the court concludes that had the defendants complied with their obligations in this regard, the court simply cannot conclude that this would have prevented the institution of the probate proceedings. On receipt of such a letter, the testatrix might have altered her Will to her husband's benefit, in which case, the plaintiffs in these proceedings, would not have received the legacy which they did actually receive under her Will. Alternatively, the testatrix would have left her Will in the format in which it had been executed. It is highly likely that William Bird, as the disquieted husband, would still have instituted the probate proceedings challenging the Will. The letter from Oliver Shanley and Company, in such circumstances, would not have effected the institution of those proceedings and would only have been of relevance in terms of strengthening any defence to a challenge based upon an allegation of undue influence.

5.28 The court is satisfied that the probate proceedings were issued on behalf of William Bird who was disgruntled with the content of his late wife's Will. This occurred independently of any negligence on the part of the defendants. Accordingly, the wishes of Bridie Bird, in terms of the legacy she intended the plaintiffs to receive, was thwarted, not by any negligence on the part of the defendants, but rather, by her husband's response to the content of her Will.

5.29 It is common case that those disappointed by the terms of a testator/testatrix's Will, often institute proceedings seeking to challenge that Will on a variety of grounds, including, at times, an allegation of undue influence, even where there is insufficient evidence to support such a claim. In such circumstances, an estate may end up being depleted by the costs of successfully defending that action, should the costs not be recovered from the unsuccessful plaintiff. In other cases, even though it is believed that the disgruntled plaintiff's action is unlikely to be successful, an executor and/or proposed beneficiary may agree that some payment should be made to the unmeritorious plaintiff to avoid any risk that their action might prove successful. Once again, the estate in these circumstances will be substantially diminished and the amount recovered by the beneficiaries under the relevant Will reduced. In neither circumstance would the beneficiary be entitled to look to the testator's solicitors for an indemnity in respect of their loss.

5.30 It appears to be the case that the executrix, Theresa Darby, was anxious regarding the potential outcome of the probate proceedings. She did not wish to risk the possibility, albeit apparently slim, that the validity of the Will could successfully be challenged on the grounds of undue influence. She, accordingly, compromised those proceedings, as she was entitled to do, and she did so with the agreement of the plaintiffs. She agreed (inter alia) that the legal costs of all parties would be paid out of the estate, and thus the legacies of Declan and Patrick Darby were reduced by that sum. On that basis, William Kavanagh agreed to withdraw his opposition to proof of the last Will and Testament of the deceased, dated 27th February, 1997. The plaintiffs are misguided in their belief that they are entitled to recover any such reduction in their distribution from Oliver Shanley and Company. That agreement was made in respect of the risks which pertained to the proceedings challenging the validity of the Will, rather than the claim regarding the validity of the transfer. The latter claim was a separate claim pertaining solely to Patrick Darby. The executrix would have had no right to agree that Declan Darby's benefit under the Will would be reduced due to any fear that the transfer to his brother Patrick Darby might be set aside.

5.31 At the time Theresa Darby settled the probate proceedings, there was no evidence that the Will, as alleged, had not been executed in accordance with the provisions of the Succession Act 1965. Further, having regard to the evidence in the present proceedings, there was simply no evidence that could have been put forward to show that the testatrix was not of sound disposing mind at the time she made her Will. Insofar as the final allegation of undue influence is concerned, the onus of proof would have been on William Kavanagh to establish that allegation, given that no presumption would have operated in his favour. It is difficult to see, William Bird being dead at the time the proceedings were settled, how such an allegation could have been established. What witnesses could have been called to establish that allegation? There is nothing in the booklet of pleadings, particulars or discovery which suggests that such evidence was available to the plaintiffs. Accordingly, the court concludes that any negligence on the part of the defendants did not cause the institution of the probate proceedings and neither did it give grounds to the testatrix to compromise those proceedings on the terms agreed.

5.32 To conclude, the court finds, as a matter of fact, that the claim challenging the validity of the Will would, as a matter of probability, have occurred irrespective of whether or not the defendants were negligent in the manner found by the court. Further, the court concludes that any negligence found against the defendants did not form any legitimate basis upon which the executrix was entitled to conclude that the proceedings required settlement in the manner agreed by her. The reduction in their distribution from the estate arising from this agreement has no connection with the negligence established by the defendants regarding the advices they gave to Bridie Bird at the time she drew her Will on 27th February, 1997.

6. Claim of Declan Darby

6.1 The claim of Declan Darby is pleaded slightly differently from that pleaded on behalf of Patrick Darby. The nature of the claim is set out at para. 1.20 of this judgment. Having regard to its findings in relation to the claim of Patrick Darby, it is clear that the claim of Declan Darby must also fail.

6.2 The court rejects, as a matter of law, the assertion pleaded on Declan Darby's behalf that the provisions of the last Will of Bridie Bird were incapable of taking effect on her death without the necessity for legal proceedings. There was no need for any such proceedings in circumstances where William Bird was entitled to elect to take a one half share in his late wife's estate following her death without the necessity for any legal proceedings. The legal proceedings were taken, not because the Will did not provide for William Bird's legal right share, but due to the fact that he wished to challenge the validity of the Will.

6.3 The court has already concluded earlier in this judgment that those proceedings were, as a matter of probability, neither instituted nor settled because of the negligence found by the court in this judgment.

7. The Transfer

Counsels' Submissions

7.1 Mr. Dwyer, for the plaintiffs, submitted that the defendant's conduct fell far short of the standard of care they were required to exercise in respect of the transfer which, he submitted, was that as set out by Barron J. in *Carroll v. Carroll* [1999] 4 I.R. 241. He noted that it had long been accepted that a solicitor does not fulfil his obligations to his client by merely carrying out what he is instructed to do. In this regard, he relied on the dicta of Barron J. in *McMullen v. Fowler* [1993] 1 I.R. 123. In respect of elderly and infirm clients, he submitted that the solicitor was obliged to take particular care in ascertaining their client's instructions, and he referred to an extract from O'Callaghan, '*The Law of Solicitors in Ireland*' in support of this contention. He argued that by failing to adhere to this standard of care, his client, Mr. Patrick Darby, had been left without evidence which could be used to rebut the presumption of undue influence in the proceedings brought to challenge the validity of the transfer.

7.2 He contended that the nature of the transaction was always such that a presumption of undue influence would arise. Consequently, in the event of a challenge to the transfer, Patrick Darby needed to be in a position to prove that the transfer was a free and independent act of Bridie Bird. He set out the appropriate steps that should have been followed by Ms. Hayes. She should only have acted for one party; she should have made enquiries as to why the transaction was taking place; she should have had a long and detailed discussion with Bridie Bird as to the nature and effect of the transfer; there should have been an opportunity for Bridie Bird to consider any legal advice given to her in advance of the execution of the transfer; a proper and detailed memorandum of all discussions with Bridie Bird should have been kept; the Family Home Declaration should have been treated appropriately and William Bird's attitude to the transfer ascertained; regard should have been had by her to the respective interests and circumstances of Bridie Bird and Patrick Darby. Further, Ms. Hayes was obliged to advise Patrick Darby to take advice from an independent solicitor regarding the proposed transfer and/or advise him that in default of so doing he would be at risk that a challenge might later be made to the transfer based on an allegation that Bridie Bird had acted under his undue influence.

7.3 Mr. Nesbitt, for the defendants, sought to distinguish the case of *Carroll v. Carroll* [1999] 4 I.R. 241. He contended that no presumption of undue influence arose in this case, or could have arisen. He noted that in that case, Mr. Carroll was in poor health and issues about his competence arose. Also, the relationship in question was that of father and son, and the asset transferred to the transferee was the transferor's only asset. These facts were to be contrasted with those of the instant case, he submitted.

7.4 Mr. Nesbitt submitted that when the probate proceedings were settled, that the validity of the transfer was no longer in issue between the parties. In this regard, he relied upon the order of the Master of the High Court dated 20th April, 2004, which, when referring to the issues to be determined at the trial of the action, made no mention of the validity of the transfer.

Was the validity of the transfer in issue when the probate proceedings were settled?

7.5 Mr. Grehan told the court that notwithstanding the Order of the Master of the High Court dated 20th April, 2004, that the issue of the validity of the Deed of Transfer dated 17th December, 1998, was very much in issue when the proceedings were settled, and was one of the issues to be dealt with at the trial of the action. Further, Mr. Dwyer, who represented Patrick Darby in those proceedings, also informed the court that the issue of the validity of the transfer was, at all stages, maintained, up to and including the date of the settlement thereof.

7.6 Having regard to the evidence, the terms of the settlement and the representations made by counsel to the court, this court accepts, as a matter of fact, that when the action was settled, irrespective of any apparent limitation in the order of the Master of the High Court, that the issue of the validity of the transfer was still at issue between the parties. Firstly, the court heard Mr. Grehan's evidence that the validity of the transfer was at issue in the proceedings when the same were settled. Mr. Shanley was not asked to give evidence on this issue and hence, Mr. Grehan's evidence remained unchallenged. Further, that evidence was corroborated by the assurance of Senior Counsel who acted on behalf of Mr. Darby in those proceedings. In addition, the terms of the settlement, and in particular, Patrick Darby's agreement to forego €70,000 from his entitlement under Bridie Bird's Will, that sum representing approximately 50% of the value of the lands transferred, is only consistent with the validity of the transfer remaining in issue.

7.7 The court believes there is a simple explanation for why the order of the Master of the High Court does not, amongst the issues recited therein, refer to the validity of the transfer. By virtue of the provisions of O. 36, r. 4 of the Rules of the Superior Courts, the plaintiff in a probate action must bring a motion to seek to fix the time and mode of trial of those proceedings. It is common practice for the parties to agree what issues arise regarding the Will which is the subject matter of the challenge. However, as already stated in this judgment, the action maintained by William Bird was a hybrid action. The probate proceedings related to the validity of Bridie Bird's Will. Allied to that action was the separate claim in relation to the validity of the transfer. That was not a claim governed by the provisions of O. 36 of the Rules of the Superior Courts requiring the court to direct the time and mode of trial of such claim. Understandably, therefore, the order of the Master of the High Court only identifies the issues to be determined in relation to the last Will and Testament of Bridie Bird. Accordingly, I reject the submission made on behalf of the defendants that the validity of the transfer to Patrick Darby was no longer an issue in the proceedings at the time they were settled.

The Court's findings regarding the transfer

7.8 Having heard the evidence and considered the submissions made, the court concludes that not only did the defendants accept instructions from Bridie Bird, but that Patrick Darby was, for the purpose of the transfer, also a client of the defendants. It was he who gave the instructions to Oliver Shanley and Company. He did not go that office merely because of Mrs. Bird's connection with the same, and his reasons for doing so are referred to earlier in this judgment. He brought the plans to Mr. Shanley's office. He advised the defendants on the extent of the site required and the purpose for which the site was to be transferred, namely, so that he could build his family home upon it. He also paid for the entirety of the legal dealings.

7.9 Having regard to these findings, the defendants owed Patrick Darby a duty to act prudently and in his interest in relation to the said transaction. A prudent solicitor, acting with Patrick Darby's interests in mind, ought to have been live to the possibility that the circumstances and backdrop to the transfer were such that a potential challenge to the validity of the transfer might arise. The facts that should have made a potential claim of undue influence foreseeable to a prudent solicitor in the present case were as follows:-

- (a) The age of the transferor.
- (b) The fact that Mr. Darby had the plans prepared and brought them into the offices of Mr. Shanley.
- (c) The fact that the site was several acres large and much larger than was needed merely for the construction of a family home.
- (d) *The fact that Mr. Darby paid for all of the legal work.*
- (e) The fact that Mr. Darby brought Mrs. Bird in to execute the transfer.
- (f) The fact that Mrs. Bird and her husband were wholly dependent upon the Darby family, almost to the point that without them, they could not have lived independently.
- (g) The fact that Mrs. Bird came in alone to the office without her husband and in circumstances where they could not have known whether or not she had been taken advantage of by Mr. Darby to the point that she may not even have been able to discuss the transfer with her husband.
- (h) They had no knowledge of Mr. Bird's attitude to the intended transfer.

7.10 A potential claim of undue influence being foreseeable, the defendants owed Patrick Darby an obligation to advise him regarding the potential for such a claim and how he could protect himself from such a challenge. The defendants were mandated to advise Patrick Darby to attend an independent solicitor and to warn him that if he did not do so, that he would be exposing the transfer to a potential challenge on the grounds of undue influence. The defendants were mandated to explain to Patrick Darby that if they continued to act on his behalf, and a challenge was made to the validity of the transfer, that he would not be in a position to prove that the advice given to Bridie Bird at the time she executed the transfer was independent of his influence.

7.11 In relation to Bridie Bird, the defendants owed a duty to her to consider the possibility that she was transferring the lands whilst under the undue influence of the Darby family. They were obliged to make reasonable inquiries of Bridie Bird as to the reasons behind her decision to transfer this property to Patrick Darby. They were also obliged to ask Bridie Bird whether or not her husband William Bird was in agreement with the proposed transfer, given that any challenge to the transfer was likely to emanate from him. In the absence of knowledge of Mr. Bird's agreement to the proposed transfer, they were mandated to advise Bridie Bird of the risk of a claim of undue influence being made at a later date, in which case, if Patrick Darby was not separately represented, it would be difficult to establish that she had acted independent of his influence. If such a challenge were made, then her wishes would be thwarted, with the property she intended to be given to Patrick Darby ending up in the hands of a third party.

7.12 The court concludes that the circumstances in which the defendants were asked to prepare the Deed of Transfer created an obligation on the defendants to advise both parties *i.e.* Bridie Bird and Patrick Darby of the risk of a potential claim for undue influence if they were not separately represented in the transaction, particularly in circumstances where Mr. Bird's attitude to the transfer had not been ascertained, either directly or indirectly, at the time the transfer was executed.

7.13 Mr. Lysaght, in his evidence, made it clear that knowledge of Mr. Bird's attitude to the intended transfer was a vital piece of information for the solicitor handling the transaction to be aware of. He confirmed that if Mr. Bird was known to have been in agreement with the proposed transfer, then no claim could later be made by him or his family challenging the validity of the transfer based upon an allegation of undue influence. The corollary of this evidence, however, is that without Mr. Bird's prior consent, which, in any event, should have been obtained by reason of the provisions of the Family Home Protection Act 1976, that one could not rule out such a claim. For these reasons, the court concludes that the defendants, in circumstances where they were not aware as to whether or not William Bird was agreeable to the transfer, was mandated to protect the interests of the transferee by advising him that as a firm, they could not act on behalf of both himself and Bridie Bird. They were negligent in failing to advise Patrick Darby of the risk of a potential challenge to the transfer if he did not attend another solicitor so that they could independently advise Bridie Bird regarding the transfer, and in the course of so doing, investigate the circumstances in which she was seeking to effect the transfer.

7.14 The court accepts the evidence of Patrick Darby that had he been advised of the risk of a challenge to the transfer in the event of both parties being represented by one solicitor that he would have attended another solicitor so as to secure the validity of the outcome of the transfer. Had he been separately represented, he would then have been in a position to put forward a defence, not only based upon his own evidence, but based also upon the evidence of the solicitor who acted for Bridie Bird. That solicitor would have been in a position to give evidence as to the inquiries they made surrounding her decision to transfer the relevant lands to Patrick Darby and evidence to the effect that they were satisfied that she was not acting under the influence of Patrick Darby when she executed the deed.

7.15 The fact that the independent legal advice, which might have been received by Patrick Darby had he attended an alternative solicitor, might not have added anything further to his own knowledge regarding the transaction is irrelevant. It is the separation of advice to the parties that is important in the context of a potential claim of undue influence. Of prime importance is the actual and apparent independence of the decision made by the person divesting themselves of the relevant property, which, in this case, was Bridie Bird.

7.16 In reaching its conclusions, the court rejects Mr. Lysaght's evidence that it was reasonable for the defendants to act for both parties, and rejects his evidence that it would have been sufficient for Ms. Hayes to have had a second solicitor within the same office witness the advice given to Mrs. Bird as to the nature of the intended transaction. In

relation to this evidence, the court firstly notes that this did not occur as a matter of fact. Mr. Shanley came up to Ms. Hayes's office, purely for the purposes of witnessing the transfer. Secondly, even if Mr. Shanley had been in attendance whilst Ms. Hayes gave the relevant advice to Bridie Bird, this would not have protected Patrick Darby from a claim that the transfer was procured by undue influence. He could well have orchestrated Bridie Bird's attendance upon the defendant; he had had several prior dealings with the defendants himself; he had paid for the entire transaction, her husband's response to the intended transaction was unknown and his agreement to the intended transfer had not been obtained. In relation to this matter, the court has had regard to the implications of Mr. Lysaght's evidence to the effect that if Mr. Bird was known to have been in agreement with the proposed transfer, then one could fairly assume that no claim could be made by him or his family as to the validity of the transfer based upon an assertion of undue influence.

7.17 Regrettably, the court has had to conclude that in relation to the transfer, the standard of care provided for the parties to the transaction by the defendants fell well short of that which the parties were entitled to expect from a prudent solicitor.

7.18 In reaching its conclusions that the defendants failed in their obligations to both Bridie Bird and Patrick Darby, the court as a matter of fact, rejects Ms. Hayes's evidence that she was live to the possibility that Bridie Bird might be transferring the land concerned to Patrick Darby whilst under his influence. Her actions are simply not consistent with her having given any consideration to this possibility. She made no note of any investigations or inquiries made of Bridie Bird in relation to the circumstances which had brought her to the point of agreeing to the transfer of the lands to Patrick Darby. Mr. Bird's attitude to the intended transfer was never ascertained, directly or indirectly, and Ms. Hayes ignored obtaining the appropriate declaration from him pursuant to the Family Home Protection Act 1976. The defendant's dealings with that declaration can only be described as quite extraordinary. In this regard, the court notes the acceptance by Mrs. Hayes that she sent this declaration form to Patrick Darby and not to Mr. Bird after the transfer had been executed. Mr. Darby was placed in the position of having it completed by Mrs. Bird and her husband. Further, Ms. Hayes told the Court that in these circumstances she was aware that the statutory declaration when completed was unlikely to be sworn, as required, before a Commissioner for Oaths. The document was, therefore, rendered entirely meaningless by the approach adopted by Mrs. Hayes. There was no control over the circumstances in which the consent of Mr. Bird was being sought and this was being left once again to the control of Patrick Darby. The entire approach of Ms. Hayes to the intended transaction manifestly fell short of the standard of care that might have been expected of a prudent solicitor concerned that their client might have been under the undue influence of the proposed transferee of the lands, the subject matter of the intended transaction. Further, Ms. Hayes did not act prudently with regard to the interests of Patrick Darby and by her want of care on his behalf exposed him to a challenge to the validity of the transfer which would not have been brought absent her negligence.

7.19 In the present case, not only did Ms. Hayes not send Mr. Patrick Darby to another solicitor, she did not even meet the required standard as given in evidence by Mr. Lysaght, which was to the effect that a second solicitor from the firm should have been in attendance at the time when the nature of the intended transaction was explained to Mrs. Bird and a note kept regarding the content of that advice.

7.20 On that point, it is to be observed that it is the transferee who stands to lose in the event of there being a challenge based upon undue influence. Hence, the court does not accept Mr. Lysaght's evidence that it would have been sufficient for Ms. Hayes to have had a second solicitor within the same office advise Mrs. Bird as to the nature of the transaction into which she was entering. This would not have done anything to protect the rights of Mr. Patrick Darby, which were entirely ignored, notwithstanding the fact that he had had several dealings with the defendants, had approached them to act as his solicitors and had paid for the entire transaction.

7.21 In summary, the court finds that Mrs. Bird was not a regular client of the office of Oliver Shanley and Company. The firm kept no memo of the instructions they took from her regarding the proposed transfer and made no or insufficient inquiries of her as to why she was transferring this property to Patrick Darby. They did not get Mr. Bird to complete the declaration pursuant to the Family Home Protection Act 1976, and whilst this may not have been required for the transfer to be valid, its existence would have rendered it impossible for Mr. Bird to make a claim contesting the validity of the transfer. The firm failed to consider the possibility that a claim might be made challenging the transfer based upon an allegation of undue influence on the part of the Darby family. The firm did nothing to protect Mr. Darby from such an allegation and the presumption that would attach to that allegation should the challenge be made. He was not advised to attend a separate solicitor, and by acting for both parties, made it effectively impossible for Mr. Darby to rebut a presumption of undue influence. It would not have been possible for him to establish that Mrs. Bird obtained fully independent advice at the time she entered into the transaction.

Foreseeability

7.22 The court concludes, having regard to the above, that it was entirely foreseeable that a claim of undue influence might arise in relation to the transfer, having regard to the fact that Bridie Bird and Patrick Darby were not separately advised at the time the transfer was executed, particularly as the attitude of William Bird to the proposed transfer had not been ascertained. It was foreseeable, therefore, that proceedings might be instituted to challenge the transfer which, on the balance of probabilities, would not have been brought had the defendants complied with their obligations to the parties.

Whether a presumption of undue influence arose

7.23 In relation of the consequences of any breach of duty of care owed to Patrick Darby, the defendants make the argument that a presumption of undue influence would not have arisen in the case due to the decision in *Carroll v. Carroll* [1999] 4 I.R. 241, on the basis that the relationship between the parties in the present case is not sufficiently close to raise that presumption, and on the basis that the transaction in the present case was so insignificant that the court would not interfere with it in any event. This court is not convinced, however, that the transaction was a small one. The plaintiff stood to receive a substantial benefit, namely, a large site upon which to build his family home.

7.24 The court concludes that the circumstances surrounding the transfer were such that William Bird, in his proceedings instituted to challenge the validity of the transfer, was entitled to assert that a presumption of undue influence existed. The pleadings demonstrate that this was the position adopted by William Bird's legal advisers.

7.25 Even if the court is incorrect in its view that the circumstances surrounding the transfer would have permitted

William Bird to rely upon a presumption of undue influence, such a fact does not undermine the court's judgment. Patrick Darby should not have been put in the position of being at risk of having to defend any proceedings based upon an allegation of undue influence, irrespective of whether or not William Bird was entitled to rely upon a presumption of undue influence. The nature of the duty of care owed by the defendants was to guard Patrick Darby against the risk of undue influence proceedings simpliciter being instituted. The fact that there was a possibility of a successful defence to those proceedings is irrelevant. Having been wrongfully put, in what the court believes was a position of significant risk in terms of his home and the potential costs of the action, he was entitled to settle the case. It was clearly foreseeable that if the same solicitors acted for both parties in this case, that a statable case could be made to invalidate the transfer, even if there was a possibility that it could have been successfully defended. Patrick Darby should never have been a defendant to any such proceedings and should not have had to carry any risk of the invalidation of the transfer and was justified in taking steps to buy off that risk.

The evidence of Mr. Grehan

7.26 In coming to its conclusions in relation to the transfer, the court has accepted much of the evidence tendered by Mr. Grehan. The court is mindful of the fact that Mr. Grehan, when giving his evidence, had, to a certain extent, a potential vested interest in the outcome of the within proceedings. It was he and his counsel who advised Patrick Darby to agree to forego €70,000 from the estate of Bridie Bird due to their belief that the validity of the transfer might be impugned in those proceedings. Accordingly, the claim of Patrick Darby for negligence on the part of the defendants in relation to the advices given at the time of the transfer, are, in effect an effort to seek an indemnity in respect of the aforementioned loss. In these circumstances, the court believes that the evidence as to the standard of care to be expected by a prudent solicitor should, in proceedings of this nature, be given by a solicitor who is entirely independent and removed from all of the events being scrutinised by the court. Notwithstanding these reservations, the court, nonetheless, has accepted Mr. Grehan's evidence in preference to that of Mr. Lysaght as to the standard of care that ought to have been adopted by the defendants when advising Bridie Bird and/or Patrick Darby in relation to the transfer the subject matter of the present claim.

7.27 For the reasons set out above, the court is satisfied that the loss occasioned to Patrick Darby from the challenge to the transfer was a direct and foreseeable consequence of the defendants' negligence.